



Original: **French**

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

Date: **4 February 2013**

THE APPEALS CHAMBER

Before:

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. Thomas Lubanga Dyilo***

Public Document with public Annex 1

**Defence Response to the “Prosecution’s Document in Support of Appeal against the
‘Decision on Sentence pursuant to Article 76 of the Statute’” of 3 December 2012**

Source: Defence team for Mr Thomas Lubanga Dyilo

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

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1. The Prosecution moved the Appeals Chamber to increase the severity of the sentence passed.
2. Before turning to each of the factual and legal arguments advanced by the Prosecution, it bears recalling that sentence determination falls within the sphere of the discretion vested in the trial Bench.¹ The Appeals Chamber revises a sentence only where the bench *a quo* has committed a “discernible error” in exercising such discretion.²
3. The observations hereunder demonstrate that the grounds argued by the Prosecution to support a more severe sentence are legally and factually untenable and that increased severity of the sentence imposed would prejudice fairness to the Accused and upset the equilibrium of the criminal justice regime, as conceived by the founders of the International Criminal Court. The Appeals Chamber will note that the Prosecution did not dispute the circumstances held to be mitigating by the Trial Chamber, but fails to heed them in its analysis of the sentence handed down. It should be recalled that the Chamber drew particular attention to the fact that Mr Lubanga was respectful and cooperative throughout the proceedings, “in circumstances when he was put under considerable unwarranted pressure by the conduct of the prosecution”.³

¹ ICTY, judgment on appeal, *Galić*, para. 393; judgment on appeal, *Jokić*, para. 8.

² ICTY, judgment on appeal, *Krstić*, para. 242; judgment on appeal, *Vasiljević*, para. 9; judgment on appeal, *Jelisić*, para. 99; judgment on appeal, *Furundžija*, para. 239; judgment on appeal, *Aleksovski*, para. 187; judgment on appeal, *Kupreškić*, para. 457.

³ ICC-01/04-01/06-2901, paras. 91 and 97.

FIRST PROSECUTION GROUND OF APPEAL: “THOMAS LUBANGA’S 14-YEAR SENTENCE IS MANIFESTLY INADEQUATE”

1 - GRAVITY OF THE CRIMES AND THE EXTENT OF THE DAMAGE CAUSED

4. The Prosecution complains that the Chamber failed to attach sufficient weight to the objective gravity of the crimes and certain factors itemised in rule 145(1)(c).
5. This complaint is unfounded.

1.1. “The harm to the victims and their families”

6. Firstly, contrary to the Prosecution’s assertion,⁴ when passing sentence on the Accused, the Chamber had express regard to the youth of the victims and all of the harm and trauma which may have affected them, including, as concerns participation in hostilities, the risk of death in combat.⁵ All harm identified by the Prosecution was considered and adjudged by the Chamber. Hence, there was no omission in the adjudication of harm that could constitute a “discernible error” on the part of the Trial Chamber.
7. The Trial Chamber drew particular attention to the protection which children must specifically be afforded on account of their vulnerability,⁶ emphasising that crimes affecting children are “undoubtedly very serious crimes”.⁷ The Chamber’s statement that “the age of the children does not both define the gravity of the crime and act as an aggravating factor”⁸ implicitly acknowledged that it had entertained that factor in appraising the intrinsic gravity of the crimes charged. The same holds true for the consideration of the harm and trauma suffered by the child soldiers.

⁴ ICC-01/04-01/06-2950, paras. 27 *et seq.*

⁵ ICC-01/04-01/06-2901, paras. 37-44. Paragraphs 39 to 42 of the Chamber’s sentencing decision cite the evidence of the expert called to testify on the issue of trauma, as submitted by the Prosecution in its observations on sentence in May 2012. There can be no doubt that the Chamber canvassed this evidence.

⁶ ICC-01/04-01/06-2901, paras. 37-38.

⁷ ICC-01/04-01/06-2901, para. 37.

⁸ ICC-01/04-01/06-2901, para. 78.

8. Secondly, contrary to the Prosecution's assertion⁹, the evidence brought at trial does not substantiate that the recruitment policy ascribed to the Accused specifically and intentionally favoured the recruitment and use of children under the age of 15 years.
9. Whereas:
 - *Critical analysis of the evidence cited by the Prosecution*
10. In its appellate brief against the *Judgment pursuant to Article 74 of the Statute*, the Defence showed that the testimonial evidence led by the Prosecution on the subject was devoid of sincerity or reliability.¹⁰
11. In particular, the Defence is of the view that the Chamber erred in finding that children under the age of 15 years took part in combat within the FPLC during the material time. In this regard, the Defence refers to the submissions set forth at paragraphs 274 to 288 of its brief pertaining to the Judgment. The Defence specifically contests the Trial Chamber's findings concerning the credibility of Witnesses P-0038 and P-0012,¹¹ its interpretation of P-0012 and P-0041's *viva voce* evidence on the participation of children under the age of 15 years in hostilities and its analysis of the role of the "*Kadogo Unit*".¹²
12. Further still, the Chamber's findings on which the Prosecution draws do not confirm that the FPLC "preferred" to recruit and use children.¹³ On the contrary, certain testimonial evidence introduced by the Prosecution and held to be credible by the Chamber showed that the vast majority of recruits were adults. By way of example, P-0041 stated that "the majority of the soldiers

⁹ ICC-01/04-01/06-2950, paras. 28-29.

¹⁰ P-0038, in particular (see ICC-01/04-01/06-2948-tENG, paras. 276-279).

¹¹ ICC-01/04-01/06-2948-tENG, paras. 276-284.

¹² ICC-01/04-01/06-2948-tENG, paras. 311-313.

¹³ In particular, the testimony of P-0014, who refers to events which occurred in August 2002, outwith the material period, and to the training of children to become informers by selling groundnuts at the market. Judgment para. 788. See also: Judgment, paras. 700, 789 and 887 for that timeframe.

serving in the UPC were over 22 years of age”.¹⁴ P-0055 stated that “they were mostly adults” at the Rwampara training camp.¹⁵

13. Similarly, the testimonial evidence cited by the Prosecution lends no support to the assertion 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 Prosecution adverts to the testimony of P-0012, who claimed to have seen child soldiers, some of whom, in his opinion, were under the age of 15 years, in the armed groups present in Bunia in 2003.¹⁶ At no point did P-0012 confirm that children under the age of 15 years were in the FPLC at the material time.¹⁷ When questioned on the subject, the witness referred to Chief Kahwa’s PUSIC.¹⁸ As to the children who, according to P-0012, were on the frontline during the battle of Bunia on 12 May 2003, nowhere does the testimony specify their age.¹⁹
- The imprecision and indirection of P-0041’s testimony on the matter preclude any finding as to the age and number of children under the age of 15 years purportedly dispatched to the frontline.²⁰ The witness estimated the age of his guards but did not specify the age of his guards who went to the front.²¹ Moreover, the witness was unable to furnish with any certainty the source of the information²² or details on

¹⁴ P-0041: Judgment, para. 849.

¹⁵ P-0055: T-175-CONF-FRA-CT, p. 75, lines 13-14; Judgment, para. 794.

¹⁶ Judgment, para. 826. See: T-168-CONF-FRA-CT, p. 78, line 7.

¹⁷ The witness’s statement of a general nature does not enable the age of the children whom he considered belonged to the FPLC to be ascertained.

¹⁸ T-168-CONF-FRA-CT, p. 78, lines 10 *et seq.*

¹⁹ Judgment, para. 826. See: T-168-CONF-FRA-CT, p. 75, lines 19 *et seq.*

²⁰ Judgment, para. 846. T-125-CONF-FRA-CT, p. 56, line 10 to p. 57, line 13.

²¹ T-125-CONF-FRA-CT, p. 56, lines 10 *et seq.*

²² T-125-CONF-FRA-CT, p. 56, lines 23 *et seq.*

the circumstances in which they headed off to do battle, such as, for instance, for which front they departed.²³

14. The Prosecution distorts furthermore the Trial Chamber's findings in contending that "[t]he UPC even had a full platoon of children under the age of 15, commonly referred to as the "*Kadogo Unit*" and intimating that that "unit" was deployed in frontline combat.²⁴ The Chamber had instead noted that approximately 45 individuals some of them under the age of 15,²⁵ were grouped together in a unit.²⁶ P-0017 stated that the Chief of Staff's aim in creating the "unit" was not their frontline deployment but their protection on account of their vulnerability.²⁷

- Absence of specific intention

15. Dismissing the unfounded hypothesis of a recruitment policy aimed specifically at children under the age of 15 years and having regard to the evidence tendered at trial, the Trial Chamber expressly underlined:

it [the Trial Chamber] did not conclude that Mr Lubanga meant to conscript and enlist boys and girls under the age of 15 into the UPC/FPLC and to use them to participate actively in hostilities. Instead, the Chamber decided Mr Lubanga was aware that, in the ordinary course of events, this would occur.²⁸

16. Thirdly, the Prosecution misrepresents the evidence tendered at trial by claiming that "Thomas Lubanga's army included children as young as five; child soldiers at his residence were 9 or 10 years old, and generally children in the UPC/FPLC were as young as 9."²⁹

²³ T-125-CONF-FRA-CT, p. 57, line 13.

²⁴ ICC-01/04-01/06-2950, para. 27 [emphasis added].

²⁵ Judgment, para. 877.

²⁶ Judgment, para. 871.

²⁷ Judgment, para. 871: P-0017 stated that the Chief of Staff transferred these individuals to headquarters in order to take care of them and protect them on account of their vulnerability. See also: T-158-CONF-FRA-CT, p. 21, lines 3-7, and p. 21, line 19 to p. 22, line 7.

²⁸ ICC-01/04-01/06-2901, para. 52.

²⁹ ICC-01/04-01/06-2950, para. 35.

17. As the Chamber makes clear,³⁰ P-0014 claimed to have estimated a child, seen prior to the material time at UPC Headquarters in Bunia, as being 5 years of age. The Prosecution makes no mention of any information to confirm the presence of five-year-old children in the UPC/FPLC during the material time.
18. Further still, the Prosecution misrepresents P-0030's testimony and the Chamber's findings as regards the guards present at Mr Lubanga's residence.³¹ P-0030 stated that in his estimation the guards ranged from 9 or 10 years to adult age.³² Witness D-0040 – identified by the Chamber in one of the videos as a child under the age of 15 years at Mr Lubanga's residence – appeared in Court during the sentencing hearing.³³ He confirmed that he was 19 years old at the time of the events.³⁴ He also confirmed that the youngest of the presidential guards were 17, 18 and 19 years of age.³⁵
19. The Prosecution allegation that "generally children in the UPC/FPLC were as young as 9"³⁶ is not grounded in the findings of the Chamber or the evidence admitted into the record. The material tendered by the Prosecution in support thereof does not establish that the children allegedly within FPLC ranks were generally 9 years of age:
 - When giving evidence, Witness P-0024 provided a general estimate of the age of individuals "[TRANSLATION] almost all [of whom were] armed" and whom he purportedly saw "[TRANSLATION] in the towns and villages".³⁷ This witness did not expound on this particularly nebulous claim or furnish any name, indication of the place where he

³⁰ Judgment, paras. 700 and 708. See: T-179-CONF-FRA-CT, p. 82, lines 11-13.

³¹ Judgment, para. 869: The Chamber found that "between September 2002 and 13 August 2003, Thomas Lubanga, as President and Commander-in-Chief of the UPC/FPLC, used a significant number of children under the age of 15 within his personal escort and as his bodyguards."

³² T-128-CONF-FRA-CT, p. 20, lines 15-16.

³³ Judgment, para. 858.

³⁴ T-360-CONF-FRA-ET, p. 22, line 19, p. 26, line 28 to p. 27, line 2; p. 27, lines 17-22.

³⁵ T-360-CONF-FRA-ET, p. 25, line 28 to p. 26, line 1.

³⁶ ICC-01/04-01/06-2950, para. 35 [emphasis added].

³⁷ T-170-CONF-FRA-CT, p. 53, lines 15-20.

supposedly saw those individuals, the information that led him to believe that they were FPLC soldiers or how he assessed their age. It was therefore impossible for the Defence to verify the witness's statements.

- P-0041's general assertion regarding the age of children in the armed forces, mentioned by the Chamber at paragraph 697 of the Judgment, contains no specific reference to the FPLC and cannot be cited by the Prosecution in support of its argument. The witness's reply set out hereunder confirms that it was of a general nature inasmuch as he adverted "[TRANSLATION] to children trained during the RCD/K-ML era".³⁸ He then added that he estimated his bodyguard trained in Mandro to have been 14 or 15 years of age.³⁹
- The testimony of P-0031 cited by the Prosecution in support of that argument was disregarded by the Chamber.⁴⁰
- Document EVD-OTP-00518 makes no mention of the presence of soldiers of "[TRANSLATION] 10 to 15 or 16 years of age", but states that a "DDRRR" programme had been established for child soldiers aged 10 to 15 or 16 years. The Defence challenges before the Court *ad quem* the Chamber's determination that the document refers to child soldiers in the UPC.⁴¹

³⁸ T-125-CONF-FRA-CT, p. 52, lines 1 *et seq.*

³⁹ T-125-CONF-FRA-CT, p. 52, line 11. The English version of this part of P-0041's testimony differs from the French. The Defence considers that the version in French, the language in which the witness spoke, must be entertained.

⁴⁰ Judgment, para. 477. The Chamber pointed out that it had treated this witness's testimony with particular caution, given his close cooperation with Intermediary P-0321. The Chamber did not entertain the content of P-0031's testimony, save for the statements concerning Witnesses P-0007, P-0008, P-0294 and P-0157, whom the Chamber ultimately disregarded.

⁴¹ The Defence refers to its brief ICC-01/04-01/06-2948-tENG, paras. 218-227.

20. In light of the foregoing, the Prosecution's claim that "many of the children were especially young, aged 5, 9 and 10"⁴² is unfounded.

1.2 "The nature of the unlawful behaviour / the degree of participation of Thomas Lubanga"

21. The Prosecution contends that the Chamber failed to attach sufficient weight to the Accused's contribution to the commission of the crimes and his intent to knowingly commit them.⁴³

22. These arguments are unfounded.

- The contribution of the Accused to the commission of the crimes

23. Firstly, contrary to the Prosecution's assertion,⁴⁴ the Trial Chamber in essence grounds the sentence in the functions and roles which it erroneously imputes to the Accused in the commission of the crimes charged. Having set forth "the key factors establishing Mr Lubanga's participation", it expressly stated that they provided "an important foundation for the sentence to be passed by the Chamber."⁴⁵

24. Secondly, the Bench will find that the Trial Chamber's findings as to these factors relating to the Accused's participation in the commission of the crimes are fraught with grave error of fact and manifest errors of misappreciation, errors canvassed by the Defence in its appellate brief against the *Judgment pursuant to Article 74 of the Statute*.⁴⁶

25. In particular, the Trial Chamber committed a grave factual error by determining that the Accused "was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives". Such finding, on which the sentence to a great extent rests, has no factual

⁴² ICC-01/04-01/06-2950, para. 35.

⁴³ ICC-01/04-01/06-2950, paras. 36-37.

⁴⁴ ICC-01/04-01/06-2950, para. 36.

⁴⁵ ICC-01/04-01-06-2901, paras. 52-53.

⁴⁶ ICC-01/04-01/06-2948-tENG, paras. 327 *et seq.*

foundation proven beyond reasonable doubt.⁴⁷ The evidence tendered at trial shows to the contrary that the Accused was uninvolved in recruitment policy.⁴⁸

26. Similarly, the Trial Chamber committed a grave factual error in determining that the Accused “personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC members of staff who were below the age of 15”.⁴⁹ Such finding, on which the sentence to a great extent rests,⁵⁰ has no factual foundation proven beyond reasonable doubt.⁵¹ Witness D-0040, whom the Chamber described as a bodyguard clearly under the age of 15 years, confirmed in court to have been aged 19 years at the time of the events⁵² and that the Accused’s youngest guards were between 17 and 19 years of age.⁵³
27. The factual errors thus identified, which concern a crucial aspect of the factors to be considered in sentence determination, will impel the Appeals Chamber, should it uphold the conviction, to considerably reduce the term of the sentence imposed.
28. Thirdly, the Prosecution misrepresents the Trial Chamber’s findings by claiming that it had determined that the Accused “personally encouraged families to contribute children to the militia; and he personally encouraged underage children to join the army and undergo military training”.⁵⁴ This

⁴⁷ ICC-01/04-01/06-2948-tENG, paras. 356-370.

⁴⁸ ICC-01/04-01/06-2948-tENG, paras. 356-370.

⁴⁹ Cited in ICC-01/04-01/06-2901, para. 52.

⁵⁰ ICC-01/04-01/06-2901, paras. 52-53.

⁵¹ ICC-01/04-01/06-2948-tENG, paras. 377-379 and 293-310.

⁵² T-360-CONF-FRA-ET, p. 22, line 19, p. 26, line 28 to p. 27, line 2; p. 27, lines 17-22. The Defence sought to file this evidence at the appellate stage: ICC-01/04-01/06-2942-tENG, paras. 7-15, 42-51; Annexes 1 and 2.

⁵³ T-360-CONF-FRA-ET, p. 25, line 28 to p. 26, line 1.

⁵⁴ ICC-01/04-01/06-2950, para. 36 [emphasis added].

assertion finds no support in the Trial Chamber's ruling or the evidence tendered at trial.⁵⁵

- The criminal intent ascribed to the Accused

29. Firstly, it must be recalled that the Trial Chamber's conviction of the Accused rests only on the mental element foreseen under article 30(2)(b), the most indirect species of criminal intent. The Chamber expressly held:

The Chamber did not conclude that Mr Lubanga meant to conscript and enlist boys and girls under the age of 15 into the UPC/FPLC and to use them to participate actively in hostilities. Instead, the Chamber decided Mr Lubanga was aware that, in the ordinary course of events, this would occur.⁵⁶

The Trial Chamber rightly underscored that in any event it was not established that the Accused deliberately encouraged and promoted the recruitment of children under the age of 15 years. Hence, the contention that the Accused determinedly and zealously pursued the recruitment of children under the age of 15 years is manifestly unfounded.

30. Secondly, the Prosecution raises the fact that the 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" and "Thomas Lubanga's zealous determination to persevere with the criminal behaviour against all constraints, a particularly serious factor."⁵⁷ These fresh arguments, pleaded for the first time before the Appeals Chamber, are, as such, inadmissible.⁵⁸

⁵⁵ In particular, this assertion is unsubstantiated by the paragraphs of the judgment cited by the Prosecution at footnote 68.

⁵⁶ ICC-01/04-01/06-2901, para. 52.

⁵⁷ ICC-01/04-01/06-2950, para. 37.

⁵⁸ The Prosecution did not raise this argument in its oral or written submissions on sentencing: ICC-01/04-01/06-2868, ICC-01/04-01/06-2881 and T-360-CONF-ENG-ET, pp. 32-36 or T-360-CONF-FRA-ET, pp. 34-38.

31. Thirdly, contrary to the Prosecution's suggestion, there is no evidence to indicate that the Accused himself deliberately impeded actions of representatives of the United Nations or non-governmental organisations to demobilise minors. The sole evidence tendered, whose reliability the Defence disputes, adverts to misdeeds attributed to civilian and military members of the UPC.⁵⁹ It was not argued that such misdeeds were perpetrated at the behest of the Accused or that they had been brought to his attention. Having regard to the principle that the sentence must reflect culpability,⁶⁰ which is appraised in respect of the principles of individual criminal responsibility, it would be manifestly unfair to hold the Accused responsible for such acts.
32. Fourthly, contrary to the view of the Trial Chamber, evidence was brought that, throughout his tenure, the Accused displayed a genuine and sincere intention to obstruct the enlistment of minors and to have them demobilised. In this regard, the Defence refers to the submissions set forth in its appellate brief against the *Judgment pursuant to Article 74 of the Statute*.⁶¹

1.3 "The means employed to execute the crimes"

33. The Prosecution takes issue with the Trial Chamber for failing to attach sufficient weight to the means employed to execute the crimes. In this respect, it invokes various practices which it views as establishing the crime of conscription.⁶²
34. This argument is flawed by errors of fact and law.
35. Firstly, contrary to the Prosecution's claim, the Trial Chamber wrongly attached decisive importance to the fact that, in its view, the enlistment of children under the age of 15 years into the FPLC was the result of pressure exerted on the civilian population through recruitment campaigns mounted

⁵⁹ Judgment, para. 1348.

⁶⁰ Rule 145(1)(a).

⁶¹ ICC-01/04-01/06-2948-tENG, paras. 396-419.

⁶² ICC-01/04-01/06-2950, paras. 38-39.

by prominent local persons and military leaders.⁶³ Accordingly, it held that the crime of conscription should incur a severer sentence than enlistment.⁶⁴

36. Secondly, the Prosecution, like the Trial Chamber, commits an error of law by maintaining that the “pressure” exerted through campaigns to persuade the civilian population to support the authorities and the armed forces constitutes compulsion, thereby establishing the crime of conscription.⁶⁵ On the contrary, it must be underlined that no example of forcible enlistment by dint of violence or threat was established.⁶⁶ Evidently, even supposing that they had been proven, awareness-raising campaigns aimed at recruiting youths cannot be considered as particularly cruel methods of committing the crime of conscription.
37. Thirdly, contrary to the Prosecution’s assertion, the aforesaid mobilisation campaigns were never directed at the recruitment of “young children”,⁶⁷ but, as the Trial Chamber put it, “young people”.⁶⁸
38. Fourthly, the assertion that “the UPC/FPLC [...] preyed on the same children and their families; many children who were able to leave the UPC/FPLC were re-recruited”⁶⁹ is ill-founded. It rests exclusively on P-0024’s testimony, which consists only of general and vague allegations and fails to specify in any way the age and number of individuals who were purportedly re-recruited by the UPC’s armed forces or the circumstances of this putative re-recruitment.⁷⁰ Furthermore, the testimony is contradicted by the apparent absence of any

⁶³ ICC-01/04-01/06-2901, para. 37. The Defence refers to the arguments raised on appeal: ICC-01/04-01/06-2948-tENG, paras. 228-251.

⁶⁴ ICC-01/04-01/06-2901, para. 98.

⁶⁵ Judgment, paras. 770-785 and 911-914. See the arguments raised by the Defence on appeal, ICC-01/04-01/06-2948-tENG, paras. 228-251.

⁶⁶ The Chamber instead found that pressure was exerted on the communities to send young people to the army (Judgment, paras. 771 and 785).

⁶⁷ ICC-01/04-01/06-2950, para. 38.

⁶⁸ Judgment, paras. 771 and 785.

⁶⁹ ICC-01/04-01/06-2950, para. 39; citing the Judgment, para. 765.

⁷⁰ Judgment, footnote 2116.

example of forcible enlistment raised at trial with any degree of reliability or persuasion.

1.4 “The circumstances of manner, time and location”

39. The Prosecution contends that the Chamber, in its appraisal of the widespread nature of the crime, failed to attach sufficient weight to the prolonged and widespread nature of the crimes charged.⁷¹
40. Firstly, contrary to the Prosecution’s assertion, the Trial Chamber wrongly held the Accused responsible for the alleged widespread commission of the crimes during the material time.⁷²
41. Secondly, as the Defence demonstrated in its appellate brief on sentencing, it is unestablished that the recruitment of children under the age of 15 years was widespread.⁷³ The Trial Chamber itself noted “[the absence of] conclusions [...] beyond reasonable doubt, as to the precise number, or proportion, of the recruits who were under 15 years.”⁷⁴ On the contrary, evidence was tendered, in particular by certain Prosecution witnesses, that the number of minors enlisted was very minimal.⁷⁵ By way of example, P-0041 stated that “the majority of the soldiers serving in the UPC were over 22 years of age”.⁷⁶ P-0055 stated that “they were mostly adults” at the Rwampara training camp.⁷⁷
42. Thirdly, the Prosecution wrongfully construes the evidence tendered at trial.

⁷¹ ICC-01/04-01/06-2950, paras. 41-44.

⁷² ICC-01/04-01/06-2901, paras. 45-50 and para. 97.

⁷³ ICC-01/04-01/06-2949-tENG, paras. 2-25.

⁷⁴ ICC-01/04-01/06-2901, para. 50.

⁷⁵ By way of example, certain Prosecution witnesses held to be credible by the Chamber stated that the vast majority of recruits were over the age of 15 years: P-0017: Judgment, paras. 783 and 817. P-0055: Judgment, para. 794 “‘very few’ kadosos”; P-0041: Judgment, para. 849; No systematic recruitment: P-0041: Judgment, paras. 780-781 and T-125-CONF-FRA-CT, p. 68, lines 20-22; P-0016: T-189-CONF-FRA-CT, p. 78, line 24 to p. 79, line 4.

⁷⁶ P-0041: Judgment, para. 849.

⁷⁷ P-0055: T-175-CONF-FRA-CT, p. 75, lines 13-14; Judgment, para. 794.

43. As regards the testimony of P-0046 cited by the Prosecution in respect of the proportion of children in the FPLC,⁷⁸ it must be recalled that P-0046 explained that the percentage (40%) reflected the estimated number of children under the age of 18 years in all of the armed groups active in Ituri. The Prosecution gives no statistic on the precise number of children under the age of 15 years in the FPLC. P-0046 further stated that the exact number of children in the armed groups was unknown and that the percentage was merely an approximation.⁷⁹
44. As to the 87 individuals whom P-0046 met and who, it is alleged, were recruited or used between mid-2002 and mid-2003, the Defence points out that the references cited by the Prosecution fail to support its submissions. P-0046 first declared that 71 children met in May 2004 had claimed to have been recruited or used between mid-2002 and mid-2003.⁸⁰ After verifying her personal notes at the Prosecution's request,⁸¹ the witness however clarified that 26 children under the age of 15 years had stated that they had participated in the hostilities⁸² and that she had no information on the number of children who were allegedly part of the UPC without participating in combat.⁸³ Furthermore, the Defence refers to the arguments set out in its appellate brief, which concern the prejudice to the Defence occasioned by the

⁷⁸ ICC-01/04-01/06-2950, para. 43. Certain references cited by the Prosecution at footnote 89 concern the document "*Histoires individuelles*", which the Trial Chamber expressly declined to admit. See for example EVD-OTP-00489, pp. 88 and 90. The Chamber's ruling: T-205-CONF-FRA-ET, p. 2, lines 15 *et seq.* (The document is referred to as Annex 8).

⁷⁹ EVD-OTP-00623, para. 141 and EVD-OTP-00479, p. 96, line 15 to p. 98, line 23.

⁸⁰ Judgment, para. 766.

⁸¹ T-206-CONF-FRA, p. 3, lines 19-21.

⁸² T-207-CONF-FRA, p. 13, lines 1 *et seq.*: "[TRANSLATION] A. I noticed at least 26 children taking part in combat during that period".

Q. In addition to that ... in addition to the 26 children who had taken part in combat, were there other children in the group of 167 who were part of the UPC, even if they hadn't taken part in combat?

A. Yes, indeed. There were children who told us that they had not taken part in combat and others who gave us no details about how they were associated with that armed group and I don't have the figures".

⁸³ T-207-CONF-FRA, p. 13, lines 3-8. See: ICC-01/04-01/06-2949-tENG, para. 21.

admission of those parts of P-0046's testimony which are akin to hearsay⁸⁴ and pertain to individuals whose identity was not disclosed to the Defence.

45. As to P-0017, the Chamber instead noted that fewer than 45 individuals, some of them under the age of 15,⁸⁵ were grouped together in a unit.⁸⁶ P-0017 stated that the Chief of Staff's aim in establishing the "unit" was not their frontline deployment but their protection on account of their vulnerability.⁸⁷ However, notwithstanding that the proportion of children under the age of 15 years in that unit is unestablished, P-0017 stated that the unit mustering 45 *kadogos* comprised the "[TRANSLATION] majority of the child soldiers".⁸⁸
46. As regards Witnesses P-0016 and P-0014, there is no doubt that the incidents they rehearsed predate the material time.⁸⁹ No specific exhibit admitted into the record establishes that the conduct at issue continued during the material time.
47. Moreover, the Prosecution draws erroneous conclusions from P-0031's testimony,⁹⁰ testimony which the Chamber disregarded on account of the witness's close cooperation with Intermediary P-0321.⁹¹ Further still, the

⁸⁴ ICC-01/04-01/06-2948-tENG, paras. 196-204.

⁸⁵ Judgment, para. 877.

⁸⁶ Judgment, para. 871.

⁸⁷ Judgment, para. 871: P-0017 stated that the Chief of Staff transferred these individuals to the headquarters in order to take care of them and protect them on account of their vulnerability. See also: T-158-CONF-FRA-CT, p. 21, lines 3 *et seq.*

⁸⁸ T-158-CONF-FRA-CT, p. 43, line 23.

⁸⁹ P-0014: The Chamber so observes at paras. 700, 789 and 887. P-0016: P-0016 stated that he was brought to Mandro 14 days after Lopondo left Bunia and that he stayed there for 10 days. He stated that the incident took place four days before he left, that is on 29 August 2002. T-188-CONF-FRA-CT, p. 91, line 13; T-189-CONF-FRA-CT, p. 13, line 2; T-190-CONF-FRA-CT, p. 66, lines 1-2. The date of Lopondo's departure was 9 August 2002: EVD-OTP-00386; The Prosecution does not dispute this date; Judgment, para. 1084.

⁹⁰ In any event, it is impossible to ascertain, on the basis of P-0031's testimony, the exact number of children under the age of 15 years who belonged to the FPLC during the material time: P-0031 instead estimated that "a hundred or so" children between 9 and 17 years of age were demobilised in his centre between 2002 and 2004. T-199-CONF-FRA-CT, p. 26, lines 5-13.

⁹¹ The Chamber pointed out that it had treated P-0031's testimony with particular caution, given his close cooperation with Intermediary P-0321. It is apparent from the judgment that the Chamber did not entertain the content of P-0031's testimony, save for his statements concerning specifically

factors enumerated by the Prosecution⁹² to establish the widespread nature of the recruitment and use of child soldiers – the training sites and the various duties performed by the recruits during deployment – were specifically relied on by the Chamber in its decision on sentence.⁹³

48. Further still, the breakdown propounded by the Prosecution, amounting to a minimum of 200 children, is ill-founded: it is self-evident that the figures put forward by each of the witnesses called, and which the Defence disputes, necessarily refer in part to the same recruits and therefore cannot be added up.

49. Finally, it is not immaterial to compare the statistical data to document DRC-OTP-0141-0010⁹⁴ provided by the Prosecution to the Defence on 29 October 2012 and referring to a contingent over 8,600 strong, that is, a considerably lower proportion than that unfoundedly alleged by the Prosecution.⁹⁵

2 – LACK OF PROPORTION WITH SENTENCES IMPOSED IN SIMILAR CASES

50. In support of his submissions, the Prosecution draws a comparison with cases which it considers similar⁹⁶ or indicative of the gravity of the crimes ascribed to Mr Lubanga.⁹⁷

51. Such arguments cannot succeed.

52. Firstly, the Prosecution errs in law by disregarding the rule that the bench is not bound by the jurisprudence of other ad hoc tribunals in matters of sentencing but must abide by the principle of individualised sentences.⁹⁸

Witnesses P-0007, P-0008, P-0294 and P-0157, whom the Chamber ultimately disregarded. See Judgment, para. 477.

⁹² ICC-01/04-01/06-2950, para. 44.

⁹³ ICC-01/04-01/06-2901, para. 49, citing the Judgment, paras. 857, 911 and 915.

⁹⁴ On 29 October 2012, the Prosecution disclosed the document entitled “*Liste Nommiative de F.P..L.C.* [sic]” to the Defence. The Defence refers to the submissions set forth in its appellate brief on the Judgment, ICC-01/04-01/06-2948-tENG, paras. 53-65.

⁹⁵ ICC-01/04-01/06-2950, para. 43.

⁹⁶ ICC-01/04-01/06-2950, para. 47.

⁹⁷ ICC-01/04-01/06-2950, para. 54.

53. For the purposes of sentence determination, the Statute invites the bench to afford case-by-case consideration to those circumstances occasioning the individual's commission of the crime *sub judice*, in particular (1) the gravity of the crime committed and (2) the individual situation of the accused.⁹⁹ The ad hoc tribunals have consistently acknowledged the importance of individualised sentences.¹⁰⁰ Their jurisprudence lays down that sentence determination perforce imports case-by-case analysis.
54. In this respect, the Appeals Chamber of the ad hoc tribunals has on a number of occasions opined that comparisons in such cases are of little value, even though it is reasonable to expect that two accused who committed similar crimes would be punished in accordance with the same tariff. Nonetheless, to do so would be warranted only in "substantially similar" circumstances.¹⁰¹ In any event, at the ICTY, the bench has underscored that such comparisons are "not [...] useful", since the Statute expressly foresees adjudication of each case in accordance with the gravity and scale of the acts committed.
55. Secondly, by casting Mr Lubanga's situation as one of "clear factual symmetry"¹⁰² with that of the two accused in the RUF case, the Prosecution committed in many respects a manifest factual error.
56. Turning first to the respective roles of the accused persons, the various modes of liability held against them undeniably preclude any comparison. Indeed, whereas Issa Hassan Sesay and Moris Kallon were convicted of personally

⁹⁸ See for example, ICTY, Judgment on appeal, *Jelisić*, para. 101. The Appeals Chamber affirmed that the jurisprudence of the ad hoc tribunals does not establish a sentencing regime which binds their appellate Bench. Hence, with more reason the ICC cannot be bound.

⁹⁹ Article 78(1): "In determining the sentence, the Court shall, in accordance with the RPE, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person."

¹⁰⁰ The sentence must always be set with regard to the facts of the case and the individual culpability of the perpetrator of the crimes. Judgment on appeal, *Krstić*, para. 241; Judgment on appeal, *Jelisić*, para. 101.

¹⁰¹ Judgment on appeal, *Jelisić*, para. 101.

¹⁰² ICC-01/04-01/06-2950, para. 47.

committing the crimes¹⁰³ – particularly Morris Kallon who in person had brought children to a training camp –¹⁰⁴ Mr Lubanga was convicted only on account of his participation in a common plan entailing commission of the crimes.¹⁰⁵ It is unestablished that Mr Lubanga himself engaged in the enlistment or conscription of children under the age of 15 years and used them to participate actively in hostilities. Furthermore, in the RUF case, Issa Hassan Sesay and Moris Kallon were convicted of planning to use children under the age of 15 years to participate actively in hostilities.¹⁰⁶ Yet, the Defence recalls that “[the Chamber] did not conclude that Mr Lubanga meant to conscript and [recruit] boys and girls under the age of 15 into the UPC/FPLC and to use them to participate actively in hostilities.”¹⁰⁷ Manifestly, therefore, supposing that the crimes were to be established, Mr Lubanga’s involvement in their commission and the criminal intent ascribed to him are substantially lesser than those of the RUF leaders convicted by the SCSL.¹⁰⁸ The Office of the Prosecutor can therefore draw no meaningful parallel in this regard.

57. As to the modalities of commission of the crimes, the Prosecution claims that a comparison is established, stating that in the RUF case the recruitment and use of child soldiers was “organized, widespread and institutionalized”¹⁰⁹ and routine between 1996 and 2000.¹¹⁰ However, as has previously been shown,¹¹¹ the Prosecution has failed to produce any evidence that the crimes of which Mr Lubanga stands convicted were widespread. Moreover, the material time in the case at bar runs to less than one quarter of the relevant timeframe in the

¹⁰³ SCSL, RUF Case, Sentencing Judgement, paras. 212 and 236.

¹⁰⁴ SCSL, RUF Case, Sentencing Judgement, para. 236.

¹⁰⁵ ICC-01/04-01/06-2901, para. 52.

¹⁰⁶ SCSL, RUF Case, Judgment, paras. 2230 and 2234.

¹⁰⁷ ICC-01/04-01/06-2901, para. 52.

¹⁰⁸ SCSL, RUF Case, Judgment, paras. 2230 and 2234.

¹⁰⁹ ICC-01/04-01/06-2950, para. 49.

¹¹⁰ ICC-01/04-01/06-2950, para. 47.

¹¹¹ See ICC-01/04-01/06-2949-tENG, paras. 7-25.

RUF case.¹¹² Hence, the Prosecution's "factual symmetry" argument does not succeed in this respect either.

58. Turning now to the purported child victims of the crimes ascribed to Mr Lubanga, the Prosecution contends that the age of such children and the treatment meted out to them are comparable to those of the RUF case.¹¹³ Firstly, as regards the age of the children allegedly incorporated into FPLC ranks, the Prosecution adverts to the testimony of P-0014, who recounted events occurring outwith the material time, and to that of P-0030. In light of the criteria for the assessment of the age of the children whom they saw and their overall credibility, reliance on such testimony is untenable.¹¹⁴ As to the ill-treatment inflicted on the children, Mr Lubanga's responsibility therefor has not been proven beyond reasonable doubt. On the contrary, the Chamber was right to explicitly exclude such mistreatment from those factors relevant to the determination of his sentence.¹¹⁵ Accordingly, no factual parallel as regards these matters can be sustained.
59. Accordingly, in light of the foregoing, whereas the SCSL Trial Chamber concluded that the criminal conduct of Messrs Sesay and Kallon reached the highest level of gravity,¹¹⁶ the factual disparities with Mr Lubanga's situation preclude any transplantation to the case at bar.
60. The preclusion of any such transplant ensues also from the divergent sentencing regimes applicable at the SCSL and the Court. Whereas the rule at the Court is that a term of imprisonment may not exceed 30 years,¹¹⁷ the

¹¹² The material period encompassed 1996 to 2000. See RUF Case, Sentencing Judgment, para. 212.

¹¹³ ICC-01/04-01/06-2950, para. 50.

¹¹⁴ The Defence refers to its earlier submissions on the matter: P-0014: ICC-01/04-01/06-2948-tENG-Conf, paras. 299 and 351; ICC-01/04-01/06-2773-Conf, paras. 562-578; P-0030: ICC-01/04-01/06-2948-tENG-Conf, para. 307; ICC-01/04-01/06-2773-Conf, paras. 533-536.

¹¹⁵ ICC-01/04-01/06-2901, para. 59.

¹¹⁶ SCSL, RUF Case, Sentencing Judgment, paras. 212 and 236.

¹¹⁷ Article 77(1)(a) of the Rome Statute; a term of life imprisonment is confined to crimes of an "extreme gravity", where justified by the individual circumstances of the convicted person (Article 77(1)(b)). See also rule 101.

Statute of the SCSL foresees no maximum and makes specific reference to the practice of the national courts of Sierra Leone.¹¹⁸ In each system, therefore, the bench determines the term of the sentence in accordance with two separate frames of reference, and in respect of different benchmarks.¹¹⁹

61. Hence, the comparison of factually different situations, brought before courts governed by different rules, is irrelevant.
62. Thirdly, by inviting the Appeals Chamber, in its appraisal of the gravity of the crimes, to admit to consideration English case-law, the Prosecution commits a further factual error by invoking a factual situation which differs wholly from the circumstances of the instant case. According to the newspaper articles mentioned by the Office of the Prosecutor, with no reference to the relevant court decisions, that accused was charged with child trafficking for prostitution, rape and sexual activity with minors, all involving witchcraft practices. Involvement of underage children in a court case *simpliciter* is insufficient to establish a meaningful nexus to the crimes ascribed to Mr Lubanga.
63. The entire submissions advanced by the Prosecution in support of this ground are legally and factually untenable.

SECOND PROSECUTION GROUND OF APPEAL: “THE CHAMBER FAILED TO CONSIDER THOMAS LUBANGA’S ABUSE OF AUTHORITY AND TRUST”

64. Firstly, contrary to the Prosecution’s assertion,¹²⁰ the Trial Chamber expressly considered “the position of authority held by Mr Lubanga within the UPC/FPLC”.¹²¹ On numerous occasions, the Trial Chamber made clear the

¹¹⁸ Article 19 of the SCSL Statute.

¹¹⁹ Neither the Statute (articles 76-78) nor the Rules (rule 145) make provision for the bench, when setting a sentence, to have regard to the jurisprudence of other courts, in contrast to the provisions governing for example the SCSL (article 19(1)).

¹²⁰ ICC-01/04-01/06-2950, para. 56.

¹²¹ ICC-01/04-01/06-2901, para. 97.

importance it attaches thereto.¹²² It is therefore incorrect to claim that the Chamber never took account of that factor in setting the sentence.

65. Secondly, although rule 145(2)(b) enumerates “abuse of power or official capacity” as an aggravating circumstance, the provision further provides that the Court shall take it into account “as appropriate”, underscoring the broad discretion vested in the bench in adjudicating particular situations. Thus the importance attached to the exercise of official capacity as an aggravating circumstance must be adjusted to the circumstances intrinsic to each case.
66. However in the case at hand, as the Defence maintained in its closing brief at trial, the Accused’s criminal responsibility was wrongly ascribed on the basis of his position of leadership in the UPC-RP.¹²³ It would therefore be unfair to rely on such circumstance as definitive of the Accused’s individual criminal responsibility and to further argue it as aggravating that same responsibility.
67. Thirdly, contrary to the Prosecution’s claim, a position of command or authority *simpliciter* is insufficient to establish *ipso facto* “abuse of power or official capacity”. Aside the position held, it lies with the Prosecution to demonstrate the Accused’s deliberate and criminal use thereof. However, the Trial Chamber itself only held against the Accused an indirect form of the criminal intent, which is manifestly inconsistent with existence of any such “abuse”.¹²⁴
68. Whereas admittedly the Chamber determined that the position held by Thomas Lubanga in the UPC/FPLC allowed him to make an essential contribution to the common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. It did not, however, conclude that Thomas Lubanga meant to conscript and recruit children under the age of 15 years into the FPLC and meant to use them to

¹²² ICC-01/04-01/06-2901, paras. 52, 53 and 97.

¹²³ ICC-01/04-01/06-2948-tENG, para. 346 *et seq.*

¹²⁴ ICC-01/04-01/06-2901, para. 52.

participate actively in hostilities. It merely decided that he was aware that, in the ordinary course of events, this would occur.¹²⁵ This finding contradicts the Prosecution's assertion that Mr Lubanga abused his authority.

69. The Prosecution's comparison with *Taylor* in this regard bears no relevance given the major factual differences with the present case, all the more so in that that Trial judgment, which is under appeal, lacks finality.
70. Fourthly, at no point was it established or did the Trial Chamber rule that Thomas Lubanga was culpable of any abuse of power or trust whatsoever.
71. Here, the Prosecution embarks on a misconstruction of the evidence tendered at trial:

- The Prosecution maintains that Thomas Lubanga abused trust and authority by influencing Hema elders or wise men from various villages to persuade the population to make young people, including children under the age of 15, available to the UPC for enlistment into the FPLC.¹²⁶ Yet, not one of the eight references to the Judgment cited by the Prosecution¹²⁷ substantiates any such attempt by Thomas Lubanga to exert influence over Hema elders or wise men to such ends. Moreover, the Chamber made clear that it did not conclude that Mr Lubanga meant to conscript and enlist children under the age of 15 years into the FPLC and to use them to participate actively in hostilities.¹²⁸ Such a position is necessarily at variance with the idea that Thomas Lubanga specifically persuaded the Hema elders or wise men to recruit children under the age of 15 years.
- The Prosecution contends that Thomas Lubanga abused his position of trust and authority by using it to impede the work of child protection

¹²⁵ ICC-01/04-01/06-2901, para. 52.

¹²⁶ ICC-01/04-01/06-2950, para. 63.

¹²⁷ ICC-01/04-01/06-2950, footnote 148.

¹²⁸ ICC-01/04-01/06-2901, para. 52.

workers and taking active steps to ensure that the recruitment and use of child soldiers continued.¹²⁹ Yet, the passages of the Judgment cited by the Prosecution¹³⁰ fail to substantiate in any way Thomas Lubanga's attempted obstruction of the NGOs' work. The Defence refers furthermore to the submissions set forth in its appellate brief against the Judgment, which state that, contrary to the Chamber's findings, it has been proven that Mr Lubanga displayed a genuine and sincere intention to impede the enlistment of minors and to have them demobilised during the material time.¹³¹

72. Moreover, as to the factors raised by the Prosecution at paragraphs 64 and 65 of its Brief, these have already been taken into account by the Chamber in passing the sentence.¹³² As the Trial Chamber so underlined¹³³ and as the Prosecution itself so acknowledges,¹³⁴ such factors cannot be double-counted for the purposes of sentencing.
73. Lastly, the Prosecution makes reference, for the first time before the Appeals Chamber,¹³⁵ to evidence, including video excerpts, to argue that the population of Ituri had placed authority and confidence in Thomas Lubanga.¹³⁶ Such submissions were never brought before the court *a quo* and were therefore not disposed of in the Judgment. Such fresh submissions,

¹²⁹ ICC-01/04-01/06-2950, para. 66.

¹³⁰ The Prosecution makes reference to the Judgment, paras. 1346 and 1348.

¹³¹ ICC-01/04-01/06-2948-tENG, paras. 396-411.

¹³² The Chamber specified at paragraphs 52 and 53 of the sentencing decision (ICC-01/04-01/06-2901) that the factors raised by the Prosecution at paragraphs 64 and 65 of its Brief (ICC-01/04-01/06-2950) had provided an important foundation for the sentence to be passed by the Chamber.

¹³³ ICC-01/04-01/06-2901, paras. 35 and 51.

¹³⁴ ICC-01/04-01/06-2950, para. 56.

¹³⁵ See the arguments raised by the Prosecution before the Trial Chamber: ICC-01/04-01/06-2881, para. 37.

¹³⁶ ICC-01/04-01/06-2950, para. 62.

pleaded for the first time before the Appeals Chamber, must therefore be found inadmissible.¹³⁷

THIRD PROSECUTION GROUND OF APPEAL: “THE MAJORITY APPLIED THE WRONG TEST TO ESTABLISH AGGRAVATING FACTORS, OR, IN THE ALTERNATIVE, REACHED UNREASONABLE FINDINGS OF FACT”

1 – THE CONSIDERATION AFFORDED TO THE HARM OCCASIONED BY THE CRIMES

74. The Prosecution complains that the Trial Chamber failed to consider the “harm” by declining to consider as aggravating circumstances the cruel treatment and sexual abuse, to which, it alleges, enlisted minors were subjected.¹³⁸
75. That complaint is unfounded.
76. It is manifest that the Prosecution’s submissions conflate, on the one hand, the physical or psychological damage/harm which is the direct and foreseeable offspring of the crimes charged with, on the other, the materialisation of separate crimes (cruel or inhuman treatment under articles 8(2)(a)(ii) and 8(2)(c)(i) and sexual violence under articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi)) which occasioned separate harm intrinsic to such offences.
77. Whereas consideration of foreseeable harm which is the direct offspring of the crime charged is not open to dispute, it is manifestly unfair at sentencing to hold the Accused responsible for the purported materialisation of separate, uncharged crimes committed by third parties. As the jurisprudence of the ad hoc tribunals underscores, the Prosecution may not raise, as aggravating circumstances, crimes not pleaded in the indictment. The Appeals Chamber of the ad hoc tribunals held in this regard that “for sentencing purposes, a Trial Chamber may only consider in aggravation circumstances pleaded in the

¹³⁷ The Prosecution did not raise this argument in its oral or written submissions on sentencing: ICC-01/04-01/06-2868, ICC-01/04-01/06-2881 and T-360-CONF-ENG-ET, pp. 32-36 or T-360-CONF-FRA-ET, pp. 34-38.

¹³⁸ ICC-01/04-01/06-2950, para. 67 *et seq.*

Indictment.”¹³⁹ As the ICTR Trial Chamber rightly stated: “Having failed to include these crimes in the Indictment, the Prosecutor should not be permitted to achieve a similar effect by having them considered as aggravating factors.”¹⁴⁰

78. Here, the Prosecution commits the same error of law as the Trial Chamber. In this respect, the Defence refers to the submission set forth in its 3 December 2012 brief, wherein it demonstrated a clear error of law on the part of the Trial Chamber in its holding that, in sentence determination there was a legal foundation for admitting into consideration the sexual violence and mistreatment meted out to recruits, notwithstanding the fact that the Accused was not afforded notice of such considerations during confirmation of the charges.¹⁴¹

2 – THE REQUIREMENT OF ATTRIBUTION

79. The Prosecution takes issue with the Trial Chamber’s holding that to be weighed at sentencing, the aggravating circumstances pleaded must be attributed to the Accused in accordance with the same criterion applicable to the establishment of his individual criminal responsibility for the crimes themselves.
80. That complaint is unfounded.
81. Firstly, the Chamber rightly recalled the principle enshrined in rule 145 that the sentence must “reflect the culpability”. It follows that a sentence cannot be founded on facts wherefor the Accused’s individual criminal responsibility has not been established in accordance with the law. Culpability must be established in accordance with the substrata laid down by articles 25 *et seq.* of the Statute, in particular the principle prescribed by article 30, which reads: “a

¹³⁹ See for example: *ICTR*: Judgment on Appeal, *Simba*, para. 82; Judgment on Appeal, *Kalimanzira*, para. 46. See also: *ICTY*: Judgment on Appeal, *Delalić*, para. 763.

¹⁴⁰ Judgement and Sentence, *Semanza*, para. 570.

¹⁴¹ ICC-01/04-01/06-2949-tENG, paras. 97-108.

person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge". Accordingly, the Trial Chamber rightly held that the attribution of aggravating circumstances to the Accused, and hence their consideration by the Bench, must be appraised in light of such principles.

82. Secondly, contrary to the Prosecution's assertion, as concerns aggravating factors, the Trial Chamber did not require "a higher *mens rea* requirement [...]" than for those that can be taken into account under gravity".¹⁴² In both cases, the bench has regard to the foregoing general criteria for attribution. At sentence determination, when appraising the inherent gravity of the crime *per se*, the bench has perforce ruled on the attribution of that crime to the accused in its verdict on his or her culpability. Since it is not required to rule anew on the attribution of the crime to the accused, the bench needs only to ensure that the elements inherent to the crime *per se* and relevant to the appraisal of its gravity are considered.
83. Thirdly, the Appeals Chamber will find that the criterion for attribution propounded by the Prosecution in respect of aggravating circumstances is in fact identical and perhaps more restrictive than that relied on by the Trial Chamber. The Prosecution considers that the aggravating factor must be a "direct and foreseeable consequence of the crime". The Trial Chamber took the view that aggravating circumstances, like the material elements of the crime, cannot be ascribed to the Accused unless they occurred "in the ordinary course of the implementation of the common plan for which Mr Lubanga is responsible".¹⁴³ Such language is an explicit reference to the concept of a consequence occurring "in the ordinary course of events" laid

¹⁴² ICC-01/04-01/06-2950, para. 70.

¹⁴³ ICC-01/04-01/06-2901, paras. 74 and 59.

down by article 30(2)(b). Yet, the Trial Chamber held, erroneously so,¹⁴⁴ that the criterion for attribution refers to the concepts of “possibility” and “probability”: in essence, foreseeability. The Prosecution therefore unfoundedly takes issue with the Trial Chamber’s application of a more restrictive attribution criterion than that which it advanced. On the contrary, as the Defence demonstrated in its appellate brief against the *Judgment pursuant to article 74*, by so applying the concept of *dolus eventualis*, the Trial Chamber adopted an excessively broad interpretation of article 30 of the Statute.¹⁴⁵

84. Fourthly, the assertion that the crimes of sexual violence and cruel treatment were “direct and foreseeable consequences” of the crime of enlistment of children under the age of 15 years or of the implementation of the common plan whereof the Accused was convicted is unfounded.
85. Moreover, articles 8(2)(b)(xxvi) and 8(2)(e)(vii) and the Elements of Crimes which amplify them contain no reference to the commission of sexual abuse and establish no nexus between child-soldier status and the commission of sexual violence. In law, the two species of offence are wholly independent and have no constituent element in common. No international criminal court adjudging the crime of enlistment of children under the age of 15 years has ever held that the fact of being used for sexual ends may characterise child-soldier status. Such acts of violence, even where committed against young recruits by soldiers within an armed group, are manifestly unconnected to hostilities, are in no way akin to military duties unlawfully imposed on young soldiers and fall outwith the sphere of activities necessary for the armed force or group to operate. Such acts of violence are to be considered separately from the crime of enlistment.

¹⁴⁴ See Defence brief ICC-01/04-01/06-2948-tENG, paras. 380 *et seq.*

¹⁴⁵ The Defence submission finds further support and is expounded on in Judge Christine Van den Wyngaert’s concurring opinion on the Judgment in *Ngudjolo*. ICC-01/04-02/12-4, paras. 36 *et seq.*

86. By the same token, inhuman or cruel treatment, as for any act of brutality exceeding rigorous and strict military discipline, cannot be considered as the “direct and foreseeable consequences” of a military recruitment policy. They are separate offences, wherefor liability rests with their perpetrators and accomplices alone.
87. Furthermore, in the context of the case at bar there is nothing to support the contention that the common plan attributed to the Accused to establish an armed force necessarily entailed the “direct and foreseeable consequence” of the commission of sexual violence and inhuman or cruel treatment.
88. The Trial Chamber rightly determined “that the evidence does not support a conclusion beyond reasonable doubt that the punishment of children below 15 years of age occurred in the ordinary course of the crimes for which Mr Lubanga has been convicted”¹⁴⁶ and that “[o]n the basis of the totality of the evidence introduced during the trial on this issue, the Majority is unable to conclude that sexual violence against the children who were recruited was sufficiently widespread that it could be characterised as occurring in the ordinary course of the implementation of the common plan for which Mr Lubanga is responsible.”¹⁴⁷
89. Finally, as the Trial Chamber also stated: “Furthermore, nothing suggests that Mr Lubanga ordered or encouraged these punishments, that he was aware of them or that they can otherwise be attributed to him in a way that reflects his culpability”, further holding that “the link between Mr Lubanga and sexual violence, in the context of the charges, has not been established beyond reasonable doubt.”

¹⁴⁶ ICC-01/04-01/06-2901, para. 59.

¹⁴⁷ ICC-01/04-01/06-2901, para. 74.

90. Accordingly, by due application of the law and fairness the Trial Chamber held that none of the aggravating circumstances raised by the Prosecution could be ascribed to the Accused.

3 – “FACTUAL ERRORS IN RELATION TO CRUEL TREATMENT AND SEXUAL VIOLENCE”

91. The Prosecution contends that the Majority erred in reaching unreasonable factual findings that cruel treatment and sexual violence to which child soldiers under the age of 15 years were subjected could not be attributable to Thomas Lubanga.¹⁴⁸
92. So put, that contention suggests that it was effectively established at trial that children under the age of 15 years were subjected to cruel treatment and sexual violence. However, the Majority specifically concluded that the evidence does not support a conclusion beyond reasonable doubt that the punishment of children below 15 years of age occurred in the ordinary course of the crimes for which Mr Lubanga has been convicted.¹⁴⁹ It further found:

On the basis of the totality of the evidence introduced during the trial on this issue, the Majority is unable to conclude that sexual violence against the children who were recruited was sufficiently widespread that it could be characterised as occurring in the ordinary course of the implementation of the common plan for which Mr Lubanga is responsible.¹⁵⁰

93. Hence, contrary to the Prosecution’s claim, and as the Chamber made clear, it was not established that FPLC soldiers aged younger than 15 years were subjected to cruel treatment and sexual violence, let alone that such acts could be ascribed to Thomas Lubanga.
94. The Prosecution’s allegations that children under the age of 15 years in the FPLC were subjected to cruel treatment or sexual violence during the material time are fraught with much factual error, as will be shown hereunder.

¹⁴⁸ ICC-01/04-01/06-2950, para. 82.

¹⁴⁹ ICC-01/04-01/06-2901, para. 59.

¹⁵⁰ ICC-01/04-01/06-2901, para. 74.

- *Cruel treatment*

95. Firstly, at no time did the Chamber consider the punishment inflicted on the recruits as cruel, contrary to the Prosecution's intimation.¹⁵¹
96. Furthermore, the Chamber's findings on the punishment meted out in the camps do not pertain to individuals under the age of 15 years, but generally to all recruits, irrespective of age. The Chamber in fact found 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."¹⁵²
97. The passage from P-0017's testimony to which the Prosecution makes reference, alludes¹⁵³ in general terms to "young soldiers".¹⁵⁴ No question was put by the Prosecution to Witness P-0017 as to the age of the soldiers in his testimony.
98. Secondly, P-0016¹⁵⁵ and P-0014's¹⁵⁶ excerpts, to which the Prosecution adverts and which pertain to the punishment of recruits, concern events outwith the material time, that is before 1 September 2002.¹⁵⁷

¹⁵¹ ICC-01/04-01/06-2950, paras. 82-83.

¹⁵² Judgment, para. 889. See also ICC-01/04-01/06-2901, para. 59.

¹⁵³ ICC-01/04-01/06-2950, para. 85.

¹⁵⁴ Judgment, para. 888.

¹⁵⁵ ICC-01/04-01/06-2950, paras. 83-84.

¹⁵⁶ ICC-01/04-01/06-2950, para. 86.

¹⁵⁷ Judgment, para. 889. There is no doubt that the events adverted to occurred outwith the material time.

P-0016 stated that he was brought to Mandro 14 days after Loondo left Bunia and that he stayed there for 10 days. He stated that the incident took place four days before he left, that is on 29 August 2002. T-188-CONF-FRA CT, p. 91, line 13; T-189-CONF-FRA-CT, p. 13, line 2; T-190-CONF-FRA-CT, p. 66, lines 1-2. The date of Loondo's departure was 9 August 2002: EVD-OTP-00386; The Prosecution does not dispute this date: Judgment, para. 1084.

P-0014: The Chamber so notes at paras. 887 and 788. T-181-CONF-FRA-CT, p. 13, lines 18-20.

The Defence disputes the accuracy of P-0016 and P-0014's testimony in this regard.

99. It emerges furthermore from P-0016's testimony that that practice was unauthorised. P-0016 in fact stated that the Mandro camp commander prepared a report on the incident and saw to it that the individual who had sustained an arm wound received treatment.¹⁵⁸ The individual who allegedly inflicted such punishment was sanctioned by the Chief of Staff with responsibility for operations, who had him transferred to a different post following the incident.¹⁵⁹
100. The excerpt of P-0046's testimony to which the Prosecution makes reference¹⁶⁰ concerns events which were reported to the witness by children under the age of 18 years – their age and identity and the timeframe of the events were unspecified. It amounts to uncorroborated hearsay, which the Defence was unable to verify since no information on the individuals who made such statements was disclosed to it.¹⁶¹
101. Thirdly, the Prosecution draws on P-0017's testimony to claim that the children in the "*kadogo* unit" lived in deplorable conditions, without food or medicine.¹⁶² However, contrary to the Prosecution's assertion, P-0017 stated that the Chief of Staff had created that "unit" specifically to protect the young people. P-0017 testified as follows: "[TRANSLATION] And the Chief of Staff went on to create the *kadogo* unit. It was referred to as the unit for *kadogos* under his protection. That way, they would eat well at Headquarters." ¹⁶³ P-0017 added: "[TRANSLATION] The Chief of Staff — I don't know — out of goodwill or something, took them back to his place. There, they could be looked after. They would wash themselves in groups. They were able to eat; that alone was good for them, but then they were also able to get some sleep.

¹⁵⁸ T-189-CONF-FRA-CT, p. 47, line 19 to p. 48, line 9.

¹⁵⁹ T-189-CONF-FRA-CT, p. 47, line 19 to p. 48, line 9. T-190-CONF-FRA-CT, p. 75, lines 3-13.

¹⁶⁰ ICC-01/04-01/06-2950, para. 85.

¹⁶¹ Ground of appeal raised by the Defence ICC-01/04-01/06-2948-tENG, paras. 203-204 and 285-287.

¹⁶² ICC-01/04-01/06-2950, para. 86.

¹⁶³ T-158-CONF-FRA-CT, p. 21, lines 3-4.

So, I think that it was simply intended to protect them because they were really vulnerable".¹⁶⁴

102. Fourthly, the Prosecution refers to P-0038's testimony on drug use among the soldiers.¹⁶⁵ The Prosecution however neglects to mention that P-0038 stated that drug use was prohibited in the FPLC: "[TRANSLATION] In the FNI, it was permitted by the authorities. But, for us, I would say that it was not permitted by the authorities. But there were some soldiers who took drugs."¹⁶⁶ P-0016 also confirmed the prohibition on smoking drugs in the FPLC.¹⁶⁷

- *Sexual violence*

103. The Prosecution wrongly maintains that P-0046 testified that sexual violence was systematic within the UPC.¹⁶⁸ That part of P-0046's testimony adverted to by the Prosecution concerned armed groups in general and not the UPC specifically. Furthermore P-0046 gave no precise example of the age, identity, timeframe, perpetrator or circumstances of commission of the acts.¹⁶⁹
104. As the Chamber points out, even were the testimony put forward by the Prosecution to be relied on – to which the Defence would object – such evidence does not establish that the sexual violence meted out to the child recruits was sufficiently widespread to be characterised as occurring in the ordinary course of the implementation of the common plan wherefor Mr Lubanga was found responsible.¹⁷⁰ What is more, the evidence led by the Prosecution itself instead shows that sexual abuse was strictly prohibited in the FPLC.¹⁷¹

¹⁶⁴ T-158-CONF-FRA-CT, p. 22, lines 3-7.

¹⁶⁵ ICC-01/04-01/06-2950, para. 86.

¹⁶⁶ T-114-CONF-FRA-CT, p. 77, lines 13-20 and p. 78, lines 11-25.

¹⁶⁷ T-191-CONF-FRA-CT, p. 10, lines 14-25.

¹⁶⁸ ICC-01/04-01/06-2950, paras. 87-88.

¹⁶⁹ T-207-CONF-FRA-ET, p. 29, line 12 to p. 39, line 23.

¹⁷⁰ ICC-01/04-01/06-2901, para. 74.

¹⁷¹ Judgment, para. 892, citing P-0016's testimony.

- *Thomas Lubanga's awareness of such treatment*

105. The Prosecution submits that 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.¹⁷²
106. Yet, not only does the factual material relied on by the Prosecution fail to substantiate such a contention,¹⁷³ but it was also not placed before the Court *a quo* and as such is inadmissible on appeal.
107. Accordingly, the facts hereunder raised by the Prosecution to support that claim do not establish that Mr Lubanga was aware that children under the age of 15 years were subjected to cruel treatment:
- Although the Chamber found that Thomas Lubanga personally visited the FPLC training camps in Mandro, EPO, the headquarters and Rwampara, and that during his visit to Rwampara he saw children under the age of 15 years,¹⁷⁴ it has not been established, and the Chamber did not so determine in its Judgment,¹⁷⁵ that the individuals trained there were subjected to cruel treatment. As to the camps in Mandro, EPO and headquarters, not only was no evidence of cruel treatment led at trial, but also the Chamber stated that it had not been established that Thomas Lubanga saw children under the age of 15 years there.¹⁷⁶
 - Further still, none of the evidence mentioned establishes that Mr Lubanga witnessed any mistreatment whatsoever or that he was informed of any act of that nature. The evidence adduced by the Prosecution shows instead that at the time of Mr Lubanga's detention

¹⁷² ICC-01/04-01/06-2950, para. 90.

¹⁷³ ICC-01/04-01/06-2950, paras. 90-95.

¹⁷⁴ Judgment, para. 1236.

¹⁷⁵ Judgment, paras. 883-889.

¹⁷⁶ Judgment, para. 1236.

in Kinshasa in August 2002,¹⁷⁷ Mr Bosco Ntaganda sanctioned a Commander for punishing a recruit in Mandro camp.¹⁷⁸ P-0016 stated that the camp commander prepared a report on the incident and saw to it that the individual who had sustained an arm wound received treatment.¹⁷⁹

- P-0031's testimony cited by the Prosecution at paragraph 91 in support of that submission was not relied on by the Chamber.¹⁸⁰

108. Further still, none of the evidence mentioned by the Prosecution established that Mr Lubanga was apprised that children under the age of 15 years were subjected to sexual violence, specifically:

- There can be no doubt that the events adverted to by Witness P-0016 took place before September 2002, at the time of Mr Lubanga's detention in Kinshasa, that is to say outwith the material period.¹⁸¹
- Although P-0055 testified that he had received complaints of sexual violence, it is unestablished that that witness passed the information on to Mr Lubanga. The Prosecution, with whom the burden of proof lies, did not question P-0055 on the subject.

¹⁷⁷ Outwith the material time: P-0016 stated that he was brought to Mandro 14 days after Lopondo left Bunia and that he stayed there for 10 days. He stated that the incident took place four days before he left, that is on 29 August 2002. T-188-CONF-FRA-CT, p. 91, line 13; T-189-CONF-FRA-CT, p.13, line 2; T-190-CONF-FRA-CT, p. 66, lines 1-2. The date of Lopondo's departure was 9 August 2002: EVD-OTP-00386; The Prosecution does not dispute this date, Judgment, para. 1084.

¹⁷⁸ T-189-CONF-FRA-CT, p. 47, line 19 to p. 48, line 9. T-190-CONF-FRA-CT, p. 75, lines 3-13.

¹⁷⁹ T-189-CONF-FRA-CT, p. 47, line 19 to p. 48, line 9.

¹⁸⁰ Judgment, para. 477. The Chamber pointed out that it had treated this witness's testimony with particular caution, given his close cooperation with Intermediary P-0321. The Chamber did not entertain the content of P-0031's testimony, save for the statements concerning Witnesses P-0007, P-0008, P-0294 and P-0157, whom the Chamber ultimately disregarded.

¹⁸¹ P-0016 stated that he was brought to Mandro 14 days after Lopondo left Bunia and that he stayed there for 10 days. He stated that the incident took place four days before he left, that is on 29 August 2002. T-188-CONF-FRA-CT, p. 91, line 13; T-189-CONF-FRA-CT, p. 13, line 2; T-190-CONF-FRA-CT, p. 66, lines 1-2. The date of Lopondo's departure was 9 August 2002: EVD-OTP-00386; The Prosecution does not dispute this date, Judgment, para. 1084.

- Finally, in no way does the passage from P-0038's testimony¹⁸² cited by the Prosecution establish that acts of sexual violence took place in Mandro camp.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

DISMISS the Prosecution's appeal.

[signed]

Ms Catherine Mabilie, Lead Counsel

Done this 4 February 2013, at The Hague

¹⁸² ICC-01/04-01/06-2950, para. 92.