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THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
v. THOMAS LUBANGA DYILO

Public

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)

Source: **Office of the Prosecutor**

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Introduction

1. The Prosecution appeals the sentence imposed on Thomas Lubanga Dyilo (hereinafter referred to as Thomas Lubanga) pursuant to article 81(2) and articles 83(2) and 83(3) of the Statute. Trial Chamber I imposed a sentence of 14 years imprisonment on Thomas Lubanga for the three war crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities.

2. The Prosecution submits that 14 years is manifestly inadequate and disproportionate to the gravity of the crime, and constitutes a discernible error which requires the Appeals Chamber's intervention. The sentence fails to give sufficient weight to the objective gravity of these crimes against children and the extent of the damage caused, considering the harm to the victims and their families. The sentence equally fails to give sufficient weight to Thomas Lubanga's unlawful behaviour, his degree of participation and the means used to commit these crimes. His role and his crimes demand a significantly higher sentence.

3. Thus, the first issue in this appeal is whether a 14-year sentence is disproportionate to Thomas Lubanga's criminal liability. Thomas Lubanga, at the helm of the UPC/FPLC as its President and Commander-in-Chief, over a period of one year contributed to a plan that resulted in the widespread enlistment, conscription and use in hostilities of children who were 14 years old and under, some as young as 5. He not only unlawfully promoted and, as head of the militia, accepted their inclusion as soldiers, he also accepted that, within the range of possible uses, these children would be deployed in particularly dangerous ways such as to the frontlines in battle where they faced a higher risk of death. He even had one full platoon made up entirely of child soldiers under the age of 15. Many

others became bodyguards – *all* UPC/FPLC political and military staff used child soldiers as bodyguards.

4. The child victims were particularly vulnerable and defenceless; they were separated from their families and communities; their schooling was interrupted; they were exposed to violence and fear; some were killed in battle, others wounded; during their military service, these former child soldiers abuse drugs and alcohol and thereafter they suffered from post-traumatic stress disorder, depression, disassociation and suicidal ideation, they remain outsiders in society, and these difficulties can continue even into the next generations. These are crimes that reach the highest level of gravity.

5. Throughout this one year period, Thomas Lubanga made decisions on recruitment policy, actively supported recruitment initiatives and personally encouraged children, including those under the age of 15, to join the army and to provide security for the population following their military training. Not only did he fail to cooperate with local and international actors on child protection to disarm or demobilize children under the age of 15, the UPC/FPLC under his leadership actively sought to impede their mission. He was even found to have used a "significant number" of children under the age of 15 in his own personal bodyguard unit. His role was not limited; it was extensive.

6. The Trial Chamber also made two additional errors that should result in the upward revision of the sentence. First, it failed to consider as an aggravating circumstance the abuse of the authority and trust held by Thomas Lubanga.

7. Second, the Majority applied the wrong test in determining whether to find aggravating factors. In particular, it required proof that Thomas Lubanga intended or knew of an outcome before it could be counted as an aggravating factor. While aggravating factors must be a direct and foreseeable consequence of the crimes for which Thomas Lubanga was convicted, for the purpose of attributing them to him on sentencing, the Prosecution need not prove that he

subjectively intended to commit those consequences or knew they would occur in the ordinary course of events. The Majority therefore erroneously required the Prosecution to prove Thomas Lubanga's criminal responsibility for aggravating factors for the purposes of sentencing to the same standard as if he were being convicted of those factors. As a result of this error, the Majority refused to find that cruel treatment and sexual violence are aggravating factors that should increase the sentence in this case. In the alternative, even if the Appeals Chambers ultimately endorses the test articulated by the Majority, the Majority made a factual error in not finding that cruel treatment and sexual violence were aggravating factors.

8. These errors, each taken separately and together, constitute grounds for revising Thomas Lubanga's sentence upwards.

Procedural Background

9. On 14 March 2012, Trial Chamber I (the "Trial 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 region of the Democratic Republic of the Congo (the "DRC") from early September 2002 to 13 August 2003.[1]

10. The Prosecution's "Sentence Request" was filed on 14 May 2012.[2] On the same day, the legal representatives of victims filed their views as to the sentence.[3] On 3 June 2012, the Defence filed its submissions on sentence.[4]

[1] ICC-01/04-01/06-2842.
[2] ICC-01/04-01/06-2881.

11. The sentencing hearing was held on 13 June 2012.[5] On 10 July 2012, the Trial 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 Thomas Lubanga's crimes (the "Sentencing Decision").[6]

12. On 3 October 2012, the Prosecution filed a Notice of Appeal against the Sentencing Decision under articles 81(2), 83(2) and 83(3), in which the Prosecution requested the Appeals Chamber to revise upward the sentence imposed against Thomas Lubanga.[7] On the same day, Thomas Lubanga filed Notices of Appeal against the Judgment[8] and the Sentencing Decision[9].

Standards of Review

13. 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.[10]

14. The Appeals Chamber will consider whether the Trial Chamber committed a discernible error in the exercise of its discretion by giving insufficient weight to

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[3] ICC-01/04-01/06-2880 and ICC-01/04-01/06-2882.
[4] ICC-01/04-01/06-2891-Conf-Exp, with public redacted version ICC-01/04-01/06-2891-Red.
[5] ICC-01/04-01/06-T-360-Red2-ENG.
[6] ICC-01/04-01/06-2901. The Sentencing Decision includes the dissenting opinion of Judge Odio Benito, pp.41-52.
[7] ICC-01/04-01/06-2933 OA4.
[8] ICC-01/04-01/06-2934 OA5.
[9] ICC-01/04-01/06-2935 OA6.
[10] 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), p.576; The Rome Statute of the International Criminal Court, A Commentary in Cassese (Gaeta and Jones, OUP:,2002) p.1545.

the gravity of the crimes and to Thomas Lubanga's role and responsibility. 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".[11] Thus, the Prosecution must demonstrate how the Trial Chamber "ventured outside its discretionary framework" in imposing the sentence.[12] The Prosecution further submits that the correct exercise of a discretion afforded by the Statute to a Chamber necessarily entails a duty to adequately explain how that discretion was exercised. When this is not done, and consequently the Appeals Chamber cannot discern, due to inadequate reasoning, the manner in which the Trial Chamber exercised its discretion, then the Appeals Chamber should reverse and either reach its own conclusions or remand for a new determination.[13]

15. 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 appropriate law and determine whether or not the Trial Chamber misinterpreted the law."[14] The Appeals Chamber will therefore articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[15]

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[11] *Babic*, Judgement on Sentencing Appeal, para.44; *Aleksovski*, Appeals Chamber Judgement, para.187; *Milosevic*, Appeals Chamber, para.297; *Galić*, , Appeals Judgment, para.444.

[12] *Delalić*, Appeals Judgment, para.725. See also *Galić*, Appeals Judgment, 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 offense or the defendant's degree of responsibility.

[13] ICC-01/04-01/06-773 OA5, 14 December 2006, para. 53.

[14] ICC-02/05-03/09-295OA, para.20. ICTY Chambers have stated that where an error of law is found in the impugned decision, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings accordingly. *Milosevic*, Appeal Judgment, paras.13-14 and authorities cited therein.

[15] Ibid., para.14. 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. *Gotovina*, Appeals Judgement, para.12.

16. 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.[16] 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 a final appeal:

> "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."[17]

17. For the first ground of appeal, the Prosecution submits that the sentence rendered by the Trial Chamber was manifestly disproportionate. The Chamber's failure to adequately consider all relevant factors and impose a sentence commensurate to the gravity of the crimes constitutes a discernible error.[18]

18. For the second a ground of appeal, the Prosecution considers that the Trial Chamber committed legal errors leading to a flawed sentence and therefore invalidating the Sentencing Decision.

19. The third ground of appeal involves in the main an error of law and in the alternative, an error of fact. On the error of law, the Trial Chamber imposed an erroneous test effectively requiring that Thomas Lubanga be criminally responsible for aggravating factors at sentencing. Where the Appeals Chamber finds an error of law in the decision arising from the application of an incorrect

[16] ICC-01/05-01/08-631-Red OA2, para.66.
[17] 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.
[18] *Aleksovski*, Appeals Judgment, para.187.

legal standard, it articulates the correct legal interpretation and reviews the relevant factual findings of the Trial Chamber against that interpretation.[19] In the alternative, the Majority committed an error of fact, since on the basis of the existing trial record any reasonable Trial Chamber would have found that cruel treatment and sexual violence are attributable to Thomas Lubanga as aggravating factors to be reflected in the sentence.[20]

[19] Boas, p.443-444, fn.136. Citing Milosevic Appeal Judgment, para.14; Zigiranyirazo Appeal Judgment, para.10; Hadzihasanovic and Kubura Appeal Judgment, para.9; Prosecutor v Kordic and Cerkez, Judgment, para.17.

[20] Accordingly, the Appeals Chamber will substitute its own finding for that of the Trial Chamber when no reasonable Trial Chamber could have reached the original decision or where the finding is "*wholly erroneous*": See Boas, p. 444, fn.141, citing Milosevic Appeal Judgment, para.15; Zigiranyirazo Appeal Judgment, para 11; CDF Appeal Judgment, para.33; Hadzihasanovic and Kubura Appeal Judgment; para 10; see also *Prosecutor v Kupreskic et al*., Appeal Judgment ("Kupreskic et al. Appeal Judgment"), para.41and *Prosecutor v Fofana & Kondewa* ("CDF Appeal Judgment"), para.33.

Prosecution's Submissions

First Ground of Appeal: Thomas Lubanga's 14-year sentence is manifestly inadequate

A. Overview

20. The Court's basic texts set out general principles for sentencing[21] without providing a range for different crimes in the Statute. The factors to be considered in sentencing as provided in the Statute and Rules of Procedure and Evidence ("Rules') are mandatory but not exhaustive. While the Trial Chamber is entitled to discretion in sentencing, this discretion is not unlimited[22] and its exercise – both in process and in result – is reviewable.

21. The starting principle of individualized sentencing is proportionality. In the Prosecution's view a proportionate sentence fully considers the gravity or seriousness of the crime, including the harm caused or threatened to the victim or the public, the duration and repetitive nature of the crime, the level of the convicted person's involvement in the crime—was he the main actor, or did he only give minor help to others who committed the crime—the person's intent and motive in committing the crime, the sentences imposed for the same crimes in other jurisdictions, or for crimes involving comparable harm to victims.

22. Gravity is a particularly significant factor in determining a proportionate sentence: "[B]y far the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence".[23]

[21] Article 78, Rule 145, Article 81.

[22] *Gacumbitsi*, , Appeal Judgment , para.205.

[23] *Delalic et al.* (*Celibici* case), Judgment, "*Celibici* Judgment", para.1225. See also *Nikolic,* , Trial Chamber, Sentencing Judgment, , para.144 and *Charles Ghankay Taylo* , Trial Chamber, Sentencing Judgement, para.19.

Gravity is enshrined in the sentencing requirements of article 78(1) of the Statute. Additionally, the sentence must be proportionate to the crime (Art 81(2)(a)) and reflect the individual circumstances and culpability of the convicted person (Art 78(1) and rule 145(1)(a)).

23. Although the Majority acknowledged that gravity is one of the principal factors in determining sentence,[24] the sentence does not give sufficient weight to the particular factors that bear on gravity—the nature of these crimes against very young children; that they were perpetrated systematically against a significant number of children over nearly one full year; the extensive damage, including death, that the Trial Chamber found was suffered by the victimized children; and the indirect suffering caused to their families and communities. The sentence also fails to give sufficient weight to the participation of Thomas Lubanga in the commission of these crimes.

B. Insufficient weight given to the objective gravity of the crimes and the extent of the damage caused

24. The 14-year sentence does not reflect the objective gravity of the crimes and the full extent of the damage they caused.

25. The Rules elaborate that in arriving at a fitting sentence the Court "shall" consider the extent of the damage caused (rule 145(1)(c)), including in particular,

> (a) the harm caused to victims and their families;
> (b) the nature of the unlawful behaviour; and
> (c) the means employed to execute the crimes.

It shall also take into account:

> (d) the degree of participation of the convicted person;
> (e) the degree of intent;
> (f) the circumstances of manner, time and location; and

[24] Judgment, para.36.

(g) the age, education, social and economic condition of the convicted person.

26. The Majority acknowledged the importance of, and took into account, gravity and the extent of the damage caused at paragraphs 36-56 of the Sentencing Decision. Although the Trial Chamber states at paragraph 44 that it has taken all of the requisite factors into account under rule 145(1)(c), it failed overall to give sufficient weight to the objective gravity of the crimes and to these seven factors, as set out in greater detail below. As noted by Judge Odio Benito in her dissenting opinion, the Majority failed to give sufficient consideration, in particular, to the harm caused to victims and their families.[25]

(i) The harm caused to victims and their families

27. First, the Majority failed to consider that the UPC/FPLC chose, among a range of possible uses of child soldiers, to use them in particularly dangerous ways, such as in the frontlines in battle. The Trial Chamber heard evidence from P-0038, P-0041 and P-0012 that children were sent to the frontlines and were shot at and killed.[26] That children were killed and injured is not simply the natural consequence of wartime; in fact, these children were especially vulnerable. P-0038 testified that children were not as strong as adults and since they could not run as fast when fleeing some were caught or came under fire from the enemy.[27] The UPC even had a full platoon of children under the age of 15, commonly referred to as the "Kadogo Unit".[28] As witnesses explained, the term "kadogo" describes small children from the age of about 13 to 16; [29] in the UPC it was a term used above all to refer to children under the age of 15.[30] The use of children in this way is particularly grave.

[25] Dissenting Opinion of Judge Odio Benito, ICC-01/04-01/06-2901, paras.4-23.
[26] Judgment, paras.823, 824, 826, 833, 846.
[27] Judgment, para.823.
[28] Judgment, paras.873, 877.
[29] Judgment, para.636.
[30] Judgment, para.637.

28. The Trial Chamber appears to have regarded the deaths of child soldiers—regardless of age—as the inevitable consequence of war. Indeed, death is mentioned in the Sentencing Decision only abstractly, as that which happens in wartime. The Majority cited the "historical objective underlying the prohibition against the use of child soldiers"[31] including "protection from violence and fatal or non-fatal injuries during fighting"[32] and the "inevitable risk of being wounded or killed".[33] In so doing, the Decision fails to acknowledge the singular callousness in this case of a militia that *preferred* using children to participate actively in hostilities. It thus failed to appreciate that, according to the evidence reviewed by the Chamber in its own factual findings, the UPC actively recruited children because their immaturity made them easier to manipulate, frighten, and coerce, and also because they would less appreciate the dangers. With these characteristics, the children were knowingly put in a position whereby they were subjected to a greater "inevitable risk" of death or injury than adult soldiers faced, particularly by being deployed to the front lines.[34]

29. The Trial Chamber further failed to appreciate that the UPC favoured young children as soldiers because they were obedient,[35] they were "more desirable" and followed orders more diligently than older children.[36] They were also particularly valued and "more used" because they were fearless and did not ask a great deal of their commanders.[37] The UPC put a premium on, and deliberately exploited, their immaturity, thereby subjecting them to greater risk of death. The recruitment of very young children was seen as an advantage to the militia. The Chamber accepted the evidence of one witness, P-0014, who recounted that

[31] Sentencing Decision, para.38.
[32] Sentencing Decision, para.38.
[33] Sentencing Decision, para.40.
[34] Judgment, paras.823-824.
[35] Judgment, para.850.
[36] Judgment, para.851.
[37] Judgment, para.851.

Thomas Lubanga's appointed representative[38] said, in relation to five-year-old recruits, that "if they get in early then they are going to grow up as real soldiers".[39]

30. Further, the Trial Chamber's passing reference to the risk of death of child soldiers completely fails to reflect the fact that some children that Thomas Lubanga actually recruited and used, who were aged 14 and under, died violent deaths on a battlefield far from their families. [40]

31. In the same fashion, the Trial Chamber further failed to recognize the effects of recruitment, conscription and use in hostilities on child soldiers who survived the war, both in the form of serious physical or psychological injury. As to physical injury,[41] the Trial Chamber refers only generally to the need to protect children from non-fatal injuries and to the risk of being wounded from use in hostilities.[42] But it did not seem to also consider the suffering from combat injuries, chronic pain, decreased work capacity or inability to work, much less that inflicting these lifelong consequences on children imposes burdensome financial, physical and emotional damage on the victims and also obligations on their families.

32. As for psychological injury, the Majority failed to give sufficient acknowledgement of the impact of the recruitment and use of child soldiers on the victims and their families, as was explained by expert witnesses Elisabeth Schauer[43] and Radhika Coomaraswamy.[44] It credited their expert evidence but failed to appreciate its significance. Ms Schauer, for example, submitted extensive written observations and testimony on the devastating consequences for children who have been combatants.[45] Former child soldiers are disadvantaged

[38] Judgment, paras.1110, 1069-1071.
[39] Judgment, para.788.
[40] Judgment, paras.823, 824, 826, 831, 832, 833, 1323.
[41] Judgment, paras.823, 883.
[42] Sentencing Decision, paras.38 and 40.
[43] Sentencing Decision, paras.39-42.
[44] Sentencing Decision, para.43.
[45] EVD-CHM-00001, pp.10-29. ICC-01/04-01/06-T-166-ENG, 7 April 2009.

vocationally and occupationally,[46] which Ms Schauer explained can cause "feelings of helplessness and thus aggravate symptoms of depression in a downward spiral effect".[47] In fact, the psychological and social damage done to these children, from the manner of their recruitment, the cruelty of their training and the exposure to particular risks precisely because they are children, is, according to Ms Schauer, both "devastating"[48] and "debilitating".[49] "[S]tressors have a vast impact, *especially* in childhood",[50] because at this period in a child's development, stress has the greatest potential to impact cognitive and affective development.[51] This is even without regard to the denial of education, socialization, family support and other needs particular to children.

33. Beyond the horrific effects on a young person of exposure to death, violence and abuse, many children develop post-traumatic stress disorder—a mental health disorder with emotional, cognitive and physiological effect and limited chance of complete recovery,[52] particularly in societies of conflict with limited access to mental health practitioners.[53] As Ms Schauer explained, post-traumatic stress disorder is like a "wound of the mind".[54] Other serious psychological disorders can emerge from such trauma.[55] The trauma can also lead to drug abuse, depression, dissociation, and suicide.[56] And child soldiers often emerge from armed groups without the essential civilian life skills that must be learned before adulthood.[57] As noted by the Trial Chamber in the *RUF* case in respect of the

[46] ICC-01/04-01/06-T-166-ENG CT WT, p.33, lines 6-7.
[47] EVD-CHM-00001, p.25.
[48] EVD-CHM-00001, p.3.
[49] EVD-CHM-00001, p.10.
[50] EVD-CHM-00001, p.17.
[51] EVD-CHM-00001, p.17.
[52] EVD-CHM-00001, pp.10-17.
[53] ICC-01/04-01/06-T-166-ENG CT WT, p.32, lines 1-7 and p.63, lines 10-12.
[54] ICC-01/04-01/06-T-166-ENG CT WT, p.63, line 7.
[55] EVD-CHM-00001, p.17.
[56] EVD-CHM-00001, pp.17-22.
[57] ICC-01/04-01/06-T-166-ENG CT WT, p.32, line 25 to p.33, line 1.

impact on relatives and society, "most families are in no position to cater for the needs of these children affected by the effects of war".[58]

34. With particular respect to the female child soldiers, Ms Schauer also highlighted the very alarming and real consequences of trauma on babies born into or as a result of violence, to parents who perpetuate the cycle of violence to which they were exposed.[59] The trauma, according to the expert, "can cripple individuals and families even into the next generations".[60]

35. Lastly, the Trial Chamber failed to consider the fact that Thomas Lubanga's army included children as young as five;[61] child soldiers at his residence were 9 or 10 years old,[62] and generally children in the UPC/FPLC were as young as 9.[63] An important internal UPC document, dated 12 February 2003 and copied to Thomas Lubanga, referred specifically to the presence of soldiers aged "10 to 15 or 16" within the ranks of the army.[64] Yet, the only time that the Chamber considered the age of the recruits is found in its discussion declining to consider age as an aggravating factor, on the basis that it cannot operate as both a factor for gravity and as an aggravating factor.[65] A review of the Trial Chamber's consideration of gravity,[66] however, reveals that it fails to reflect any specific consideration of the critical fact that many of the children were especially young, aged 5, 9 and 10.

(ii) The nature of the unlawful behaviour / the degree of participation of Thomas Lubanga

36. First, the Trial Chamber failed to give sufficient weight to the nature of the unlawful behaviour and the participation of Thomas Lubanga in the commission

[58] RUF case, Sentencing Decision, para.186.
[59] EVD-CHM-00001, pp.25-27.
[60] EVD-CHM-00001, p.25; ICC-01/04-01/06-T-166-ENG CT WT, p.75, line 18 to p.76, line 16.
[61] Judgment, paras.700, 708, 709. The Chamber accepted that the children recruited in July-August 2002 "were trained by the UPC/FPLC at its headquarters from July 2002 and this continued after September 2002" (para.791).
[62] Judgment, para.717-718.
[63] Judgment, paras.765 and 697. See also ICC-01/04-01/06-T-199, p.35, lines 15-16.
[64] Judgment, paras.741-748. EVD-OTP-00518.
[65] Sentencing Decision, para.78.
[66] Sentencing Decision, para.38.

of these crimes. The Trial Chamber quotes one paragraph of its overall conclusions on Thomas Lubanga's participation in the crimes without any further discussion on the effect of this unlawful behaviour and degree of participation on his sentence.[67] The evidence showed that Thomas Lubanga's unlawful behaviour is at the heart of the crimes of enlisting, conscripting and using child soldiers in combat. He was closely involved in making decisions on recruitment policy; he actively supported recruitment initiatives; he personally encouraged families to contribute children to the militia; and he personally encouraged underage children to join the army and undergo military training.[68] He personally used children under the age of 15 as his bodyguards and he regularly saw guards of other UPC/FPLC staff who were under the age of 15.[69]

37. Second, the Trial Chamber does not appear to have appropriately considered as a significant factor that representatives of the United Nations and certain non-governmental organizations repeatedly met with Thomas Lubanga and his staff to urge him to stop recruiting and using child soldiers.[70] They put him on notice of the cruelty and illegality of the practice. In response, the UPC/FPLC threatened the demobilizers and attempted to impede the work of organizations that tried to help child soldiers.[71] Thomas Lubanga also sought to quiet the criticism by issuing several "demobilization orders" while in fact recruitment continued; Thomas Lubanga was aware that, after pretending to demobilize, children under the age of 15 continued to be present in his militia.[72] Indeed, during the very times he claimed to have sought demobilization, he visited training camps and encouraged recruits, including those under the age of 15, to train and later become part of the FPLC. This led the Trial Chamber to conclude in the Judgment

[67] Sentencing Decision, para.52. The Trial Chamber simply cites an excerpt of para.1356 of the Judgment and thereafter states only that "these conclusions have provided an important foundation for the sentence to be passed by the Chamber."
[68] Judgment, paras.1277, 1348.
[69] Judgment, para.1277.
[70] Judgment, 1283, 1284, 1285, 1288, 1290.
[71] Judgment, para.1287 and 1290.
[72] Judgment, paras.1285, 1287, 1290, 1344, 1348.

that his lack of cooperation with demobilizers and threats directed against human rights workers "undermine the suggestion that demobilization, as ordered by the President, was meant to be implemented".[73] The Trial Chamber held that "the behaviour of the accused was *wholly incompatible* with a genuine intention to avoid recruiting children into, or to demobilize children from, the FPLC" (emphasis added).[74] Indeed, during this time, Thomas Lubanga continued to use children in his own bodyguard unit,[75] and child recruitment by the UPC/FPLC continued during the entire period of the charges regardless of external pressure.[76] This is evidence of Thomas Lubanga's zealous determination to persevere with the criminal behaviour against all constraints, a particularly serious factor.

(iii) The means employed to execute the crimes

38. The Trial Chamber did not adequately consider as a sentencing factor the means employed to execute the crimes. First, Thomas Lubanga, along with other UPC/FPLC members, mounted pressurized recruitment campaigns to force families to surrender their young children to the UPC/FPLC armed forces, when these families were trying to cope with the devastating effects of war. Conscription in this case[77] was a form of compulsory taxation by Thomas Lubanga's political movement on families and communities.[78]

39. Second, Thomas Lubanga and the UPC/FPLC repeatedly preyed on the same children and their families; many children who were able to leave the UPC/FPLC were re-recruited.[79] Under Thomas Lubanga's leadership, "the risk for those

[73] Judgment, para.1348.
[74] Judgment, para.1335.
[75] Judgment, para.1321.
[76] Judgment, para.1321.
[77] Judgment, paras.911, 912, 913, 914.
[78] Judgment, paras.770, 781, 785.
[79] Judgment, para.765.

children who did not rejoin the [UPC/FPLC,] was that they or their families would be threatened or attacked".[80]

40. The Trial Chamber makes no more than a general reference to the fact that "the crime of conscription is distinguished by the added element of compulsion"[81] or the fact that one expert opined that children join armed groups as a "matter of pure survival".[82] This does not sufficiently capture the gravity of directly or indirectly threatening families if they did not give up their children, and forcefully pursuing the families for the same children even after they had demobilized.

(iv) The circumstances of manner, time and location

41. Although the Trial Chamber noted at sentencing that the involvement of children under the age of 15 in the UPC/FPLC was "widespread", it failed adequately to consider the prolonged and widespread nature of the crimes. The *ad-hoc* Tribunals have held that a crime is aggravated where it was committed on a prolonged basis, systematically, with premeditation, with zeal or where the crimes were widespread.[83] As noted above, the crimes of which Thomas Lubanga was convicted were committed with zeal and as set out below, they were prolonged in time, extended in territory and they were widespread.

42. Thomas Lubanga and his troops committed these crimes during a one-year period (early September 2002 to 13 August 2003) throughout the region of Ituri in the Democratic Republic of Congo.[84] During this period, the UPC/FPLC was responsible for the "widespread recruitment of young people, including children

[80] Judgment, para.765.
[81] Sentencing Decision, para.37.
[82] Sentencing Decision, para.43.
[83] *Krstic* Trial Judgment, paras.711-712; *Simic et al* Trial Judgment, para.74; *Blaskic* Trial Judgment, para.784; *Jelisic* Trial Judgment, para.131; *Todorovic* Trial Judgment, paras.63-64; *Stakic* Trial Judgment, para.917; *Vasiljevic* Trial Judgment, para.279; *Tadic* Sentencing Judgment, para.20; *Serushago* Sentence, para.30; *Kambanda*, para61(B)(vi); *Kayishema and Ruzindana* Sentence, para.16; *Ruggiu* Trial Judgment, para.51; *Niyitegeka* Trial Judgment, para.499(vi).
[84] Judgment, para.1358.

under the age of 15, on an enforced as well as 'voluntary' basis'",[85] some as young as 5 years old.[86] The Trial Chamber found that a "significant number" of children under 15 were part of the UPC/FPLC army,[87] – exposing them to real danger as potential targets.[88]

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.[89] She further testified about the 87 UPC/FPLC child soldiers she met who were under 15 and had been recruited and used between mid-2002 and mid-2003.[90] P-0017 confirmed that the UPC/FPLC used a full platoon of children under the age of 15 – approximately 45 children.[91] P-0016 stated that at the Mandro training camp there were over 100 recruits and about 35% were under 15.[92] P-0014 estimated that 20% of approximately 100 young recruits being trained at the UPC Headquarters were under 15.[93] 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.[94] This evidence alone identifies approximately 200 child soldiers in the UPC/FPLC, though this is well under the final count.

44. Moreover, that the instances of recruitment and use were numerous and repeated is corroborated by other factors, such as: the frequency of the recruitment campaigns, the length of time during which the recruitment continued, the noticeable presence of multiple children at training centres, and the depth of deployment of the children under 15 within the ranks of the UPC/FPLC. The Trial

[85] Judgment, para.911.
[86] Judgment, paras.700, 708, 709.
[87] Judgment, paras.42, 643, 824, 838, 857, 869, 877, 882.
[88] Judgment, para.820. See also paras.915-916 on the use of children under the age of 15.
[89] EVD-OTP-00489, pp.88-90, 120-121; EVD-OTP-00623; EVD-OTP-00480; EVD-OTP-00737.
[90] Judgment, paras.653, 766 and T.206, p.48, line 24 to p.49, line 13, p.50, line 14 to p.51, line 8; T.207, p.13, lines 5-14.
[91] Judgment, paras.873, 877.
[92] Judgment, paras.804-805.
[93] Judgment, para.700.
[94] T.199, p.25, line 2 to p.26, line 6, p.27, lines 1-8.

Chamber's findings that children under 15 were recruited and trained in the military camps in Bunia (Headquarters), Mandro, Rwampara and Mongbwalu,[95] illustrate the large-scale nature of the commission of the crimes. Similarly, the Chamber's findings regarding the deployment of children under 15 within the ranks of the UPC/FPLC, as soldiers (in several areas in Ituri),[96] within the bodyguard units of all UPC/FPLC political and military staff,[97] and as bodyguards to Mr Lubanga within his presidential guard,[98] attest to the large-scale and widespread nature of the commission of the crimes. These factors should have been duly considered in passing a sentence. Instead, the Trial Chamber, on sentence, found only that the involvement of children under the age of 15 in the UPC/FPLC was "widespread", but declined to go beyond this assertion.[99]

C. Lack of proportion with sentences imposed in similar cases

45. The Trial Chamber acknowledged that it is appropriate to consider the jurisprudence of the *ad hoc* tribunals, stating that "the *ad hoc* tribunals are in a comparable position to the Court in the context of sentencing."[100] It specifically noted that the Special Court for Sierra Leone ("SCSL") is the only other international tribunal to have convicted persons for the recruitment or use of child soldiers, and it considered those sentences. The Prosecution submits that while there may be justifiable divergence in the sentences imposed on different accused in different cases, due to the specific features of each case, it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive widely different sentences, unless there are

[95] Judgment, para.819.
[96] Judgment, paras.821-834.
[97] Judgment, paras.839 and 849.
[98] Judgment, para.915.
[99] Sentencing Decision, para.50.
[100] Sentencing Decision, para.12.

important differences in the applicable mitigating and aggravating factors. As the ICTY Appeals Chamber has stated, "a sentence should not be capricious or excessive, and […] in principle, it may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences. Where there is such disparity, the Appeals Chamber may infer that there was disregard of the standard criteria by which sentence should be assessed […]".[101]

46. There are two relevant cases at the SCSL where child soldier crimes were given separate sentences, as noted by the Trial Chamber.[102] Yet the sentences imposed against two convicted persons in the *RUF* case compared to the sentence imposed against Thomas Lubanga reveal a real measure of inconsistency.[103] The Prosecution asserts that this disparity in sentencing the same crime in similar circumstances is an additional indication that the Trial Chamber "disregarded the standard criteria by which the sentence should be assessed".[104]

47. There is clear factual symmetry between the case against Thomas Lubanga, who was found to be the head of both the political and military branches of the UPC/FPLC, and the *RUF* case, in which two senior RUF commanders were convicted on one count of using children under the age of 15 years to participate actively in hostilities. In the *RUF* case, Issa Hassan Sesay[105] was one of the most senior RUF commanders who had substantial involvement in the planning of the

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[101] *Jelisic*, Appeal Judgement , para.96.

[102] *Sesay, Kallon and Gbao* Trial Chamber Judgment, ("*RUF* case"); *Fofana and Kondewa,* Trial Chamber, Judgment ("*CDF* case").

[103] The facts in the second of the SCSL cases (the *CDF* case) are not similar to the facts in this case: Allieu Kondewa, a priest, was convicted of enlisting child soldiers (paras.968-970). He was a High Priest (paras.61-62), not the military or political leader of the CDF with an overall coordinating role, as was Thomas Lubanga. Nor did he personally use children under the age of 15. In mitigation, the Chamber considered Kondewa's expression of remorse, his lack of formal education or training and of prior convictions, and his motive of civic duty, all of which "significantly impacted" on the sentence imposed for each count (paras.65, 66, 68, 94). *Kondewa* was sentenced to 7 years imprisonment. His conviction was later overturned on appeal.

[104] J*elisic* Appeal Judgment, para. 96

[105] RUF case, Trial Chamber, Sentencing Judgment, para.4.

system of conscription; he interacted directly with child soldiers on a regular basis; some of his own personal bodyguards were child soldiers; he gave orders that young boys should be trained; he distributed drugs for the fighters; and his group, the RUF, routinely used persons under 15 to actively participate in hostilities between 1996-2000 in three districts.[106] Based on these facts, the Chamber sentenced him to 50 years imprisonment, more than three times the sentenced imposed against Thomas Lubanga.

48. Morris Kallon[107] was a senior RUF commander who participated in the design and maintenance of the system of forced recruitment of child soldiers as well as their use in hostilities, and made an important contribution.[108] His participation was also direct in that he personally brought children under the age of 15 for training to one location in 1998 and he was the senior RUF commander in 2000 at another location where child soldiers were used in hostilities.[109] For this crime, Kallon was sentenced to 35 years imprisonment, more than double the sentence imposed against Thomas Lubanga.

49. There are further factual parallels: where the SCSL Chamber found that the practice of recruitment and use of child soldiers was "organized, widespread and institutionalized",[110] Trial Chamber I found that between 1 Sept 2002 and 13 August 2003, the UPC/FPLC was responsible for the widespread recruitment of young people, including those under 15,[111] that a significant number of children under 15 were part of the UPC/FPLC,[112] and that Thomas Lubanga and other senior leaders were particularly active in mobilization drives and recruitment

[106] RUF case, Trial Chamber, Sentencing Judgment, para.212.
[107] RUF case, Trial Chamber, Sentencing Judgment, para.7.
[108] RUF case, Trial Chamber, Sentencing Judgment, para.236.
[109] RUF case, Trial Chamber, Sentencing Judgment, para.236.
[110] RUF case, Trial Chamber, Sentencing Judgment, para.179.
[111] Judgment, para.911.
[112] Judgment, para.643.

campaigns directed at persuading Hema families to send their children to serve in the UPC/FPLC army.[113]

50. The SCSL Chamber found that children as young as 10 were armed[114] and used to mount ambushes, as bodyguards to commanders—including to Sesay and Kallon—and they were used during patrols, all of which put their lives in danger.[115] In *Lubanga*, Trial Chamber I accepted evidence of children as young as 5 being recruited into the UPC[116], that Thomas Lubanga and senior politicians/ commanders used a significant number of children under 15 as bodyguards,[117] that children as young as 9 and 10 were at Thomas Lubanga's residence,[118] that the UPC/FPLC used child soldiers in hostilities, and as bodyguards, military guards and domestic workers exposing them to real danger as potential targets,[119] and that child soldiers shot at the enemy and were killed during combat.[120] The SCSL Chamber found that the child soldiers were subjected to "cruel and harsh military training",[121] and Trial Chamber I found that "children in the camps endured a harsh training regime and they were subjected to a variety of severe punishments".[122]

51. Taking all these factors into account,[123] the Chamber in the *RUF* case found that the inherent gravity of the child soldier crimes was "*exceptionally high*",[124] and that Sesay's and Kallon's particular criminal conduct "reaches the highest level" of

[113] Judgment, para.911.
[114] RUF case, Trial Chamber, Sentencing Judgment, para.180.
[115] RUF case, Trial Chamber, Sentencing Judgment, para.180.
[116] Judgment, paras.700, 708, 709.
[117] Judgment, paras.857, 869.
[118] Judgment, paras.717-718.
[119] Judgment, paras.627-628, 820-882, 915.
[120] Judgment, para.823.
[121] RUF case, Trial Chamber, Sentencing Judgment, para.180.
[122] Judgment, paras.883-889, 913.
[123] As part of its consideration of gravity, the SCSL Trial Chamber considered (i) the scale and brutality of the offences committed, (ii) the role of the Accused in the commission of the crimes; (iii) the degree of suffering or impact of the crime on the immediate victim as well as its effect on relatives of the victims; (v) the vulnerability and number of victims: *RUF* case, Trial Chamber, Sentencing Judgment, para.19.
[124] RUF case, Trial Chamber, Sentencing Judgment, para.187.

gravity.[125] For the sole count of using children under the age of 15 to participate actively in hostilities, Sesay received a separate sentence of 50 years imprisonment and Kallon received a separate sentence of 35 years imprisonment. For the same crime of using children under the age of 15 to participate actively in hostilities, Thomas Lubanga was sentenced to only 14 years imprisonment.[126]

52. The Trial Chamber attempted to draw a distinction between the *RUF* and Lubanga cases on the basis that persons convicted of many crimes deserve a higher sentence than those convicted of only one crime: "[i]t is significant that both Messrs Sesay and Kallon were convicted on sixteen separate counts and that their sentences were ordered to run concurrently (Mr Sesay received 52 years in total and Mr Kallon, 40 years)."[127] Yet, contrary to this assertion, the total sentences for these two convicted persons were *not* markedly higher than those given for a single count of child soldier crimes (50 v. 52 for Sesay and 35 v. 40 for Kallon). In fact, the convicted persons received *lower* individual sentences for other crimes (e.g. Sesay received 40 years for murder) and the only counts that received higher sentences were 52 years for acts of terrorism and 51 years for intentional attacks against personnel involved in humanitarian assistance or peacekeeping mission. The Prosecution submits that this tends to show that the SCSL considered child soldier crimes as one of the gravest, deserving of a particularly high sentence.

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[125] RUF case, Trial Chamber, Sentencing Judgment, para.212.

[126] The factors considered in mitigation in the cases do not resolve this discrepancy either: the SCSL Trial Chamber considered Sesay's contribution to the peace process in Sierra Leone and "very limited mitigation" for his expression of empathy with the victims of the conflict (RUF case, Trial Chamber, Sentencing Judgment, paras.228 and 232). As for Kallon, the Chamber considered his sincere acknowledgement of his role in the conflict and his apology as a mitigating factor (RUF case, Trial Chamber, Sentencing Judgment, para.256). The Trial Chamber in the present case held that Thomas Lubanga's hope that peace would return to Ituri was "only of limited relevance" in mitigation "given the persistent recruitment of child soldiers during the period covered by the charges" (Sentencing Decision, para.87). The Chamber considered Thomas Lubanga's cooperation with the Court in mitigation (Sentencing Decision, para.91).

[127] Sentencing Decision, para.14.

53. The review of this SCSL case demonstrates (a) that in clear contrast with the approach of the Majority, the SCSL attached a particular high gravity to the crime of enlistment and use of children in hostilities, attracting enhanced punishment;[128] and (b) that in comparison to the sentence imposed by the SCSL to accused that engaged in conduct similar to that of Thomas Lubanga, the sentence imposed by the Majority is manifestly inadequate in its disregard for criteria by which the sentence should be assessed. The inconsistency between these sentences is excessive.

54. As this case concerns crimes against children, the Prosecution notes the seriousness with which this crime is considered in domestic jurisdictions. For example, in a recent case in the United Kingdom, a convicted person was sentenced to 20 years imprisonment for child trafficking in relation to three girls aged 14, 16 and 17 years old.[129] They were orphans and were brought to the United Kingdom where they suffered sexual abuse. Among other things, the Court found that the convicted person preyed on vulnerable children and that the mental and physical scars inflicted by him will remain with the victims for the rest of their lives. This case shows that cases involving such crimes against children are considered particularly grave and deserve a fittingly high sentence.

55. Thomas Lubanga's crimes were against scores of children – the evidence revealed more than 200 victims. His sentence should fully reflect the gravity of his crimes, his role in them, and the harm caused to victims, and should accordingly be revised upwards.

[128] Trial Chamber I held that conscripting, enlisting child soldiers and using them to participate actively in hostilities are "undoubtedly very serious crimes" (Sentencing Judgment, para.37).
[129] http://www.bbc.co.uk/news/uk-england-20096101; http://www.guardian.co.uk/uk/2012/oct/29/sex-trafficker-jailed-nigerian-orphans; Daily Mail, 30 October 2012 (2012 WLNR 23002471).

<u>Second Ground of Appeal</u>: The Trial Chamber failed to consider Thomas Lubanga's abuse of authority and trust

56. The Trial Chamber makes no reference to abuse of authority or abuse of trust in the Sentencing Decision, nor is there any discussion of this factor. The sole reference in paragraph 51 of the Sentencing Decision is to the "extent of participation of Mr Lubanga and the nature of his intent" and to "his position as President and commander-in-chief of the UPC" with the Trial Chamber noting that factors should not be double-counted. The Prosecution accepts that factors should not be double-counted when imposing a sentence. But they should be at least single-counted. Here, the factor was not taken into account *at all*, either as aggravating or as part of the gravity of the crime.[130] The Trial Chamber does not refer to the Prosecution's submission that Thomas Lubanga abused his position of authority in committing the crimes.[131] Other than a general reference to its overall findings on Thomas Lubanga's position within the UPC/FPLC, his essential contribution to the common plan and his personal use of child soldiers,[132] which are all different factors, nothing in these paragraphs indicates that the Chamber considered the serious effect of Thomas Lubanga's *abuse* of authority.

57. One of the most important aggravating factors consistently highlighted in international jurisprudence is abuse of authority or betrayal of trust in the commission of crimes.[133] A position of authority, whether civilian or military,

[130] See *Galic*, Appeals Chamber Judgment, para.412: the Trial Chamber did not err in treating as aggravating that General Galic "repeatedly breached his public duty from this very senior position". In the same paragraph, the Appeals Chamber concluded that "The Trial Chamber therefore did not use the same factors both to establish Galic's responsibility for the crimes and to aggravate his sentence."

[131] Prosecution's Sentence Request, ICC-01/04-01/06-2881, para.37.

[132] Judgment, para.52.

[133] "Abuse of superior position" or "position of command" has, more than any other consideration, been accepted as an aggravating factor by ICTY chambers: Hola, B., A. Smeulers, C. Bijleveld (2009),

gives rise to both a duty and trust, which, if broken or abused, aggravates sentence.[134] This jurisprudence has been codified in the Court's basic texts: rule 145(2)(b) *requires* the Court to take into account the "abuse of power or official capacity" as an aggravating circumstance. This mandatory factor, moreover, is not merged with the separate other mandatory consideration – the degree of participation of the convicted person and the degree of intent, under rule 145(1)(c). Thus, the Trial Chamber erroneously ignored a factor that it was legally obliged to consider.

58. As the rule makes clear, abuse of authority is not synonymous with an accused's role but instead is a separate aggravating factor. The Appeals Chamber in *Nikolic* confirmed the same: "abuse of [an accused's] position of authority is distinct from his role in the crimes".[135]

59. The Trial Chamber in *Taylor* equally held that a position of leadership, on the one hand, is distinct from the breach of that trust or authority: "the position of leadership of an accused held criminally responsible for a crime under article 6(1) of the Statute can be considered to be an aggravating circumstance. Furthermore, breach of trust or authority, where the accused was in a position that carries with it a duty to protect or defend the victims, such as in the case of a government official, police chief or commander, can be an aggravating factor".[136]

60. To illustrate the distinction between *position* of authority and *abuse* of authority in this case, the Trial Chamber considered for sentence that Thomas Lubanga held a

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"Is ICTY sentencing predictable? An empirical analysis of ICTY sentencing practice," *Leiden Journal of International Law* 22(1) 79, 86: "abuse of superior position/position of authority or trust (accepted in 35 cases)." See also, *Taylor* Trial Judgment, paras.97-102; *Galic*, Appeals Judgment, paras.451 and 455; *Celibici,* Trial Judgment, para.1261; *Nikolic* Appeal Judgment, para.61 referring to *Nikolic,* Trial Judgment, para.135.

[134] *Blaskic*, Trial Judgment, 3 March 2000, at p.789; *Taylor* Trial Judgment, paras.97-102; *Kondewa* Sentencing Judgment, paras.61-62.

[135] *Nikolic* Appeal Judgment, 8 March 2006, para.61.

[136] Taylor case, Trial Judgment, para.29, citing *Kambanda* Judgment and Sentence, para.44; *Seromba*, Appeals Judgement, 12 March 2008, para.230; *Ndindabahizi,* Appeals Judgement, para.136.

position of authority within the UPC/FPLC[137] through which he made essential contributions to the common plan that resulted in the commission of these crime.[138] But what additionally aggravates the seriousness of his contribution to the crimes is that (as the head of the governing authority in Ituri) he was vested with public trust to protect the population and he seriously betrayed that trust in committing these crimes against children. This is distinct from his position within the UPC/FPLC, yet the Trial Chamber failed to consider it.

61. The Trial Chamber held in *Taylor* that the betrayal of public trust is "an aggravating factor of great weight".[139] Specifically applying that principle to the facts, it explained that Taylor "held a position of public trust, with inherent authority, which he abused in aiding and abetting and planning the commission of the crimes for which he has been convicted".[140] In the CDF case, the SCSL Trial Chamber likewise held that: "given the cultural context, Kondewa, in his role as High Priest who blessed the CDF/Kamajors before they went to battle, and as someone widely respected for his mystical powers and abilities to immunize people against harm, held a unique and prominent position in the community. The Chamber therefore finds that he also breached a position of trust in committing the crimes for which he was convicted".[141]

62. Thomas Lubanga's abuse of authority and trust is equally grave. He held official government positions in Ituri since his appointment as Minister of Defence for the RCD-ML.[142] He later became the highest authority in the UPC/FPLC, exercising control over Ituri after the departure of the RCD-ML from Bunia in August

[137] Judgment, paras.1169, 1356.
[138] Judgment, paras.1169, 1270, 1356.
[139] *Taylor*, Trial Judgment, para.97.
[140] *Taylor*, Trial Judgment, para.97.
[141] *CDF* case, Trial Chamber, Judgment, para.62. Although the Prosecution submits that there are differences in the facts of this case and that of Thomas Lubanga's for the purpose of comparing overall sentence, this finding on abuse of trust by the SCSL Trial Chamber is a relevant authority for the present case. See also *Kambanda*, Trial Judgment and Sentence, para.44.
[142] Judgment, para.1051.

2002.[143] As the highest Government authority in Ituri, Thomas Lubanga was entrusted with the protection of the population.[144] And people also personally placed their trust in him. According to the evidence of P-0046,[145] child soldiers sang songs about "Papa Thomas", referring to Thomas Lubanga.[146] Videos admitted at trial show that whenever he made public appearances, he was warmly welcomed and cheered by the local population.[147] In short, placing both authority and confidence in Thomas Lubanga, the population trusted him with their welfare and the welfare of their families.

63. Thomas Lubanga abused this trust and authority by influencing Hema / Gegere elders or wise men from various villages to persuade the population to make young people, including those under the age of 15, available to the UPC for enlistment into the armed forces.[148]

64. He abused this trust and authority when he visited training camps in his official capacity and encouraged the recruits, including those who were under 15, to continue their training and join his war effort.[149]

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[143] Judgment, paras.1108, 1112, 1354.
[144] *Akayesu*, Appeals Judgment, para.414.
[145] The Chamber found P-0046 to be a credible and reliable witness, Judgment, para.655.
[146] EVD-OTP-00489, p.47, line 21 to p.48, line 3.
[147] See EVD-OTP-00583 and EVD-OTP-00416, 29 August 2002: Thomas Lubanga arrives at the airport in Bunia, where he is warmly welcomed by officials and by the local population. People are singing and cheering; EVD-OTP-00571, 11 January 2003: the video depicts a public rally held in Bunia. Thomas Lubanga arrives at the rally with his presidential convoy. He is being cheered by the audience (singing, dancing and applause) upon his arrival (02:22:35 - 02:25:07) and when he takes the floor to address the crowd (02:34:40 - 02:35:13); EVD-OTP-00578, 1 June 2003: The video depicts Thomas Lubanga's visits to Shari and to Katoto. The population sings and applauds (00:00:55-00:01:30 & 00:05:00-00:05:50). Before addressing the population, Thomas Lubanga is introduced as "Mr. President" and asked to come to talk to "his children", which is followed by applause and cheering by the population (01.01.29-01.02.00); EVD-OTP-00579, 3 June 2003: The video depicts a public rally. When Thomas Lubanga takes the floor, the population applaudes, sings and cheers (02:36:07-02:38:23); EVD-OTP-00585, 5 June 2003: Excerpts 00:39:00-00:39:39 and 00:44:40-00:46:35 depict the audience in Iga-Barrière while awaiting Thomas Lubanga's speech. The people are dancing, singing, applauding and cheering.
[148] Judgment, paras.771, 773, 781, 783, 784, 785, 911, 1354.
[149] Judgment, paras.1266, 1277.

65. He abused this trust and authority when he used children under the age of 15 in his own bodyguard unit.[150] He was aware that children under the age of 15 formed part of the personal escorts of senior members of the FPLC,[151] and, by using children under the age of 15, he endorsed and perpetuated the practice.

66. Moreover, Thomas Lubanga knew that the recruitment of children was prohibited yet he further abused his position of trust and authority by using it to impede the work of child protection workers and taking active steps to ensure that the recruitment and use of child soldiers continued.[152] The abuse of his official position and trust in committing these crimes constitutes a serious and significant aggravating factor, which the Trial Chamber failed to consider.

[150] Judgment, para.1262.
[151] Judgment, para.1277.
[152] Judgment, paras.1346, 1348.

<u>Third Ground of Appeal</u>: The Majority applied the wrong test to establish aggravating factors, or, in the alternative, reached unreasonable findings of fact

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. This conclusion was both legally unsound, to the extent that it excludes aggravating factors that fall short of this level of attribution and personal culpability, and factually incorrect. That the victims were subjected to cruel treatment and sexual violence on account of Thomas Lubanga's crimes are examples of harm that should be taken into account in sentencing, so long as these harms were directly related to the crimes and objectively foreseeable. In the circumstances of this case, the harm inflicted by harsh disciplinary regimes and sexual abuse was directly related to the recruitment and use of child soldiers and was foreseeable and, given their severity, should have been reflected in Thomas Lubanga's sentence.

68. In the alternative, accepting the test as set out by the Majority, the Prosecution submits that the Majority erred in fact in failing to find that cruel treatment and sexual violence are aggravating factors, given that the evidence adduced at trial is sufficient to establish beyond reasonable doubt that such harm occurred and that it is attributable to Thomas Lubanga.

(a) Harm can be assessed either under gravity or as an aggravating factor

69. The Trial Chamber has the discretion to consider cruel treatment and sexual violence either as part of its assessment of the gravity of the crime, or as

aggravating factors.[153] The Appeals Chamber in *Hadzihasanovic* commented that "though gravity of the crime and aggravating circumstances are two distinct concepts, Trial Chambers have some discretion as to the rubric under which they treat particular factors".[154]

70. In this case, the Majority, following the Prosecution's submissions, assessed these two factors as aggravating under rule 145(2)(b)(iii)—the victim is particularly defenceless—and rule 145(2)(b)(iv)—the crime was committed with particular cruelty. There is no error in this approach *per se*, except to the extent that in the end the Majority has failed to take into account *at all* the harm caused by cruel treatment and sexual violence, harm that flowed directly from Thomas Lubanga's crimes, *and* appears to require a higher *mens rea* requirement for aggravating factors than for those that can be taken into account under gravity. The Prosecution notes that in the *RUF* case at the SCSL, the Trial Chamber considered the fact that "child soldiers were subjected to cruel and harsh military training" as a factor, among others, that exacerbated the gravity of the sentence.[155] Similarly, in her dissenting opinion, Judge Odio Benito assessed cruel treatment and sexual violence in her analysis of the gravity of the crimes.[156]

(b) The Majority's requirement of "attribution"

71. The Majority refused to consider the harm from cruel treatment and sexual abuse suffered by the children recruited into Thomas Lubanga's militia. It reasoned that the factors could not be weighed at sentencing because the Prosecution had failed to prove that Thomas Lubanga was personally responsible for these

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[153] Rule 145(2)(b)(vi).
[154] *Hadzihasanovic*, Appeals Judgment, para.317. See also, *Vasiljevic* Appeal Judgment, para.157; *Taylor*, Sentencing Judgment, para.28, noting that some international Trial Chambers consider gravity and aggravating circumstances together. See also *Brima*, Trial Chamber, Sentencing Judgement, para.23.
[155] *RUF*, Sentencing Judgment, para.180.
[156] Dissenting Opinion of Judge Odio Benito, Sentencing Decision, p.41, heading (B) and paras.1, 2, 6, 13.

consequences.[157] Thus, it appears to require attribution to the accused for aggravating circumstances that effectively obliges, both at the objective and subjective (article 30) levels, the same nexus that would be required for the purposes of convicting the accused. The "test" articulated by the Majority is further confused by the words "or that can otherwise be attributed to him in a way that reflects his culpability".[158] The Prosecution submits that this is a legal error.

72. The Majority effectively held that the cruel treatment and the sexual violence that child soldiers were subjected to had to be the responsibility of Thomas Lubanga to be considered aggravating. The Majority held that the Prosecution must establish beyond reasonable doubt (a) that child soldiers under 15 were subjected to sexual violence and cruel treatment, and (b) that these acts of violence and cruelty were attributable to Mr Lubanga, and thus reflect his direct and personal culpability, pursuant to rule 145(1)(a) of the Rules.[159] The Majority concluded (apparently in line with the required mental element with respect to consequences found in article 30(2)(b)) that neither cruel treatment nor sexual violence was sufficiently widespread as to have occurred in the ordinary course of the crimes for which Thomas Lubanga was convicted[160]—a factual finding the Prosecution also disputes—and that he neither ordered nor encouraged these consequences, nor was even aware of them.[161] It then held that nothing suggested that either cruel treatment or sexual violence could otherwise be attributed to him in a way that reflected his culpability.[162] Thus, the Majority appears to require the Prosecution to prove beyond reasonable doubt that Thomas Lubanga knew and intended that cruel treatment and sexual violence would occur. The Majority

[157]Sentencing Decision, para.59, 74 and 75.
[158]Sentencing Decision, paras.59 and 74.
[159]Sentencing Decision, para.69.
[160]Sentencing Decision, paras.59 and 74.
[161]Sentencing Decision, paras.59 and 74.
[162]Sentencing Decision, paras.59 and 74.

rules out the applicability of aggravating circumstances that flow naturally from the crime committed and were foreseeable, but were not necessarily contemplated by the convicted person. This standard is wrong.

73. As stated by the Trial Chamber in *Taylor*, citing decisions from the ICTY Appeals and Trial Chambers, aggravating factors need only have a "direct relation to the offences charged".[163] The *Taylor* Trial Chamber did not require the Prosecution to additionally prove that the convicted person acted with intent and knowledge in respect of the aggravating factors. Nor did it conclude that, absent such proof of personal intent and knowledge, these aggravating factors could not, as a matter of law, be attributable to the person. To the contrary, it is sufficient if the evidence established the connection to the offence of which the person was convicted and the objective foreseeability of the harm.

74. Indeed, in *Kunarac*,[164] the 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".[165] The Appeals Chamber in *Deronjic*,[166] explaining the Trial Chamber's judgment in *Kunerac*,[167] 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 circumstance was committed).[168] The Appeals Chamber clarified that the aggravating factor must have been a *direct and foreseeable consequence* of the crime, such as taking advantage of the vulnerability of victims, because holding

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[163] *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.
[164] *Kunarac*, Trial Chamber Judgement.
[165] *Kunarac,* para.850 (emphasis added).
[166] *Deronjic*, Judgment on Sentencing Appeal, ("*Deronjic")*.
[167] *Kunerac*, Trial Chamber Judgment.
[168] *Deronjic*, paras.124-125 (emphasis added).

individuals responsible for such a consequence falls "well within th[e] notion of individual responsibility".[169] Other examples of aggravating factors enumerated by the Appeals Chamber in *Deronjic* include victim characteristics such as age, the number of victims, and the length of time over which the crime was committed.[170] This is because they are "all features of the crime of which an accused is aware or *could be expected to foresee* and for which it is fair to hold him responsible".[171]

75. The question is thus whether the aggravating factor was a direct consequence of his crimes and whether it would have been foreseeable to a reasonable person placed in the convicted person's position. The standard to which aggravating factors relate is not the same as the test for criminal responsibility; rather, it is foreseeability.[172] Of course, if the accused person did in fact foresee the consequences of his conduct, they must be attributed to him for the purposes of aggravation (regardless of whether the consequences were objectively foreseeable or not). But this is not a necessary requirement for finding an aggravating factor. Aggravating circumstances may be properly considered on the basis of directness and objective foreseeability alone.

76. The Majority's error was to treat those *consequences* of the crime which are not integral part of the crime charged but are clearly relevant for the purposes of aggravation, as *elements* of the crime charged, and demand for the former the

[169] *Deronjic*, paras.124-125.
[170] *Deronjic*, paras.124 (emphasis added).
[171] *Deronjic*, paras.124 (emphasis added).
[172] The Sentencing Guidelines Council, created to assist the courts of England and Wales with criminal cases, explains the requirement to impose a sentence that reflects the seriousness of the offence as provided by section 143(1) of the *Criminal Justice Act (2003)* as follows: "the assessment of the seriousness of any individual offence must take account not only of any harm actually caused by the offence, but also of any harm that was intended to be caused or might foreseeably be caused by the offence". Sentencing Guidelines Council, Guideline on Overarching Principles: Seriousness, December 2004, p. 5. Aggravating factors indicate either a higher than usual level of culpability (e.g., offence committed while on bail) or a greater than usual degree of harm (e.g., a serious physical or psychological effect on the victim "even if unintended"). Thus, the harm need only be a foreseeable consequence of the offence. See Sentencing Guidelines Council, Guideline on Seriousness, pp.5-7.

same type of nexus that is required for the latter.[173] This approach is incorrect and inconsistent with the purposes of sentencing, which are not to establish the criminal responsibility of the accused, but to determine the adequate punishment in light of the overall circumstances of the crime committed. In this context, it is perfectly appropriate to consider factors that are a direct and foreseeable consequence of the crimes committed regardless of whether the accused in fact intended or even contemplated those consequences. For instance, a rapist may persuade himself that his conduct will not cause psychological harm to the victim, for instance because he believes that she is sufficiently sexually experienced that she will not regard this event as anything unusual. The perpetrator's refusal or unwillingness to contemplate that there may be lingering consequences to the victim from his conduct does not render the resulting harm any less severe. If the degree of harm suffered by the victim is an aggravating factor – and it is – then it should not be diminished by the indifference of the wrongdoer. If this damage remains within the limits of a direct and objectively foreseeable consequence of the convicted person's conduct, it can and should be considered for sentencing purposes.[174]

77. By failing to consider this essential matter, and instead using a wrong test regarding the *mens rea* for aggravating factors, the Trial Chamber consequently reached the wrong conclusion when it held that cruel treatment and sexual

[173] Eser argues that article 30 applies to aggravating circumstances which either heighten the gravity of the crime or the culpability of the accused. See Cassesse, *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, p.920. However, he fails to provide any reasoning and/or authorities supporting this particular position, and also draws a false parallel between aggravating factors and the additional mental element in the war crime of employing prohibited bullets under article 8(2)(b)(xix) (namely that "the perpetrator was aware of the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect"): this additional mental element is not an aggravating circumstance, but an exception to article 30 under the "unless otherwise provided" formula of article 30(1), and as such, an element of the crime.

[174] The Trial Chamber in the *RUF* case did not require that the cruel and harsh military training to which the child soldiers were subjected had to be attributable to the convicted persons: *RUF*, Sentencing Judgment, para.180.

violence are not aggravating factors in this case because there was no proof that Thomas Lubanga knew and intended that these harmful events occur.

78. However, these are a direct and foreseeable consequence of Thomas Lubanga's crimes. First, it was entirely foreseeable that harsh discipline and sexual violence would occur as a result of the enlistment, conscription and use of children under the age of 15. In the context of these crimes, any reasonable person could anticipate that a group of persons aged 14 and under could suffer abuse and ill-treatment when sent to military training camps without protection and that young girls who were placed in remote areas with military men who were armed and in positions of power, far away from their wives, would be likely victims of sexual abuse. More particularly, it was known and foreseeable that commanders would take "bush wives" from the ranks of conscripted female soldiers and that they would not carefully distinguish within those ranks between underage girls and adults. [175]

79. Second, the evidence accepted by the Trial Chamber demonstrates that harsh discipline, amounting to cruel treatment, and sexual violence did occur regularly over the period of the charges. On the evidence of several UPC/FPLC insiders, the Trial Chamber concluded that "a number of recruits would have been subjected to a range of punishments during training with the UPC/FPLC, *particularly given there is no evidence to suggest they were excluded from this treatment*".[176] The Trial Chamber relied, for example, on evidence of whippings that occurred before the period of the charges as demonstrating "*practices that would have continued into the period of the charges*".[177]

80. As for sexual violence, although it declined to make findings of fact on this issue, the Trial Chamber rehearsed the evidence of sexual abuse from witnesses it

[175] Judgment, paras.892, 894, 895 and ICC-01/04-01/06-T-114-Red3-ENG, p.23, lines 16-19; and
[176] Judgment, para.889 (emphasis added).
[177] Judgment, para.887 (emphasis added). Judgment, paras.892, 894, 895 and ICC-01/04-01/06-T-114-Red3-ENG, p.23, lines 16-19; and

deemed credible and reliable, both in its Judgment and in the Sentencing Decision. In the Sentencing Decision, the Trial Chamber accepted the evidence of sexual violence, solely failing to find that it was sufficiently widespread to be found to have occurred in the ordinary course of the implementation of the common plan.[178] Military insiders in the UPC/FPLC who trained children at the Mandro camp[179] were aware that sexual violence was being committed at the camps.[180] The Chamber also heard testimony from P-0046, who interviewed girls and boys who had been child soldiers in the militia, and who testified that the children told her of the "systematic" sexual violence within the UPC.[181]

81. Third, and as it will be demonstrated in the alternative factual error pleaded below, there was ample evidence before the Trial Chamber showing that not only were these consequences objectively foreseeable, but that Thomas Lubanga must have known of their occurrence. Although proof of an aggravating factor only requires a direct and foreseeable connection between the harm and the crime or the perpetrator, this test is certainly made out when the facts establish actual knowledge. The evidence discussed in paragraphs 82-93 below thus also confirms the foreseeable nature of the cruel treatment and the sexual violence inflicted on the children.

(b) The Majority also made a factual error in relation to cruel treatment and sexual violence

82. Even if the Appeals Chamber accepts the legal test as articulated by the Trial Chamber, the Trial Chamber also erred in reaching unreasonable factual findings that cruel treatment and sexual violence cannot be attributable to Thomas Lubanga. The Prosecution submits that it has proven beyond reasonable doubt

[178] Sentencing Decision, para.74.
[179] Judgment, para.684 (P-0016's tasks included giving instructions to those undergoing military training); para.688 (P-0038 was a trainer at Mandro training camp).
[180] Judgment, paras.892, 894 and 895.
[181] Judgment, para.891, citing the evidence of P-0046 at ICC-01/04-01/06-T-270-Red2-ENG, p.31, lines 4-6.

that child soldiers under 15 were subjected to cruel treatment and sexual violence and that Thomas Lubanga was aware that these acts would occur in the ordinary course of events.

83. First, with regard to the evidence of cruel treatment the Trial Chamber found as a fact that "children in the camps endured a harsh training regime and they were subjected to a variety of severe punishments".[182] It accepted the evidence of insiders that there were many different types of punishment at Mandro camp. More importantly, some recruits died or were disabled as a consequence of this so-called military discipline.[183] The punishments were apparently so well-known that they had names: one punishment was called "kafuni" which involved the use of a cane with a bulge at the end called a "gongo".[184] Sometimes those punished received somewhere around 300 strokes. If hit on the nape of the neck they could "die easily from that",[185] and one child recruit aged about 14 years died precisely that way.[186] Another child, aged 14 or 15 years old, who informed the witness of this treatment was flogged until he lost the use of his right arm.[187]

84. Another punishment was called "kiboko" which involved a whip.[188] The Trial Chamber rehearsed evidence that "torture was used, such as whipping people who were tied up, and a wide range of objects featured during punishment".[189] One witness saw recruits at the UPC/FPLC headquarters being whipped on the buttocks while they were lying on the ground or when their hands and legs were held. [190]

[182] Judgment, para.913.
[183] Judgment, para.883.
[184] Judgment, para.883.
[185] Judgment, para.883.
[186] Judgment, para.883.
[187] Judgment, para.883, citing P-0016 at ICC-01/04-01/06-T-189-Red2ENG, p.47, lines 19-22.
[188] Judgment, para.884.
[189] Judgment, para.884. See also para.885.
[190] Judgment, para.885.

85. Another insider testified that it was common in the UPC for individuals to be whipped and imprisoned (although imprisonment occurred less often), including young soldiers.[191] Witness P-0046, who was held to be credible and reliable by the Trial Chamber,[192] testified that she met with UPC child soldiers who spoke of very hard training conditions with very little to eat, long trainings, and beatings for any mistake they made during training, such as not singing songs correctly.[193]

86. Even without the deliberately harsh discipline, the conditions themselves were cruel and harsh, particularly for vulnerable children. One witness gave evidence about a hungry child who was crying and calling for his mother, to which the soldiers replied "that is good. They are going to grow up as true soldiers".[194] Witnesses P-0017, P-0016 and P-0046 also gave evidence of suffering in the UPC/FPLC because of lack of food.[195] Speaking of the children in the "kadogo unit", witness P-0017 testified that conditions for them were deplorable: there was no food or medicine, they could hardly ever wash, and they had lice.[196] Witness P-0038 spoke of soldiers of all ages, including under the age of 15 and commanders, abusing drugs.[197]

87. The Majority committed the same factual errors in disregarding the evidence of sexual violence, which was accepted by the Trial Chamber as credible evidence. As set out above in paragraph 80, P-0046 testified about the "systematic" sexual violence within the UPC.[198] She described it: "And the accounts of the boys and the girls made it clear that this was a systematic conduct. The girls had to

[191] Judgment, para.888.
[192] Judgment, para.655.
[193] Although the Trial Chamber did not specifically mention this evidence from witness P-0046, there is no doubt that they accepted her evidence to be reliable and credible. EVD-OTP-00489, p.49, line 23 to p.51, line 6 and T-207, p.19, line 13 to p.20, line21.
[194] Judgment, para.886.
[195] P-0016, T-190, p.70, lines 10-15; P-0017, T-158, p.22, lines 3-7; P-0046, T-207, p.19, line 13 to p.20, line 21.
[196] P-0017, T-158, p.23, lines 10-19.
[197] T-114-Red3-ENG, p.85, line 16 to p.87, line 5.
[198] Judgment, para.891, citing the evidence of P-0046: (ICC-01/04-01/06-T-270-Red2-ENG, p.31, lines 4-6).

systematically spend the night in a separate area, and they were forced to spend the night with the officers."[199] All but one or two of the young girls she met with—as young as 12 years old[200]—stated that they had been sexually abused by their commanders or other soldiers.[201]

88. Some of the girl child soldiers became pregnant and had voluntary or involuntary abortions; some girls even had multiple abortions.[202] Some who became pregnant were kicked out of the UPC and ended up on the streets of Bunia.[203] Others joined family members but it was particularly difficult to reintegrate them into their families because the girls were stigmatized, and significant mediation was necessary.[204] P-0046 described the psychological and physical state of these girls as "quite catastrophic".[205]

89. Military insiders in the UPC/FPLC who gave training at the Mandro camp[206] testified that they knew of sexual violence against the recruits at the camps.[207] The testimony of P-0016, as set out above, explained that trainers, guards and camp commanders took advantage of the situation and raped the recruits,[208] irrespective of their age.[209] He said that it was a common practice to use young girl recruits as "domestic staff", which included sexual abuse as a matter of course: the commander of the Mandro camp had four such girls, and other

[199] P-0046: ICC-01/04-01/06-T-270-Red2-ENG, p.31, lines 4-6.
[200] Judgment, para.891, citing the evidence of P-0046 at ICC-01/04-01/06-T-270-Red2-ENG, p.35, lines 17-23.
[201] Judgment, para.890, citing the evidence of P-0046 at ICC-01/04-01/06-T-270-Red2-ENG, p.30, line 14 to p.31, line 1.
[202] Judgment, para.890, citing the evidence of P-0046 at ICC-01/04-01/06-T-270-Red2-ENG, p.31, lines 2-4 and p.38, lines 11-14.
[203] Judgment, para.891.
[204] Judgment, para.891.
[205] Judgment, para.890, citing the evidence of P-0046 at ICC-01/04-01/06-T-270-Red2-ENG, p.31, lines 16-18.
[206] Judgment, para.684 (P-0016's tasks included giving instructions to those undergoing military training); para.688 (P-0038 was a trainer at Mandro training camp).
[207] Judgment, paras.892, 894 and 895.
[208] Judgment, para.892.
[209] Judgment, para.892.

instructors used girls.[210] P-0038 testified that "girls and children were more sought after as bodyguards. But the girls were used more to prepare food and for sexual services for the commanders. They used girls more for this reason, as if they were their women, their wives".[211] He noted that Commanders Abelanga and Ndjabu, and other brigade commanders, had girls as bodyguards; one of the girls kept by Abelanga was under 15.[212] Another girl became pregnant by commander Ndjabu.[213] One girl, commonly referred to as commander Abelanga's "wife", would be heard saying "I don't want to" and crying at night.[214]

90. Thomas Lubanga must have been aware that in the ordinary course of events, recruits of all ages would suffer sexual abuse and a cruel disciplinary regimen. He visited training camps where children under the age of 15 were being trained,[215] and he knew the senior members of the FPLC who trained and used child soldiers,[216] which surely resulted in an understanding of their violent methods and behaviours. During his visit to the Rwampara training camp, he promoted his direct and personal oversight: he stated to the persons present that he sees the commanders "every day", that even though it is difficult for him to personally be in touch with the recruits regularly, his chief of staff—commander Bosco Ntaganda—should come to the camps and if he does not he would consider him to be an enemy.[217] This demonstrates not only the authority he had over those directly in charge of the military training of the recruits[218] but also his claimed full oversight, and the regularity with which he was updated on training activities and camp conditions. Thomas Lubanga was informed of military operations,[219]

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[210] Judgment, para.892.
[211] Judgment para.894, citing P-0038 at ICC-01/04-01/06-T-114-Red3-ENG, p.23, lines 16-19.
[212] Judgment, para.895.
[213] Judgment, para.895.
[214] Judgment, para.895.
[215] Judgment, para.1266, 1269.
[216] Judgment, para.1262, 1277.
[217] Judgment, para.1269 and T-128-Red2-ENG, p.36, line 23 to p.41, line 17.
[218] Judgment, para.1269.
[219] Judgment, paras.1145, 1148, 1151.

and there were established reporting structures and lines of communication through which information flowed to him.[220]

91. Indeed, Thomas Lubanga himself revealed that he was aware of harsh disciplinary regimes. He told one witness: "that's how it happens in military life. The child failed to obey orders and so had to be disciplined".[221] Similarly, while visiting the Rwampara training camp to encourage recruits to continue their training, Thomas Lubanga told the recruits that "this work" can "involve suffering whilst you are being trained. However, it's all to train your endurance and to ensure that you have the capacity".[222]

92. UPC/FPLC insiders at various levels knew that female recruits were being sexually abused, including commanders based at the Mandro camp who had daily contact with recruits.[223] Senior commander P-0016 stated that the trainers and guards took advantage of the situation and raped the recruits, and that the perpetrators included the commander of the centre.[224] Another senior commander P-0055, who visited camps,[225] received complaints about sexual violence, sexual slavery and forced impregnation.[226] The fact that this information reached a high-ranking official corroborates the testimony of witnesses P-0016, P-0038 and P-0046. Though P-0055 also claimed at trial that the complaints were not frequent,[227] P-0038 and P-0016, who were present on a daily basis for a period of time at the Mandro camp, testified that such violence occurred routinely, which indicates that Thomas Lubanga must also have known of it.[228]

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[220] Judgment, paras. 1169, 1190.
[221] 01/04-01/06-T-199-RED2-ENG, p.37, lines 8-12.
[222] T-128-Red2-ENG, p.37, lines 5-25, p.38, lines 17 to 24.
[223] Judgment, paras.892, 894 and 895.
[224] Judgment, para.892.
[225] Judgment, para.893.
[226] Judgment, para.893.
[227] Judgment, para.893.
[228] Infra, para.89.

93. The Prosecution submits that, independent of the Majority's error on the required nexus between aggravating factors and the accused, any reasonable Trial Chamber would have concluded on the basis of this evidence, as set out above, that the documented instances of cruel treatment and sexual violence were attributable to Thomas Lubanga because he was aware that they would occur in the ordinary course of the crimes for which he was convicted. And given Thomas Lubanga's personal authority over the activities of his militia, the fact that his high-ranking officials were aware of the abuse requires the conclusion that Thomas Lubanga must also have known of it. On the basis of the existing findings as well as the evidence accepted by the Trial Chamber, the Appeals Chamber should amend the Decision and consider both consequences of the crimes as aggravating circumstances.

Conclusion

94. By sentencing Thomas Lubanga to 14 years imprisonment, a sentence that is manifestly inadequate in light of the gravity of the crimes and the relevant factors in this case, the Trial Chamber abused its discretion. The sentence does not convey the seriousness of his contribution to the crimes. Nor does it adequately capture the death and injury of child soldiers or the considerable psychological, physical, cognitive and social trauma that they and their families suffered as a result of the crimes against them. It equally fails to consider the abuse of his position of authority and trust, as it is required to do under rule 145(1)(c). The Trial Chamber erred in deciding not to take into account the cruel treatment and sexual violence that the victims had to endure and that were direct and foreseeable consequences of his crimes. The record of this case further establishes that Thomas Lubanga must have known that these consequences would occur in the ordinary course of events.

95. Thomas Lubanga's sentence must convey to other senior leaders of armed groups that their failure to meet responsibilities related to the recruitment and use of children under the age of 15 will be adequately punished.[229] A 14-year sentence does not act as a deterrent for future similarly situated persons.

[229] *Krnojelac*, Case No. IT-97-25-T, Trial Judgment, 15 March 2002, para.514.

Relief Sought

96. For the above referred reasons, and pursuant to article 83 of the Statute, the Prosecution requests the Appeals Chamber:

(i) in relation to the First Ground of Appeal, to find Thomas Lubanga Dyilo's sentence disproportionate to the crime and vary the sentence upwards; and

(ii) in relation to the Second and Third Grounds of Appeal, to find that the sentence is materially affected by the legal and factual errors argued herein, and to amend the sentence by increasing it (article 83 (2) (a)).

Fatou Bensouda
Prosecutor

Dated this 3rd day of December 2012
At The Hague, The Netherlands