Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-01/06**
Date: **10 July 2012**

TRIAL CHAMBER I

Before: **Judge Adrian Fulford, Presiding Judge**
Judge Elizabeth Odio Benito
Judge René Blattmann

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

Public

Decision on Sentence pursuant to Article 76 of the Statute

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

The Office of the Prosecutor
Ms Fatou Bensouda

Counsel for the Defence
Ms Catherine Mabille
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims
Mr Luc Walleyn
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Paul Kabongo Tshibangu

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massida

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), the case of *The Prosecutor v. Thomas Lubanga Dyilo*, delivers the following Decision on Sentence pursuant to Article 76 of the Statute.

I. Procedural History

1. The Chamber delivered the Judgment pursuant to Article 74 of the Statute on 14 March 2012 ("Judgment").[1] It found Thomas Lubanga Dyilo guilty, as a co-perpetrator, of the charges of conscripting and enlisting children under the age of fifteen years into the UPC/FPLC and using them to participate actively in hostilities in the Ituri region of the Democratic Republic of the Congo ("DRC") within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute ("Statute") from early September 2002 to 13 August 2003.

2. Thereafter, pursuant to an order from the Chamber,[2] the defence identified the parts of the Judgment it suggested required translation in order to prepare its submissions on sentencing.[3] The French translation of those parts was made available to the parties and participants on 27 April 2012.[4]

3. The written submissions by the Office of the Prosecutor ("prosecution")[5] and the legal representatives of victims[6] on the procedure to be adopted for sentencing

[1] Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842.
[2] Scheduling order concerning timetable for sentencing and reparations, 14 March 2012, ICC-01/04-01/06-2844.
[3] Observations de la Défense conformément à l' « *Ordonnance portant calendrier concernant la fixation de la peine et des réparations* » du 14 mars 2012, 28 March 2012, ICC-01/04-01/06-2849.
[4] Email communication from the Registry to the Trial Chamber and parties and participants on 27 April 2012 at 17.05, with a link to French Draft of Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842.
[5] Prosecution's Submissions on the Procedures and Principles for Sentencing, 18 April 2012, ICC-01/04-01/06-2868.
[6] Observations sur la fixation de la peine et les réparations de la part des victimes a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09 et a/1622/10, 18 April 2012, ICC-01/04-01/06-2864; Observations du groupe de victimes V02 concernant la fixation de la peine et des réparations, 18 April 2012, ICC-01/04-01/06-2869.

and the principles to be applied by the Chamber when considering the appropriate sentence to be imposed were filed on 18 April 2012.

4. On 24 April 2012, the Chamber issued an order setting the date for the public hearing on sentence as 13 June 2012.[7]

5. On 14 May 2012, the prosecution and the legal representatives of victims filed submissions on the relevant evidence presented during the trial and their views as to the sentence to be passed on Mr Lubanga.[8]

6. On 25 May 2012, the defence filed an urgent request for leave to extend by eleven days the deadline for filing its written submissions on sentence and a request to introduce additional evidence relevant to sentence.[9] The prosecution filed its response to the defence request on 28 May 2012,[10] and on the same day, the Chamber extended the deadline for the defence submissions by seven days.[11]

7. On 30 May 2012, the Chamber granted the defence request[12] for an extension of the page limit for its submissions to 41 pages.[13]

8. On 3 June 2012, the defence filed its submission on sentence[14] along with a request to introduce additional evidence during the sentencing hearing.[15]

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[7] Order fixing the date for the sentencing hearing, 24 April 2012, ICC-01/04-01/06-2871.
[8] Prosecution's Sentence Request, 14 May 2012, ICC-01/04-01/06-2881; Observations sur la peine pour le groupe de victimes V01, 14 May 2012, ICC-01/04-01/06-2880; and Observations du groupe de victimes V02 sur des éléments de preuve établissant des circonstances aggravantes ou des circonstances atténuantes des faits portés à la charge de l'accusé reconnu coupable, 14 May 2012, ICC-01/04-01/06-2882.
[9] Requête urgente de la Défense aux fins de prorogation de délais, 25 May 2012, ICC-01/04-01/06-2884.
[10] Prosecution's Response to « Requête urgente de la Défense aux fins de prorogation de délais », ICC-01/04-01/06-2887.
[11] Order on the defence request for an extension of time, 28 May 2012, ICC-01/04-01/06-2888.
[12] Requête urgente de la Défense aux fins d'augmentation du nombre de pages autorisé pour le dépôt de ses observations sur la peine, ICC-01/04-01/06-2889.
[13] Email communication from a Legal Officer of the Trial Chamber to the parties and participants on 30 May 2012 at 15.02.
[14] Observations de la Défense sur la peine, 3 June 2012 (notified on 4 June 2012), ICC-01/04-01/06-2891-Conf-Exp, public redacted version filed the same day, ICC-01/04-01/06-2891-Red.
[15] Requête de la Défense sollicitant l'autorisation de présenter des éléments de preuve supplémentaires lors de l'audience sur la peine prévue le 13 juin 2012, 3 June 2012 (notified on 4 June 2012), ICC-01/04-01/06-2892 and four confidential annexes.

9. On 7 June 2012, the legal representatives filed their submissions on the defence request to introduce additional evidence.[16] The prosecution filed its submissions on this issue on 8 June 2012.[17]

10. The Chamber issued an Order on the defence request to provide the Chamber with additional evidence during the sentencing hearing on 11 June 2012,[18] granting leave to the defence to: (i) call two additional witnesses (D01-0039 and D01-0040) via a video-link with the DRC; (ii) rely on two documents when questioning witness D01-0040;[19] and (iii) introduce an additional document relevant to the time spent by Mr Lubanga in detention in the DRC.[20]

11. The sentencing hearing was held on 13 June 2012, during which the Chamber heard the evidence of witnesses D01-0039 and D01-0040. Thereafter the Prosecutor, the legal representatives of victims and the defence made their oral submissions. Following these submissions, Mr Lubanga made a statement to the Chamber.[21] The evidence of the two additional witnesses and all the oral submissions are considered below, where relevant.

II. The jurisprudence of other courts in relation to sentencing regarding child soldiers

12. Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the *ad hoc* tribunals are in a comparable position to the Court in the context of sentencing. However, the

[16] Réponse des représentants légaux du groupe de victims VOl à la requête de la défense ICC-01/04-01/06-2892 du 4 juin 2012, 7 June 2012, ICC-01/04-01/06-2893.
[17] Prosecution's Response to « Requête de la Défense sollicitant l'autorisation de présenter des éléments de preuve supplémentaires lors de l'audience sur la peine prévue le 13 juin 2012 », 8 June 2012, ICC-01/04-01/06-2894.
[18] Order on the defence request to present evidence during the sentencing hearing, 11 June 2012, ICC-01/04-01/06-2895.
[19] ICC-01/04-01/06-2895, para. 22.
[20] DRC-D01-0001-0136.
[21] ICC-01/04-01/06-T-360-Red2-ENG. Transcripts are referred to hereinafter as "T-".

only convictions by an international criminal tribunal for the recruitment or use of child soldiers are from the Special Court for Sierra Leone ("SCSL"). There have been seven[22] convictions at the SCSL in four cases for the crime of using child soldiers under the age of 15.[23] In two of those cases,[24] the Trial Chamber did not address each count separately in its sentencing decision, and accordingly it is impossible to determine the effect the conviction for the use of child soldiers had on the overall sentences. The two cases in which separate sentences were handed down for the crime of using child soldiers are briefly discussed below.

13. The Trial Chamber in the RUF case, when addressing the issue of gravity, determined that the offences it was considering relating to the use of child soldiers were committed on a large scale and with a significant degree of brutality.[25] It was established that many children had been abducted from their families and they were subjected to cruel and harsh military training. Those who were unable to withstand the training regime were often summarily shot and killed.[26] Children as young as 10 were armed and used to ambush others, as well as acting as bodyguards for the commanders. The Chamber found that "very young children were used to engage in the perpetration of gruesome crimes directed against innocent civilians", including amputating the limbs of civilians and beheading corpses.[27] Many children were shot and killed in training and

[22] The conviction of Mr Kondewa was later overturned on appeal. *Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-A,* Appeals Chamber, Judgment, 28 May 2008.
[23] SCSL, *Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-T,* Trial Chamber, Judgment, 2 August 2007 ("CDF case"); *Prosecutor v. Taylor, Case No. SCSL-03-01-T,* Trial Chamber, Judgment, 18 May 2012 ("Taylor case"); *Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL-04-15-T,* Trial Chamber, Judgment, 25 February 2009 ("RUF case"); *Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-04-16-T,* Trial Chamber, Judgment, 20 June 2007 ("AFRC case").
[24] The AFRC and Taylor cases.
[25] SCSL, *The Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL-04-15-T,* Trial Chamber, Sentencing Judgment ("RUF Sentencing Judgment"), 8 April 2009, para. 180.
[26] RUF Sentencing Judgment, paras 180 – 185.
[27] RUF Sentencing Judgment, para. 181.

combat.[28] The Chamber found that RUF fighters regularly drugged children,[29] and it concluded that the inherent gravity of the criminal acts in question was "exceptionally high".[30] The Chamber imposed a 50 year sentence on Issa Sesay for using children actively in hostilities[31] and sentenced Morris Kallon to 35 years for his involvement in the use of child soldiers.[32]

14. It 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). The RUF Trial Chamber noted that "it is universally recognised and accepted that a person who has been convicted of many crimes should generally receive a higher sentence than a person convicted of only one of those crimes".[33]

15. In the CDF case, Mr Kondewa was convicted of a number of offenses, including conscripting child soldiers in order to participate actively in hostilities and he was sentenced to seven years in prison for this crime, although this conviction was later overturned on appeal. As a mitigating factor, the Chamber took into account Mr Kondewa's contribution to establishing peace in Sierra Leone.[34]

III. Analysis

A. The principles and the legal framework

16. In considering the purposes of punishment at the ICC, the Chamber has taken into account the Preamble of the Statute, which provides that "the most serious crimes of concern to the international community as a whole must not go

[28] RUF Sentencing Judgment, para. 184.
[29] RUF Sentencing Judgment, para. 181.
[30] RUF Sentencing Judgment, para. 187.
[31] RUF Sentencing Judgment, page 94.
[32] RUF Sentencing Judgment, page 96.
[33] RUF Sentencing Judgment, para. 18.
[34] SCSL, *Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-A*, Trial Chamber, Sentencing Judgment, 9 October 2007, para. 94 ("CDF Sentencing Judgment").

unpunished".[35] The Preamble further provides that the States Parties are "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".[36] The ICC was established "to these ends and for the sake of present and future generations".[37]

17. Pursuant to Article 21(1) of the Statute, when passing sentence the Chamber shall apply Articles 23, 76, 77 and 78 and 81(2)(a) of the Statute and Rules 143, 145 and 146 of the Rules of Procedure and Evidence ("Rules").

18. Article 23 of the Statute reflects the *nulla poena sine lege* principle, namely the convicted person can only be punished in accordance with the Statute.

19. Article 76(1) of the Statute establishes that the Chamber, when considering the appropriate sentence, "shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence".

20. The Chamber is required to hold a sentencing hearing under Article 76(2) of the Statute if this step is requested by the prosecution or the defence and the Chamber can also order a hearing of its own motion. Following a defence request during the preparation stage of the trial, the Chamber indicated that it would hold a separate sentencing hearing in the event of a conviction. Additionally, for reasons of efficiency and economy, it ordered that evidence relating to sentence could be admitted during the trial.[38]

21. Pursuant to Article 77(1) of the Statute and Rule 145(3) of the Rules, the Chamber may impose a sentence of imprisonment that does not exceed 30 years, unless

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[35] Preamble, para. 4.
[36] Preamble, para. 5.
[37] Preamble, para. 9.
[38] T-99-ENG, page 39, line 11 to page 40, line 4; Decision on various issues related to witnesses' testimony during trial, 29 January 2008, ICC-01/04-01/06-1140, para. 32; Decision on judicial questioning, 18 March 2010, ICC-01/04-01/06-2360, para. 38.

"the extreme gravity of the crime and the individual circumstances of the convicted person" warrant a term of life imprisonment.

22. In addition, the Chamber may order a fine or the forfeiture of proceeds, property and assets derived directly or indirectly from the crime, or both, pursuant to Article 77(2) of the Statute.

23. Article 78 of the Statute and Rule 145 of the Rules govern the Chamber's determination of the sentence, providing that the Chamber must take into account such factors as the gravity of the crime and the individual circumstances of the convicted person, as well as any mitigating and aggravating circumstances.

24. Article 78(2) of the Statute provides that with a sentence of imprisonment, the Court must deduct the time, if any, spent in detention in accordance with an order of the Court. Additionally, it "may deduct any time otherwise spent in detention in connection with conduct underlying the crime".

25. Rules 145(1)(a) and (b) of the Rules require that the sentence must reflect the culpability of the convicted person and the Chamber needs to balance all the relevant factors, including any mitigating and aggravating factors and taking into account the circumstances of the convicted person and the crime. Additional factors and circumstances that are to be considered are listed in Rules 145(1)(c) and (2) of the Rules.

26. Finally, pursuant to Article 81(2)(a) of the Statute, the Chamber must ensure that the sentence is in proportion to the crime.

B. Preliminary considerations

1) Facts and circumstances described in the charges

27. The prosecution submits that the considerations the Chamber is required to take into account when passing sentence, as set out in Rule 145 of the Rules, include facts and circumstances beyond those described in the charges,[39] whilst the defence suggests these are limited by the Decision on the Confirmation of Charges ("Confirmation Decision").[40] The defence argues that it would be unfair if the Chamber is influenced in passing sentence by matters it was not able to investigate during the trial.[41]

28. Pursuant to Article 67(1)(a) of the Statute, the accused has the right to be informed promptly and in detail of the nature, cause and content of the charges against him and, under Regulation 52 of the Regulations of the Court ("Regulations"), the legal characterisation of the facts in the Document containing the charges needs "to accord both with the crimes [...] and precise form of participation under articles 25 and 28".[42] Pursuant to Article 74(2) of the Statute, the judgment "shall not exceed the facts and circumstances, described in the charges and any amendments to the charges" and the basis of the conviction

[39] ICC-01/04-01/06-2868, para. 25.
[40] ICC-01/04-01/06-2891-Red, paras 43 – 46 and 60 – 61.
[41] ICC-01/04-01/06-2891-Red, para. 61.
[42] See also Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, ICC-01/04-01/06-2205. The Appeals Chamber has defined what are "the facts" in this context: "In the view of the Appeals Chamber, the term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61 (5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged. The Appeals Chamber emphasises that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67 (1) (a) of the Statute." ICC-01/04-01/06-2205, footnote 163.

should not exceed the factual circumstances identified in the Confirmation Decision supporting each of the legal elements of the crimes charged.[43]

29. The legal framework applicable to the sentencing stage of the proceedings, applying Article 21(1) of the Statute, is set out in Articles 23, 76, 77, 78 and 81(2)(a) of the Statute and Rules 143, 145 and 146 of the Rules, and it is to be noted that none of these provisions limit the factors that are properly to be considered during sentencing to those described in the Confirmation Decision. Instead, Article 76(1) of the Statute establishes that when considering the "appropriate" sentence, the Trial Chamber "shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence". Pursuant to Article 76(2) of the Statute, the Chamber "may on its own motion, and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence [...]". In the judgment of the Chamber, the evidence admitted at this stage can exceed the facts and circumstances set out in the Confirmation Decision, provided the defence has had a reasonable opportunity to address them.

30. As set out above, during the preparation stage of the trial, the Chamber indicated that it would hold a separate sentencing hearing in the event of a conviction and, for reasons of efficiency and economy, it ordered that evidence relating to sentence could be admitted during the trial.[44] The defence has had a sufficient opportunity to challenge the evidence and the allegations relevant to the sentence as advanced during the trial. In addition, the Chamber has provided the defence an opportunity to respond to all the submissions and evidence that have been

[43] See ICC-01/04-01/06-2842, paras 2 to 8.
[44] T-99-ENG, page 39, line 11 to page 40, line 4; Decision on various issues related to witnesses' testimony during trial, 29 January 2008, ICC-01/04-01/06-1140, para. 32; Decision on judicial questioning, 18 March 2010, ICC-01/04-01/06-2360, para. 38.

relied on for the purposes of sentence following Mr Lubanga's conviction.[45] The Chamber requested written submissions on: (i) the procedure to be adopted for sentencing and the principles to be applied by the Chamber;[46] and (ii) the relevant evidence presented during trial, the aggravating and mitigating factors, and the sentence to be imposed on Mr Lubanga.[47] This has ensured that he has had adequate notice of the matters that may be taken into consideration by the Chamber at this stage of the proceedings.

31. Moreover, the defence has been provided with adequate time and facilities, including the opportunity to identify and introduce evidence relevant to sentence.

2) Standard of proof

32. The prosecution argues that the Chamber should not follow the jurisprudence of the *ad hoc* tribunals when they decided that the relevant aggravating factors need to be established by the prosecution beyond reasonable doubt and they must be directly related to the offences that resulted in a conviction.[48] The prosecution submits that it is open to the Chamber to make findings as to the aggravating and mitigating factors on the basis of a "balance of probabilities".[49] The defence argues that the aggravating factors must be proved beyond a reasonable doubt.[50]

33. It is for the Chamber to establish the standard of proof for the purposes of sentencing, given the Statute and the Rules do not provide any guidance. Since any aggravating factors established by the Chamber may have a significant effect

[45] See William Schabas in Otto Triffterer (ed), Commentary on the Rome Statute of the International Criminal Court, Observers' Notes (2008), page 1414.
[46] See ICC-01/04-01/06-2868, ICC-01/04-01/06-2864 and ICC-01/04-01/06-2869.
[47] ICC-01/04-01/06-2881, ICC-01/04-01/06-2880 and ICC-01/04-01/06-2882.
[48] ICC-01/04-01/06-2868, para. 25.
[49] ICC-01/04-01/06-2868, para. 25.
[50] ICC-01/04-01/06-2891-Red, para. 50.

on the overall length of the sentence Mr Lubanga will serve, it is necessary that they are established to the criminal standard of proof, namely "beyond a reasonable doubt".

34. As to the mitigating circumstances, the defence submits that it is not limited to the facts relied on during the confirmation stage of the proceedings, and the standard of proof to be applied should be that of a balance of probabilities.[51] The Chamber accepts that the mitigating factors are not limited to the facts and circumstances described in the Confirmation Decision, particularly given Rule 145(2)(a)(ii) of the Rules refers to "the convicted person's conduct after the act" in this context. As to the standard of proof, the Chamber is of the view that the *in dubio pro reo* principle applies at the sentencing stage of the proceedings, and any mitigating circumstances are to be established on a balance of probabilities.

3) Double counting

35. Any factors that are to be taken into account when assessing the gravity of the crime will not additionally be taken into account as aggravating circumstances, and vice versa.[52]

C. The relevant factors

1) Gravity of the crime

36. The "gravity of the crime", as set out in Article 78(1) of the Statute and in Rule 145 of the Rules, is one of the principal factors to be considered in the

[51] ICC-01/04-01/06-2891-Red, para. 86.
[52] International Tribunal for the former Yugoslavia ("ICTY"), *Prosecutor v. Nikolić, Case No. IT-02-60/1-A,* Appeals Chamber, Judgment on Sentencing Appeal, 8 March 2006, para. 58.

determination of the sentence,[53] which should be in proportion to the crime (Article 81(2)(a) of the Statute), and it should reflect the culpability of the convicted person (Rule 145(1)(a) of the Rules).

37. The crimes of conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities are undoubtedly very serious crimes that affect the international community as a whole. Additionally, as set out in the Judgment, the crime of conscription is distinguished by the added element of compulsion.[54] The crime of using children to participate actively in hostilities involves exposing them to real danger as potential targets.[55] The vulnerability of children mean that they need to be afforded particular protection that does not apply to the general population,[56] as recognised in various international treaties.[57]

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[53] See Mark Jennings in Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes (2008), page 1436 and ICTY, *Prosecutor v. Nikolić*, *Case No. IT-94-2-S*, Trial Chamber, Sentencing Judgment, 18 December 2003, para. 144.
[54] ICC-01/04-01/06-2842, para 608.
[55] ICC-01/04-01/06-2842, para 628.
[56] ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987), page 1377 at marginal note 4544; see also page 1379 at marginal note 4555.
[57] The drafters of Additional Protocol II made "provision for the consequences of any possible violation" by including a provision (Article 4(3)(d)) requiring special protection for children under 15 if they take a direct part in hostilities and are captured: ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987), page 1380. Article 77(2) of Additional Protocol I provides: "The parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces."; ICC-01/04-01/06-803-tEN, paras 242 – 243; see also Michael Cottier in Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes (2008), page 467 at marginal note 227; Knut Dörmann, Elements of War crimes under the Rome Statute of the International Criminal Court, Sources and Commentary (2003), pages 376 and 470. Notably, Article 4(3)(c) of Additional Protocol II to the 1949 Geneva Conventions includes an absolute prohibition against the recruitment and use of children under the age of 15 in hostilities (in the context of an armed conflict not of an international character) as follows: "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities." The Convention on the Rights of the Child, an almost universally ratified human rights treaty, requires the State Parties to "take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities", and to "refrain from recruiting any person who has not attained the age of fifteen years into their armed forces" in all types of armed conflicts ("armed conflicts which are relevant to the child"), Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989; entered into force on 2 September 1990: Article 38, paras 2 and 3. See also Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, U.N.DOC.A/54/RES/263 (2000), Articles 1 to 3, and African Charter On the Rights and Welfare of

38. As the Chamber described in the Judgment, the principal historical objective underlying the prohibition against the use of child soldiers is to protect children under the age of 15 from the risks that are associated with armed conflict, and particularly they are directed at securing their physical and psychological well-being. This includes not only protection from violence and fatal or non-fatal injuries during fighting, but also the potentially serious trauma that can accompany recruitment, including separating children from their families, interrupting or disrupting their schooling and exposing them to an environment of violence and fear.[58]

39. In her written submissions, the expert witness Ms Schauer set out that:

> [a]mong a number of at risk populations, children of war and child soldiers are a particularly vulnerable group and often suffer from devastating long-term consequences of experienced or witnessed acts of violence. Child war survivors have to cope with repeated traumatic life events, exposure to combat, shelling and other life threatening events, acts of abuse such as torture or rape, violent death of a parent or friend, witnessing loved ones being tortured or injured, separation from family, being abducted or held in detention, insufficient adult care, lack of safe drinking water and food, inadequate shelter, explosive devices and dangerous building ruins in proximity, marching or being transported in crowded vehicles over long distances and spending months in transit camps. These experiences can hamper children's healthy development and their ability to function fully even once the violence has ceased. [references omitted][59]

40. Children used in hostilities face the inevitable risk of being wounded or killed and, on the basis of studies carried out with former child soldiers in various countries including Uganda and the DRC between 2004 and 2008, Ms Schauer set out in her report and during her evidence before the Chamber that a significant

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the Child, OAU Doc. CAB/LEG/24.9/49 (1990), adopted on 11 July 1990 and entered into force on 29 November 1999, Article 22(2): [Armed Conflicts] "State Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child."

[58] Expert Report of Ms Schauer (CHM-00001), The Psychological Impact of Child Soldiering, ICC-01/04-01/06-1729-Anx1 (EVD-CHM-00001); Gregoria Palomino Suárez, Kindersoldaten im Völkerstrafrecht (2009), page 124; see also Graca Machel, Impact of Armed Conflict on Children, 26 August 1996, UN Doc A/51/306, para. 30; Francois Bugnion, "Les Enfants Soldats, le Droit International Humanitaire et la Charte Africaine des Droits et du Bien-Être de L'Enfant", 12 African Journal of International & Comparative Law (2000), page 263.

[59] EVD-CHM-00001, page 3.

number of the children who were interviewed had developed the debilitating mental health condition known as post-traumatic stress disorder. This followed their exposure to traumatic events whilst serving as child soldiers.[60] Ms Schauer described the core symptoms[61] and she indicated that post-traumatic stress tends to persist, possibly for the remainder of the individual's life.[62] She suggested that "the response to war-related trauma by ex-combatants and child soldiers in countries directly affected by war and violence is complex and frequently leads to severe forms of multiple psychological disorders."[63]

41. A significant percentage of the former child soldiers who were the subject of the study had abused drugs or alcohol; they suffered from depression and dissociation; and some demonstrated suicidal behaviour.[64] According to the report, "[r]esearch shows that former child soldiers have difficulties in controlling aggressive impulses and have little skills to handle life without violence. These children show ongoing aggressiveness within their families and communities even after relocation to their home villages."[65] Studies indicate that abduction and the consequent trauma have a negative impact on their education and cognitive abilities.[66] It was stated in the report that "psychological exposure and suffering from trauma can cripple individuals and families even into the next generations".

42. Ms Schauer also pointed out that children who have been child soldiers for a significant period of time usually do not demonstrate "civilian life skills" as they have difficulties socialising, they missed schooling, and as a result they are at a

[60] See T-166-ENG and EVD-CHM-00001, pages 10 – 12.
[61] EVD-CHM-00001, pages 13 – 14.
[62] EVD-CHM-00001, page 15.
[63] EVD-CHM-00001, page 17.
[64] EVD-CHM-00001, pages 18 – 21.
[65] EVD-CHM-00001, page 21.
[66] EVD-CHM-00001, pages 23 – 24.

disadvantage, particularly as regards employment.[67] This loss of the productivity of a large number of young people is described as a challenge in a poor country.[68]

43. The United Nations Special Representative of the Secretary General on Children and Armed Conflict, Ms Radhika Coomaraswamy gave evidence that many of the children she had spoken with voluntarily joined armed groups because of their circumstances.[69] She met numerous children who had entered armed groups in order to feed themselves, due to their extreme poverty or because they were maltreated by members of their families.[70] Therefore, children frequently joined armed groups "as a matter of pure survival."[71] As set out in the Judgment, the consent of a child to recruitment does not constitute a valid defence to any of the crimes of which Mr Lubanga has been convicted.[72]

44. Against this general background the Chamber has considered the gravity of these crimes in the circumstances of this case, with regard, *inter alia*, to the extent of the damage caused, and in particular "the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person."[73]

2) Large-scale and widespread nature of the crimes committed.

45. In the context of "circumstances of manner, time and location of the crimes" the prosecution submits that the extent and widespread nature of the crimes should

[67] T-166-ENG, page 32, line 25 to page 33, line 7.
[68] T-166-ENG, page 33, lines 8 – 14.
[69] T-223-ENG, page 12, lines 13 – 14.
[70] T-223-ENG, page 12, lines 14 – 17.
[71] T-223-ENG, page 12, line 24.
[72] ICC-01/04-01/06-2842, para. 617.
[73] Rule 145(1)(c).

be taken into account by the Chamber in setting the sentence.[74] Witnesses P-0014 and P-0016 described the significant percentage of recruits under 15 years old who were at the headquarters at Bunia prior to the period covered by the charges, and at Mandro.[75]

46. The V01 Group of victims relies on the 25 April 2012 report from the Trust Fund for Victims, which set out that approximately 2,900 children under the age of 15 were enlisted by the UPC/FPLC. It is submitted that this constitutes considerable damage in the context of this case.[76]

47. The defence suggests that these contentions by the prosecution and the legal representatives are not based in either the evidence at trial or the Judgment.[77] Rather, it is argued that the Chamber only referred to "the widespread recruitment of young people, including children under the age of 15"; it made no specific findings as to the proportion of child soldiers amongst the recruits; and it did not reach the conclusion that child soldiers were used in large number to participate actively in hostilities.[78]

48. The defence sought to rely on evidence from Witness D01-0040, who was described in the Judgment as a child who was "evidently under the age of 15".[79] He suggested during the sentencing hearing that he was born in 1983.[80] Although the defence did not call this individual (as it was entitled) as a witness during the trial, it nonetheless suggests his testimony, at this stage of the proceedings, supports the argument that an assessment of age that is reached on the basis of an individual's appearance alone is frequently at risk of a significant margin of

[74] ICC-01/04-01/06-2881, paras 10 – 11.
[75] ICC-01/04-01/06-2881, para. 11.
[76] ICC-01/04-01/06-2880, paras 8 – 9.
[77] ICC-01/04-01/06-2891-Red, paras 7 – 19; T-360-Red2-ENG, page 49, line 13 to page 52, line 19.
[78] ICC-01/04-01/06-2891-Red, paras 9 – 13.
[79] ICC-01/04-01/06-2842, para. 1254.
[80] T-360-Red2-ENG, page 21, lines 14 – 15.

error.[81] On this basis, the defence argues that there is significant uncertainty as to the number of young people conscripted and enlisted into the UPC/FPLC and used to participate in hostilities.[82] In support of this contention, the defence relies on the accounts of several witnesses at trial who stated that certain individuals who went to the demobilisation centres lied about their age or their status in order to receive benefits.[83]

49. The Chamber concluded in the Judgment that the evidence established beyond a reasonable doubt that during the period of the charges, recruitment by the UPC/FPLC of young people, including children under 15, was widespread, that a significant number of children were used as military guards and as escorts or bodyguards for the main staff commanders, and that children under 15 years of age were used by the UPC/FPLC in hostilities.[84]

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

3) Degree of participation and intent of the convicted person

51. The prosecution has advanced submissions on the extent of the participation of Mr Lubanga and nature of his intent.[85] The prosecution also argues that his position as President and commander-in-chief of the UPC constitutes an

[81] ICC-01/04-01/06-2891-Red, paras 20 – 24 and T-360-Red2-ENG, page 50, line 8 to page 51, line 18.
[82] T-360-Red2-ENG, page 51, lines 8 – 18.
[83] ICC-01/04-01/06-2891-Red, paras 25 – 32 and T-360-Red2-ENG, page 51, line 19 to page 52, line 9.
[84] ICC-01/04-01/06-2842, paras 857, 911 and 915.
[85] ICC-01/04-01/06-2881, para. 28.

aggravating circumstance.[86] As set out above, the Chamber stresses that these factors should not be "double-counted" for the purposes of sentence.

52. The Chamber determined that Mr Luganga agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. The Chamber did not conclude that Mr Lubanga meant to conscript and enlist boys and girls under the age of 15 into the UPC/FPLC and to use them to participate actively in hostilities. Instead, the Chamber decided Mr Lubanga was aware that, in the ordinary course of events, this would occur.[87] It was in this context that Mr Lubanga was convicted as a co-perpetrator who made an essential contribution to the common plan.[88] The Chamber has summarised the key factors establishing Mr Lubanga's participation, as follows:

> Thomas Lubanga was the President of the UPC/FPLC, and the evidence demonstrates that he was simultaneously the Commander-in-Chief of the army and its political leader. He exercised an overall coordinating role over the activities of the UPC/FPLC. He was informed, on a substantive and continuous basis, of the operations of the FPLC. He was involved in planning military operations, and he played a critical role in providing logistical support, including as regards weapons, ammunition, food, uniforms, military rations and other general supplies for the FPLC troops. He was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives, for instance by giving speeches to the local population and the recruits. In his speech at the Rwampara camp, he encouraged children, including those under the age of 15 years, to join the army and to provide security for the populace once deployed in the field following their military training. Furthermore, he personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC members of staff who were below the age of 15. The Chamber has concluded that these contributions by Thomas Lubanga, taken together, were essential to a common plan that resulted in the conscription and enlistment of girls and boys below the age of 15 into the UPC/FPLC and their use to actively participate in hostilities.[89]

[86] ICC-01/04-01/06-2881, para. 37.
[87] ICC-01/04-01/06-2842 paras 1271 – 1279 and 1351.
[88] ICC-01/04-01/06-2842, paras 1356 and 1357.
[89] ICC-01/04-01/06-2842 para. 1356.

53. These conclusions have provided an important foundation for the sentence to be passed by the Chamber.

4) Individual circumstances of the convicted person

54. The Statute does not identify the factors that are to be taken into account as the "individual circumstances of the convicted person" pursuant to Article 78(1) of the Statute. However, Rule 145(b) of the Rules reiterates this requirement that the circumstances of the convicted person are to be considered, which are stated as including, *inter alia*, "the age, education, social and economic condition of the convicted person" (Rule 145(c) of the Rules).

55. The prosecution submits that the individual circumstances of Mr Lubanga increase the gravity of the crimes. It is suggested that given he was 41 when he committed these crimes and is well-educated – he has a degree in psychology – he would have understood "the gravity of depriving children of the care of their families and their education".[90] It is submitted that these factors, coupled with Mr Lubanga's position of authority within the UPC/FPLC, "exacerbate his criminality".[91] These submissions are adopted by the V02 group of victims.[92]

56. Mr Lubanga is clearly an intelligent and well-educated individual, who would have understood the seriousness of the crimes of which he has been found guilty. This marked level of awareness on his part is a relevant factor in determining the appropriate sentence.

[90] ICC-01/04-01/06-2881, para. 29.
[91] ICC-01/04-01/06-2881, para. 29.
[92] T-360-Red2-ENG, page 41, lines 15 – 19.

5) Aggravating Circumstances

a) Punishment

57. The prosecution argues that the harsh conditions in the camps and the brutal treatment of the children are aggravating factors.[93] The Chamber is reminded of its findings as to the conditions endured by the children at the UPC/FPLC training camps, including particularly the use whips and canes, and the detention of particular individuals in a covered trench.[94]

58. The defence submits Mr Lubanga has not been charged with the crime of cruel treatment,[95] and it is suggested it would be inappropriate to treat as aggravating circumstances evidence that was not expressly relied on in the Confirmation Decision.[96] Additionally, the defence suggests it has not been established that Mr Lubanga was responsible for these events.[97]

59. Although the Chamber found that a number of recruits were subjected to a range of punishments during training with the UPC/FPLC,[98] the Majority has 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.[99] Furthermore, nothing suggests that Mr Lubanga ordered or encouraged these punishments, that he was

[93] ICC-01/04-01/06-2881, paras 18 – 22.
[94] ICC-01/04-01/06-2881, paras 18 – 22.
[95] ICC-01/04-01/06-2891-Red, para. 83.
[96] ICC-01/04-01/06-2891-Red, para. 83.
[97] ICC-01/04-01/06-2891-Red, para. 85.
[98] ICC-01/04-01/06-2842, paras 883 – 889.
[99] The Majority notes that although Mr Lubanga stated in his Rwampara speech "It can involve suffering whilst you are being trained" his following sentence is: "However, it's all to train your endurance and to ensure that you have the capacity". As a result the Majority is unable to conclude that Mr Lubanga was referring to suffering beyond that involved in training endurance and ensuring military capacity. This evidence therefore cannot be relied on to prove Mr Lubanga's culpability for acts of extreme violence and sexual abuse. See 128-Red2-ENG, page 36, lines 23 – 24, page 37, lines 8 – 23; page 38, line 17 to page 39, line 1, page 40, lines 5 – 11, and page 40, line 23 to page 41, line 17; the interpretation is taken from the court transcript of EVD-OTP-00570 from time code 00:09:07 to 00:26:10.

aware of them or that they can otherwise be attributed to him in a way that reflects his culpability. Therefore, the Majority of the Chamber has decided that it has not been demonstrated that the individual punishments referred to by the Chamber were the responsibility of Mr Lubanga, and in any event the Chamber has not taken this into account as an aggravating factor in the determination of his sentence.

b) Sexual Violence

60. The Chamber strongly deprecates the attitude of the former Prosecutor in relation to the issue of sexual violence. He advanced extensive submissions as regards sexual violence in his opening and closing submissions at trial, and in his arguments on sentence he contended that sexual violence is an aggravating factor that should be reflected by the Chamber.[100] However, not only did the former Prosecutor fail to apply to include sexual violence or sexual slavery at any stage during these proceedings, including in the original charges, but he actively opposed taking this step during the trial when he submitted that it would cause unfairness to the accused if he was convicted on this basis.[101] Notwithstanding this stance on his part throughout these proceedings, he suggested that sexual violence ought to be considered for the purposes of sentencing.

61. The prosecution suggests that although the Chamber did not base its Article 74(2) decision on evidence relating to sexual violence and rape, the evidence of the witnesses on this issue was credible and reliable and it may "assist as regards

[100] T-107-ENG, page 11, line 17 to page 13, line 8; T-356-ENG, page 9, lines 9 – 13 and, lines 22 –25; page 52, line 16, T-360-Red2-ENG, page 33, line 17 to page 34, line 20. ("The children were trained to kill and to rape [...] All the girls recruited as soldiers would be raped and abused because they are girls.")

[101] Prosecution's Application for Leave to Appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 12 August 2009, ICC-01/04-01/06-2074, paras 22 and 23. See also Prosecution's Further Observations Regarding the Legal Representatives' Joint Request Made Pursuant to Regulation 55, 12 June 2009, ICC-01/04-01/06-1966.

sentence".[102] On this basis, the prosecution submits that the sexual violence and rape to which some girl soldiers were subjected demonstrates that the crimes of conscription, enlistment and use of children were committed with marked cruelty, and they were directed at victims who were particularly defenceless, within the meaning of Rule 145(2)(b)(iii) of the Rules.[103]

62. The prosecution argues that the evidence supports the conclusion that sexual violence was routinely inflicted upon female child soldiers by the UPC/FPLC trainers and commanders,[104] and that the evidence of sexual violence and rape should be treated as an aggravating factor for the purposes of sentencing.[105] It is submitted that this would not be prejudicial to the convicted person as the defence was on notice of this evidence and the accused cross-examined witnesses on this material during the trial.[106]

63. During the sentencing hearing, the defence argued against the prosecution's oral submission that "[a]ll the girls recruited [into the UPC/FPLC] as soldiers would be raped", in that it is contended that there was no evidence introduced during the trial to support this suggestion.[107]

64. In its written and oral submissions, the defence advances a number of arguments against the prosecution's position as regards sexual violence. It submits that the sexual violence alleged by the Prosecutor ought not to be invoked as an aggravating circumstance at the sentencing stage, given Mr Lubanga was not charged with or convicted of any crime of sexual violence, and it is suggested that the Confirmation Decision did not include any findings in this regard.[108] It is

[102] ICC-01/04-01/06-2881, para. 30, referring to ICC-01/04-01/06-2842, para. 896.
[103] ICC-01/04-01/06-2881, para. 31.
[104] ICC-01/04-01/06-2881, paras 32 – 33.
[105] ICC-01/04-01/06-2881, para. 34.
[106] ICC-01/04-01/06-2881, para. 34.
[107] T-360-Red2-ENG, page 53, lines 11 – 21.
[108] ICC-01/04-01/06-2891-Red, paras 55 – 61 and T-360-Red2-ENG, page 53, line 23 to page 54, line 2.

submitted that it would be unfair to take these matters into consideration at this stage because Mr Lubanga did not address them during the trial.[109]

65. The defence further argues that the evidence presented at trial was contradictory in this regard, given there was support for the suggestion that sexual abuse was formally prohibited.[110]

66. Finally, it is submitted that even if sexual violence occurred, it cannot be attributed to Mr Lubanga,[111] given the absence of evidence that Mr Lubanga ordered or encouraged behaviour of this kind or that he was aware of it; moreover, it is suggested that there is no evidence to support the allegation that sexual violence occurred "in the ordinary course" of the recruitment for which Mr Lubanga was convicted. Therefore, even if sexual violence occurred in the context of the crimes of which Mr Lubanga has been convicted, it is argued this does not provide a proper basis for attributing responsibility to Mr Lubanga as an aggravating circumstance.[112]

67. The prosecution's failure to charge Mr Lubanga with rape and other forms of sexual violence as separate crimes within the jurisdiction of the Court is not determinative of the question of whether that activity is a relevant factor in the determination of the sentence. The Chamber is entitled to consider sexual violence under Rule 145(1)(c) of the Rules as part of: (i) the harm suffered by the victims; (ii) the nature of the unlawful behaviour; and (iii) the circumstances of manner in which the crime was committed; additionally, this can be considered under Rule 145(2)(b)(iv) as showing the crime was committed with particular cruelty.

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[109] ICC-01/04-01/06-2891-Red, para. 61 and T-360-Red2-ENG, page 54, lines 2 – 12.
[110] ICC-01/04-01/06-2891-Red, para. 62.
[111] ICC-01/04-01/06-2891-Red, para. 63 and T-360-Red2-ENG, page 54, lines 13 – 22.
[112] ICC-01/04-01/06-2891-Red, paras 63 – 64 and T-360-Red2-ENG, page 54, lines 22 – 23.

68. For the reasons set out above in the section establishing the procedure to be adopted at this stage,[113] the Chamber is entitled to consider sexual violence in determining the sentence that is to be passed, notwithstanding the fact that it did not form part of the Confirmation Decision. Given the procedural safeguards, there will be no consequential unfairness if the Chamber decides that sexual violence is a relevant factor.

69. However, that said, it remains necessary for the Chamber to be satisfied beyond reasonable doubt that: (i) child soldiers under 15 were subjected to sexual violence; and (ii) this can be attributed to Mr Lubanga in a manner that reflects his culpability, pursuant to Rule 145(1)(a) of the Rules.

70. P-0046 testified that the girls she interviewed informed her of incidents of sexual violence that occurred as a result of children having been integrated into the FPLC.[114] The girls P-0046 interviewed indicated that they had been sexually abused and raped by commanders and other soldiers,[115] the youngest of whom was 12 years old.[116]

71. P-0016 suggested that female recruits at Mandro were raped, irrespective of their age and notwithstanding a strict prohibition in this regard.[117] However, P-0016 also said that it was difficult to determine the age of the recruits who were raped from their appearance.[118]

72. P-0055 gave evidence that when he visited the camps he received complaints "along those lines" that there was sexual violence against girl soldiers, sexual

[113] See paras 28 – 31 above.
[114] ICC-01/04-01/06-2842, paras 890 – 896.
[115] ICC-01/04-01/06-2842, paras 890 – 891.
[116] ICC-01/04-01/06-2842, paras 890 – 891.
[117] ICC-01/04-01/06-2842, para. 892.
[118] ICC-01/04-01/06-2842, para. 892.

slavery and forced impregnation, although he indicated these events were infrequent.[119]

73. P-0038 testified that the commanders in particular treated the girls as if they were their "women" or their wives[120] and he gave evidence about a girl under the age of 15, in his view, who was with Commander Abelanga for a considerable period of time in Mongbwalu and Bunia, and whose resistance and cries could be heard during the night.[121]

74. 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. Moreover, nothing suggests that Mr Lubanga ordered or encouraged sexual violence, that he was aware of it or that it could otherwise be attributed to him in a way that reflects his culpability.

75. Although the former Prosecutor was entitled to introduce evidence on this issue during the sentencing hearing, he failed to take this step or to refer to any relevant evidence that had been given during the trial. As a result, in the view of the Majority, the link between Mr Lubanga and sexual violence, in the context of the charges, has not been established beyond reasonable doubt. Therefore, this factor cannot properly form part of the assessment of his culpability for the purposes of sentence.

76. In a separate Decision, the Chamber will assess whether this factor is relevant to the issue of reparations.

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[119] ICC-01/04-01/06-2842, para. 893.
[120] ICC-01/04-01/06-2842, paras 894 – 895.
[121] ICC-01/04-01/06-2842, para. 895.

c) Commission of the Crime when the Victims are Particularly Defenceless

77. The prosecution submits that some of the children recruited were as young as 5 or 6 years and their extreme youth should be treated as an aggravating factor.[122] The defence argues that the age of the recruits is an element of the offence and therefore cannot constitute an aggravating circumstance.[123] The V01 group of victims suggests that in joining with others to form a rebel army that included children under the age of 15, Mr Lubanga knew the crime involved individuals who were particularly vulnerable; whose education would be interrupted; who might be injured or killed during fighting; and who were at risk of abuse, including sexual abuse. The victims submit that these factors should be taken into account as an aggravating circumstance by the Court.[124]

78. As already indicated, the factors that are relevant for determining the gravity of the crime cannot additionally be taken into account as aggravating circumstances. Therefore, the age of the children does not both define the gravity of the crime and act as an aggravating factor. Accordingly, the age of the children does not constitute an aggravating factor as regard these offences.

d) Discriminatory motive

79. The prosecution contends that the evidence demonstrates that the female recruits were subjected to sexual violence, rape and "conjugal subservience" on the basis of their gender. It is suggested this constitutes gender-based harm within the

[122] ICC-01/04-01/06-2881, para. 38.
[123] ICC-01/04-01/06-2891-Red, paras 65 - 67. The defence also submits that these allegations have not been proved beyond a reasonable doubt, and that in any event there is no evidence that Mr Lubanga was aware of recruitment of children as young as 5 or 6. ICC-01/04-01/06-2891-Red, paras 68 – 69.
[124] ICC-01/04-01/06-2880, paras 15 – 16. See also ICC-01/04-01/06-2882, paras 6 – 9.

meaning of Rule 145(2)(b)(v) and, as a result, it is an aggravating factor.[125] The V02 group of victims submits that the crimes for which Mr Lubanga was convicted were committed in a deliberately discriminatory manner, given the commanders sexually abused female soldiers.[126]

80. The defence suggests that any evidence relating to sexual violence should not be treated as an aggravating factor, and it argues that it has not been demonstrated that Mr Lubanga acted in an intentionally discriminatory manner.[127]

81. In the judgment of the Majority, the Court has not been provided with any evidence that Mr Lubanga deliberately discriminated against women in committing these offences, in the sense suggested by the prosecution or the victims. In any event, "motive involving discrimination" pursuant to Rule 145(2)(b)(v) has not been treated as an aggravating factor.

6) Mitigating Circumstances

82. The prosecution and the V01 and V02 groups of victims submit that there are no mitigating circumstances in this case.[128] The defence argues that there are a number of mitigating factors.[129]

a) Necessity, peaceful motives and demobilisation orders

83. The defence refers to Article 31 of the Statute, which addresses the grounds for excluding criminal responsibility, and it submits that it was necessary for Mr Lubanga and others to build an army, in which they enrolled a large number of

[125] ICC-01/04-01/06-2881, paras 35 – 36.
[126] ICC-01/04-01/06-2880, para. 10.
[127] ICC-01/04-01/06-2891-Red, paras 79 - 81.
[128] ICC-01/04-01/06-2881, para. 7; ICC-01/04-01/06-2880, paras 17 – 21 and ICC-01/04-01/06-2882, page 5.
[129] ICC-01/04-01/06-2891-Red, paras 86 – 109.

people, in order to establish political and military control over Ituri as a response to the threat of massacre and given the absence of any effective intervention from the United Nations.[130] The defence submits that enlistment into the UPC/FPLC occurred on a "massive and voluntary" basis, and it is contended that the Chamber should take these circumstances into account in its determination of the appropriate sentence.[131] The defence further notes the extensive involvement of the governments of the DRC, Uganda and Rwanda in the violence in Ituri during the period covered by the charges. The defence submits that Rule 145 requires the sentence to be proportional to the guilt of the accused and that Thomas Lubanga was not among those most responsible for these events.[132]

84. The defence argues that the Chamber ought to take Mr Lubanga's overall motives and intent into consideration, and it submits that the evidence demonstrates that Mr Lubanga was significantly involved during the period of the charges in attempts to secure peace.[133] The defence takes issue with the prosecution's oral submissions during the sentencing hearing that children in the UPC/FPLC were "instructed to kill everyone, regardless of whether they were men, women or children", an allegation which it is said has no basis in the evidence.[134] The defence instead cites the speech made by Mr Lubanga at the Rwampara training camp on 12 February 2003, in which he asserted that the enemy of the UPC/FPLC was not any particular ethnic group but instead "anyone who doesn't want peace."[135]

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[130] ICC-01/04-01/06-2891-Red, paras 97 – 103 and T-360-Red2-ENG, page 55, line 2 to page 56, line 9.
[131] T-360-Red2-ENG, page 56, lines 3 – 9.
[132] T-360-Red2-ENG, page 57, line 7 to page 58, line 20.
[133] ICC-01/04-01/06-2891-Red, paras 104 – 107 and T-360-Red2-ENG, page 58, line 21 to page 65, line 10. See also the testimony of D01-0039, T-360-Red2, page 1, line 24 to page 13, line 9.
[134] T-360-Red2-ENG, page 61, lines 12 – 21.
[135] T-360-Red2-ENG, page 61, line 22 to page 62, line 18.

85. Finally, the defence submits that the Chamber in its determination of the appropriate sentence should take into account the demobilisation orders and the speech by Mr Lubanga during a military meeting on 16 June 2003 in which he stated that child soldiers should be demobilised, notwithstanding the fact that this is at variance with other evidence that demonstrates that enlistment continued. It is contended that Mr Lubanga had only limited control over a complex situation.[136]

86. Mr Lubanga made a personal statement during the sentencing hearing,[137] in which he spoke of the extent of the violence and insecurity in Ituri during the period of the charges.[138] He stated that although "no one can say with certainty that no child below 15 was among the soldiers" who were part of the UPC/FPLC in 2002 – 2003, he was opposed to their enlistment.[139] He also emphasised that he took up this position of responsibility not for power but for peace, and he submitted that the UPC was created, and the FPLC soldiers were trained, in order to pursue this objective.[140]

87. The Chamber accepts that Mr Lubanga hoped that peace would return to Ituri once he had secured his objectives, but this is only of limited relevance given the persistent recruitment of child soldiers during the period covered by the charges. The critical factor is that, in order to achieve his goals, he used children as part of the armed forces over which he had control, and the Chamber has set out in the Judgment its conclusions as to their continued presence in the UPC/FPLC, notwithstanding public statements to the contrary and the demobilisation orders

[136] ICC-01/04-01/06-2891-Red, paras 94 – 96 and T-360-Red2-ENG, page 63, line 11 to page 65, line 10.
[137] T-360-Red2-ENG, page 65, line 13 to page 69, line 21.
[138] T-360-Red2-ENG, page 66, line 23 to page 67, line 17.
[139] T-360-Red2-ENG, page 66, lines 5 – 18.
[140] T-360-Red2-ENG, page 68, lines 6 – 18.

he issued.[141] Whether or not Mr Lubanga genuinely feared attacks by others, his response should not have included using children as part of the armed wing of the UPC.

b) Cooperation with the Court

88. The defence emphasises that Mr Lubanga has no prior convictions and suggests that he has been extremely cooperative throughout the trial.[142]

89. The defence also argues that the Chamber should reduce Mr Lubanga's sentence on account of suggested alleged violations of his fundamental rights during the trial. It is contended that Mr Lubanga's right to adequate time and facilities for the preparation of his defence was breached following disclosure violations by the former Prosecutor, including in relation to the use of intermediaries, and it is suggested that the resulting stays of the proceedings have led to a breach of his right to an expeditious trial.[143] The defence similarly submits that the failures by the prosecution to conduct thorough investigations have resulted in considerable prejudice to the accused, as this resulted in a significant expenditure of time and resources in examining the evidence of unreliable witnesses.[144]

90. The Chamber has already considered, and rejected, an abuse of process challenge brought by the defence in relation to many of the abovementioned issues[145] and in any event it does not find that these factors merit a reduction in Mr Lubanga's sentence. Any relevant period that he has spent in detention, including during the trial, will be deducted from the sentence that is passed.

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[141] ICC-01/04-01/06-2842, paras 1280 – 1348.
[142] ICC-01/04-01/06-2891-Red, para. 109.
[143] ICC-01/04-01/06-2891-Red, paras 112 – 130 and T-360-Red2-ENG, page 43, line 24 to page 46, line 16.
[144] ICC-01/04-01/06-2891-Red, paras 124 – 126 and T-360-Red2-ENG, page 44, line 11 to page 45, line 16.
[145] Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings", 23 February 2011, ICC-01/04-01/06-2690-Conf. A public redacted version was issued on 7 March 2011 (notified on 8 March 2011), ICC-01/04-01/06-2690-Red.

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

    a) the prosecution gathered an extensive quantity of evidence under confidentiality agreements (Article 54(3)(e) of the Statute) leading to a failure to disclose exculpatory material, which in turn resulted in a stay of the proceedings[146] and a provisional order to release Mr Lubanga;[147]

    b) the prosecution repeatedly failed to comply with the Chamber's disclosure orders, leading to a second stay of the proceedings[148] and a second provisional order releasing Mr Lubanga;[149] and

    c) the prosecution's use of a public interview, given by Ms Beatrice le Fraper du Hellen, to make misleading and inaccurate statements to the press about the evidence in the case and Mr Lubanga's conduct during the proceedings.[150]

IV. Determination of the Sentence

92. The prosecution argues that in order "to avoid inexplicable sentencing discrepancies", the sentencing policy of the Court should presume a "consistent baseline" for sentences, which should not be adjusted on the basis that some crimes are less serious than others.[151] It is submitted that the appropriate

[146] Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401.
[147] Decision on the release of Thomas Lubanga Dyilo, 2 July 2008, ICC-01/04-01/06-1418.
[148] Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of the Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, 8 July 2010, ICC-01/04-01/06-2517-Red.
[149] T-314-ENG, page 17, line 8 to page 22, line 8.
[150] Decision on the press interview with Ms Le Fraper du Hellen, 12 May 2010, ICC-01/04-01/06-2433.
[151] ICC-01/04-01/06-2868, para. 4.

"baseline" or starting point for all sentences should be set at approximately 80% of the statutory maximum, and this should then be adjusted in accordance with Rule 145 to take into account any aggravating and mitigating circumstances and other factors relevant to the convicted person and the circumstances of the crimes.[152]

93. No established principle of law or relevant jurisprudence under Article 21 of the Statute has been relied on in support of this suggested approach, which would bind the judges to a minimum starting point of 24 years in all cases. In the judgment of the Chamber, the sentence passed by a Trial Chamber should always be proportionate to the crime (see Article 81(2)(a)), and an automatic starting point – as proposed by the prosecution – that is the same for all offences would tend to undermine that fundamental principle.

94. As set out above, pursuant to Article 77(1) of the Statute, the prison sentence for each crime falling within the jurisdiction of the Court must not exceed 30 years, unless the extreme gravity of the crime and the individual circumstances of the convicted person justify life imprisonment.

95. The prosecution has requested that the Chamber impose a 30-year sentence on Mr Lubanga.[153]

96. A life sentence would be inappropriate in the instant case, given the requirement in Rule 145(3) that imposing this sentence is "justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances". Given the Chamber has not found any aggravating factors in this case, a whole life term would be inappropriate.

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[152] ICC-01/04-01/06-2868, para. 5.
[153] T-360-Red2-ENG, page 35, lines 13 – 16.

97. Mr Lubanga has been convicted of having committed, jointly with others, the crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities in the context of an internal armed conflict. The Chamber has borne in mind the widespread recruitment and the significant use of child soldiers during the timeframe of the charges; the position of authority held by Mr Lubanga within the UPC/FPLC and his essential contribution to the common plan that resulted, in the ordinary course of events, in these crimes against children; the lack of any aggravating circumstances; and the mitigation provided by his consistent cooperation with the Court during the entirety of these proceedings, in circumstances when he was put under considerable unwarranted pressure by the conduct of the prosecution during the trial, as set out above.

98. Under Article 78(3) of the Statute, when the person has been convicted for more than one crime "the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment". Taking into account all the factors discussed above, the Majority sentences Mr Lubanga:

    1) for having committed, jointly with other persons, the crime of conscripting children under the age of 15 into the UPC to 13 years' imprisonment;

    2) for having committed, jointly with other persons, the crime of enlisting children under the age of 15 into the UPC to 12 years' imprisonment; and

    3) for having committed, jointly with other persons, the crime of using children under the age of 15 to participate actively in hostilities to 14 years' imprisonment.

99. Pursuant to Article 78(3) of the Statute, the total period of imprisonment on the basis of the joint sentence is 14 years' imprisonment.

Deduction of time spent in detention

100. Pursuant to Article 78(2) of the Statute, the Court shall deduct the time "[...] spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime".

101. Under this provision, the defence submits that the Chamber should deduct the period of Mr Lubanga's house arrest and detention by the DRC authorities between 2003 and 2006.[154] The defence argues that the detention of Mr Lubanga in the DRC was imposed as a result of the same conduct underlying the crimes for which he has been convicted at the Court, namely his activities as President of the UPC/FPLC in 2002-2003.[155] On this basis, the defence requests that the Chamber deducts this period of domestic detention from Mr Lubanga's sentence.[156]

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

[154] ICC-01/04-01/06-2891-Red, paras 133 – 140.
[155] ICC-01/04-01/06-2891-Red, paras 137 – 140.
[156] ICC-01/04-01/06-2891-Red, paras 137 – 140.

103. On 10 February 2006, Pre-Trial Chamber I issued a warrant of arrest[157] against Mr Lubanga and on 24 February 2006, a request for his arrest and surrender was transmitted to the DRC.[158]

104. On 16 March 2006, the convicted person was surrendered to the Court and transferred to its detention centre in The Netherlands.

V. Fine

105. The V01 group of victims submits that a fine should be imposed pursuant to Article 79(2) to benefit the Trust Fund for Victims. It is submitted that Rule 146 enables the Court to take into account the financial circumstances of the convicted person.[159] In addition, the V01 group of victims seeks an order from the Chamber that any confiscated assets are paid to the Trust Fund for Victims in accordance with Article 79(2) of the Statute.[160]

106. Pursuant to Article 77(2) of the Statute and Rule 146(1) of the Rules, the Chamber considers it inappropriate to impose a fine in addition to the prison term, given the financial situation of Mr Lubanga. Despite extensive enquiries by the Court, no relevant funds have been identified.

VI. Disposition

107. For the reasons set out above, for the crimes of conscripting and enlisting children under the age of 15 years into the FPLC and using them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the

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[157] Warrant of arrest, 10 February 2006, ICC-01/04-01/06-2-tEN (reclassified as public pursuant to ICC-01/04-01/06-37).
[158] Demande d'arrestation et de remise de M. Thomas Lubanga Dyilo adressée à la République démocratique du Congo ICC-01/04-01/06-9, 24 February 2006, ICC-01/04-01/06-9 (reclassified as public pursuant to ICC-01/04-01/06-42).
[159] ICC-01/04-01/06-2880, paras 8 – 10.
[160] ICC-01/04-01/06-2881, para. 11.

Statute from early September 2002 to 13 August 2003, the Majority of the Chamber passes, by way of a joint sentence, a total period of 14 years' imprisonment.

108. The Chamber orders pursuant to Article 78(2) that the time from Mr Lubanga's arrest on 16 March 2006 until the date of this Decision shall be deducted from his sentence.

109. In line with the approach taken as regards notification of the Judgment,[161] on the basis of Rule 144(2)(b) the Chamber determines that the accused and the prosecution are notified of the Article 76 Decision (for the purposes of an appeal) when the French translation is effectively notified from the Court by the Registry.

110. Judge Odio Benito appends a dissenting opinion to this Decision.

[161] See Decision on the translation of the Article 74 Decision and related procedural issues, 15 December 2011, ICC-01/04-01/06-2834.

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

Judge Adrian Fulford

Judge Elizabeth Odio Benito

Judge René Blattmann

Dated this 10 July 2012

At The Hague, The Netherlands

VII. DISSENTING OPINION OF JUDGE ODIO BENITO

A. Preliminary remarks

1. I agree with the majority of the Chamber that in the determination of the sentence against the convicted person, the Chamber should take into account the widespread use of child soldiers during the timeframe of the charges; the significant position of authority held by Mr Lubanga within the UPC/FPLC and his ability throughout the relevant period to prevent the commission of these offences. I also agree with the Majority of the Chamber that no aggravating circumstances are to be considered and that the cooperation of the convicted person with the Court during the entirety of the proceedings should be taken into consideration as a mitigating circumstance.

2. However, I strongly disagree with the Majority of the Chamber that disregards the damage caused to the victims and their families, particularly as a result of the harsh punishments and sexual violence suffered by the victims of these crimes pursuant to Rule 145(1)(c) of the Rules of Procedure and Evidence ("Rules").

3. I also firmly disagree with the Majority's decision to impose a differentiated sentence to the convicted person as regards the crimes of enlistment, conscription and use to participate actively in the hostilities.

B. The harm caused to victims and their families as a factor of gravity pursuant to Rule 145(1)(c) of the Rules

4. The Majority of the Chamber states the following:

> Against this general background the Chamber has considered the gravity of these crimes in the circumstances of this case, with regard, *inter alia*, to the extent of the damage caused, and in particular "the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person." [footnote omitted] [1]

5. Despite this affirmation, it subsequently disregards this fundamental factor which shall be considered by the Chamber pursuant to Rule 145(1)(c) of the Rules. The Majority of the Chamber considers as relevant factors only: a) the large-scale and widespread nature of the crimes committed; b) the degree of participation and intent of the convicted person; and c) the individual circumstances of the convicted person.[2]

6. It is my opinion that the Chamber received ample evidence during the trial related to the conditions in which boys and girls were recruited and the harms they suffered as a result of their involvement with the UPC. The evidence received as regards the punishments and harsh conditions of children in the recruitment camps and the sexual violence they suffered (mainly but not exclusively the girls) at their young age should be taken into consideration when determining the sentence against the convicted person as it touches upon the gravity of the crimes of enlistment, conscription and use of children under the age of 15 to participate actively in the hostilities, and particularly the damage caused to the child victims and their families as a result of these crimes.

7. The evidence presented during the trial demonstrates beyond reasonable doubt that children "were subject to a range of punishments during the training with the UPC/FPLC, particularly given there is no evidence to suggest they were excluded

[1] Majority Decision, para. 44
[2] Majority Decision, paras 45-56.

from this treatment".[3] As regards sexual violence, although the Chamber concluded that it would not make findings of fact on whether the responsibility is to be attributed to Mr Lubanga, it concluded that it would hear submissions as to whether the issue could assist as regards sentence and reparations.[4]

8. Pursuant to Rule 145(1)(c) of the Rules, the Chamber has the authority and the obligation to consider the damaging effects that the recruitment, particularly the harsh treatment and sexual violence had upon very young children, as an exacerbating factor in the determination of the sentence. Although cruel treatment and sexual violence are not included in the facts and circumstances of the charges described in the Confirmation of Charges decision, as set out in the Majority Decision, given the procedural safeguards implemented by the Chamber, the convicted person has had adequate notice, time and facilities for the preparation of his defence during the sentence hearing. There is thus no unfairness towards the defence should the Chamber consider the issue in the determination of the sentence.

C. *The expert witnesses' evidence on the harm caused to victims and their families*

9. The evidence that the Chamber heard from expert witness Elisabeth Schauer, who testified on post-traumatic stress disorder and other harmful effects that child recruitment has on its victims is fundamental to determine the damage that the crimes for which Mr Lubanga has been convicted cause on the lives of the young victims and their families. Although, as noted by the Majority Decision, the crimes subject matter of this case occurred during a rather limited time period, the effects

[3] Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 809.
[4] ICC-01/04-01/06-2842, para. 895.

of the crimes on the victims and their families are long-lasting, sometimes for a lifetime and often will pass from one generation to another. As noted by the expert witness Ms Schauer, the post-traumatic stress disorder may affect victims for their entire lives, following their exposure to traumatic events (including having experienced or witnessed killing or mutilation, severe physical or sexual assault, sexual abuse and rape) whilst serving as child soldiers.[5]

10. As noted by the Majority of the Chamber, during her testimony at trial, expert witness Ms Schauer explained that:

> [a]mong a number of at risk populations, children of war and child soldiers are a particularly vulnerable group and often suffer from devastating long-term consequences of experienced or witnessed acts of violence. Child war survivors have to cope with repeated traumatic life events, exposure to combat, shelling and other life threatening events, acts of abuse such as torture or rape, violent death of a parent or friend, witnessing loved ones being tortured or injured, separation from family, being abducted or held in detention, insufficient adult care, lack of safe drinking water and food, inadequate shelter, explosive devices and dangerous building ruins in proximity, marching or being transported in crowded vehicles over long distances and spending months in transit camps. These experiences can hamper children's healthy development and their ability to function fully even once the violence has ceased. [references omitted].[6]

11. Ms Schauer further stated that survivors of rape and cruel torture "seem to have a predictive power in terms of likelihood of development of psychopathology".[7] The expert also stated that studies indicate that abduction and the consequent trauma have a negative impact on their education and cognitive abilities.[8] The expert stated that "psychological exposure and suffering from trauma can cripple individuals and families even into the next generations". The expert further pointed out that usually children who have been child soldiers for a long time do not demonstrate "civilian life skills" as they have difficulties with interpersonal contacts, they

[5] EVD-CHM-00001, pages 10 – 13.
[6] EVD-CHM-00001, page 3.
[7] EVD-CHM-00001, page 16.
[8] EVD-CHM-00001, pages 23 – 24.

missed school, and as a result they are vocationally or occupationally disadvantaged.[9] The loss of the productivity on the part of a large number of young people is described as a challenge in a poor country.[10]

12. The Chamber also heard the evidence of expert witness Ms Radhika Coomaraswamy, who stated during her testimony that child recruitment is *per se* against the best interests of a child. She stated that those victims of child recruitment who had the resilience to struggle and to come up and talk about what happened to them, tell how their experience went against their education and livelihood, and how they had to have some kind of psychosocial support. The witness described how she had not met one child soldier, even the ones who have survived and done so well, who would say for a moment that his or her experience as a child soldier was in any way positive.[11]

13. Whilst considering the gravity of the crimes of enlistment, conscription and use of children under the age of 15 to participate actively in the hostilities, it is essential to keep in mind the differential gender effects and damages that these crimes have upon their victims, depending on whether they are boys or girls. Along these lines, Ms Schauer stated that sexual violence, including torture, rape, mass rape, sexual slavery, enforced prostitution, forced sterilization, forced termination of pregnancies, giving birth without assistance and being mutilated are some of the key gender-based experiences of both women and girls during armed conflicts. She also stated that in some armed conflicts, abducted girls where almost universally raped.[12] Similarly, Ms Coomaraswamy stated that rape happens to girls on a

[9] T-166-ENG, page 32, line 25 to page 33, line 7.
[10] T-166-ENG, page 33, lines 8 – 14.
[11] T-223-ENG, page 28, line 16 to page 29, line 11.
[12] EVD-CHM-00001, page 28.

regular basis and they also suffer from forced marriage and other forms of sexual violence, including force nudity and sexual harassment. She stated that for girls, recruitment is a "particularly horrendous experience".[13]

D. The fact-based witnesses' evidence on the harm caused to victims and their families

14. Throughout the Trial, the Chamber heard evidence of the harm suffered by girls and boys under the age of 15 as a result of their recruitment within the UPC. This included evidence that harsh punishments were administered during training, which included whipping, beating with a cane and imprisonment.[14] P-0016 described the circumstances of two individuals who died as a result of being punished, one of whom was a child about 14 years old.[15] The same witness testified that a child who informed the witness about these deaths was subsequently flogged until he lost the use of his right arm, which remains defective.[16] The same witness gave evidence of the common practice amongst some high-ranking UPC officials of using young girl recruits as domestic servants in their private residences.[17] The commander of the centre at Mandro had four such individuals, and the other instructors used girls for housework, as well as sexually abusing them.[18] Although P-0016 said that it was difficult to determine the age of the recruits who were raped from their appearance,[19] he stated that female recruits at Mandro camp were raped, irrespective of their age and notwithstanding a strict

[13] T-223-ENG, page 30, line 25 to page 31, line 9.
[14] ICC-01/04-01/06-2842, paras 883 – 889.
[15] T-189-Red2-ENG, page 46, lines 18 – 21 and page 47, lines 14 – 18.
[16] T-189-Red2-ENG, page 47, lines 3 – 4 and 7 – 10.
[17] T-191-Red2-ENG, page 16, lines 14 – 17.
[18] T-191-Red2-ENG, page 16, line 18 to page 17, line 4.
[19] T-191-Red2-ENG, page 29, lines 20 – 25.

prohibition in this regard.[20] In answer to a question as to whether sexual violence was committed against the female recruits during training,[21] P-0016 indicated the trainers and the other guards in the centre took advantage of the situation and raped the recruits, and that the perpetrators included the commander of the centre.[22]

15. The Chamber further admitted video-footage evidence when Mr Lubanga visited Rwampara camp. On that occasion he gave a speech to the recruits and other soldiers which also shows that he was aware of the suffering of child soldiers:[23]

> When I first arrived, when I was put in prison, I think there was a building here. The Ugandans arrested me. It's the second time I come here. I think many have heard the name; they listen to what is said about us on the radio. When you were still civilians, you saw us on television. I am Thomas Lubanga, the president of our party, the UPC. I believe this is the first time many of you see me. (Yes, yes, says the group). You are used to seeing our commanders; they are helping us carry out training, managing the army. I see them everyday. But we have a lot to do, a lot. And from time to time I am asked to go out, hold conferences and meet people; it is difficult for me to always be in touch with you; the chief of staff, commander Bosco should come and see you here. Is he coming here? (the group answers yes, yes). So if he doesn't come, he will be seen as an enemy but I think he cannot do that because he needs the troops. We have come to see you and encourage you. Why give you courage? Because the work we are doing, we are doing with you. The work you know, being enlisted in the army, trained, using weapons, is blessed. We have just sung about daily suffering, and it is this daily suffering that has made us decide to do what we are doing, correct?
>
> [...] in view of the responsibility we have towards you, because I know we are united, aren't we? Well, we took an initiative and as soon as you finish your training and you're given your weapons, you have to go and ensure the safety and security of the population, and this is a very important task to carry out before God and humanity. You shouldn't take this work lightly. This type of work is of great importance. **It can involve suffering whilst you are being trained.** However, it's all to train your endurance and to ensure that you have the capacity. And if a member of the population sees you wearing a uniform, that they feel they can sleep tightly because somebody is guarding their safety. [...] (emphasis added)

16. The Chamber also heard evidence from P-0046, who extensively interviewed children who were recruited by the UPC. This witness stated that all the girls she met at the demobilisation centres, except for a few, were sexually abused by

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[20] T-191-Red2-ENG, page 16, lines 1 – 13.
[21] T-191-Red2-ENG, page 15, lines 15 – 18.
[22] T-191-Red2-ENG, page 15, lines 19 – 21 and page 30, line 4 to page 31, line 8.
[23] T-128-Red2-ENG, page 36, lines 23 – 24, page 37, lines 8 – 23; page 38, line 17 to page 39, line 1, page 40, lines 5 – 11, and page 40, line 23 to page 41, line 17; the interpretation is taken from the court transcript from time code 00:09:07 to 00:26:10.

commanders and soldiers.[24] The same witness also described how many of these girls fell pregnant and aborted, sometimes in multiple occasions.[25] The witness stated that the psychological and physical state of some of these young girls was "catastrophic".[26]

17. The witness stated that the children provided her with a clear account of systematic sexual violence in the camps.[27] The youngest victim of sexual abuse interviewed by P-0046 was 12 years old.[28] She commented how some of those who became pregnant were thrown out of the armed group and ended up on the streets of Bunia.[29] Others went to join their relatives, and although they may have felt they remained part of the UPC, the latter failed to provide them with support.[30] The witness stated that it was difficult to reintegrate them into their families because girls were stigmatised, and significant mediation was necessary.[31]

18. The Chamber also heard the evidence of P-0055, who gave evidence that when he visited the camps he received complaints "along those lines" that there was sexual violence against girl soldiers, sexual slavery and forced impregnation, although he indicated these events were infrequent.[32] Likewise, P-0038 testified that girls acted as bodyguards but were also often used to prepare food and to provide sexual services for the commanders, who treated them as their "women" or their "wives".[33] This same witness stated that Commander Abelanga kept a girl under 15

[24] T-207-Red2-ENG, page 30, line 14 to page 31, line 1.
[25] T-207-Red2-ENG, page 31, lines 2-4 and page 38, lines 11 – 14.
[26] T-207-Red2-ENG, page 31, lines 16 – 18.
[27] T-207-Red2-ENG, page 31, lines 4 – 6.
[28] T-207-Red2-ENG, page 35, lines 17 – 23.
[29] T-207-Red2-ENG, page 37, lines 12 – 20.
[30] T-207-Red2-ENG, page 37, lines 20 – 23.
[31] T-207-Red2-ENG, page 39, lines 3 – 19.
[32] T-178-Red2-ENG, page 78, line 11 to page 79, line 7.
[33] T-114-Red2-ENG, page 23, lines 16 – 18.

years old at his home and that this was commonly known and commented. He also stated that Commander Ndjabu retained another as his bodyguard (she later became pregnant by the brigade commander).[34]

E. The harm caused to victims and their families has been proven beyond reasonable doubt as a factor pursuant to Rule 145(1)(c) of the Rules

19. In light of the abundant evidence rehearsed above, it is my opinion that the damage caused to these children is a factor that shall be considered by the Chamber in the determination of the sentence against Mr Lubanga Dyilo, pursuant to Rule 145(1)(c) of the Rules. The children who were victims of the crimes for which Mr Lubanga has been convicted were subjected to acts of extreme violence, including harsh punishments and sexual violence, all of which caused serious damage which may continue to date and may extend into the future, even affecting future generations. Given the nature of these crimes, the harm caused extends to the victims' family, including the parents who lost their children or lost any possibility to have a relationship with their children in the future. Children born as a result of the sexual violence suffered by girls who were recruited are also deeply affected by these crimes and this is what was defined by expert Ms Schauer as the "transgenerational effects", which in her words "cripple individuals and families even into next generations".[35]

20. The fact that the victims were all of a young age (under the age of 15) must also be considered by the Chamber. Moreover, because of their age, many of the victims may never be able to be fully repaired for the harm they suffered and still continue

[34] T-114-Red2-ENG, page 23, line 21 to page 25, line 11.
[35] The Psychological Impact of Child Soldiering, ICC-01/04-01/06-1729-Anx1, pages 25-27.

to suffer. Their childhood was deeply affected by these crimes that have scarred their lives and those of their families forever. Consequently, I deem that these are exacerbating factors pursuant to Rule 145(1)(c) of the Rules, all of which may be attributed to Mr Lubanga since he was found guilty beyond reasonable doubt of the crimes that caused such harms to the child victims and their families.

21. Although, as noted by the Majority of the Chamber, Mr Lubanga may not have "deliberately discriminated against women in committing these offences",[36] the crimes for which he was convicted resulted in the discrimination of women, particularly girls under the age of 15 who were subject to sexual violence (and consequently to unwanted pregnancies, abortions, HIV and other sexually transmitted diseases) as a result of their recruitment within the UPC. Although this may not have been the deliberate intention of the convicted person, the sexual violence suffered by children under the age of 15 as a result of the crimes for which he was found to be a co-perpetrator, impaired and most likely nullified, perhaps for the rest of their lives, the enjoyment of other human rights and fundamental freedoms of its victims (including *inter alia,* their right to education, their right to health, including sexual and reproductive health, and their right to a family life).[37]

22. Consequently, I dissent with the Majority of the Chamber that disregarded factors such as "punishment" and "sexual violence" in the determination of the sentence against Mr Lubanga Dyilo, as these acts resulted in serious and often irreparable harm to the victims and their families.

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[36] Majority Decision, para. 81.
[37] Committee on the Elimination of Discrimination against Women, General Recommendation No. 19, Violence against Women, 11th session, 1992, para. 7.

23. As stated in the Majority decision, any factors that are to be taken into account when assessing the gravity of the crime will not additionally be taken into account as aggravating circumstances, and *vice versa*.[38] Consequently, the aforesaid factors should not be "double-counted" for the purposes of sentence.

F. The sentence to be imposed to the convicted person

24. I disagree with the Majority's Decision to impose a lower sentence to the crime of enlistment (12 years), a higher sentence to the crime of conscription (13 years) and an even higher sentence to the crime of use of children to participate actively in the hostilities (14 years).[39]

25. The crimes of enlistment, conscription and use of children under the age of 15 to participate actively in the hostilities, although separate and distinct crimes pursuant to the Rome Statute, are all the result of the same plan implemented by Mr Lubanga and his co-perpetrators which resulted in the aforesaid damage caused to the victims and their families, regardless of the nature of their initial recruitment (voluntary or compulsory) and regardless of whether they were used to participate actively in the hostilities or not. All three crimes unmistakably put young children under the age of 15 at risk of severe physical and emotional harm and death.

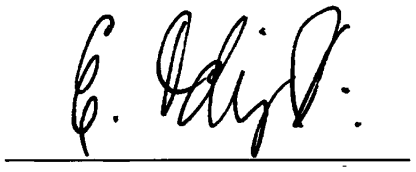
26. Accordingly, it is my opinion that Mr Lubanga shall be sentenced:

    a. for having committed, jointly with other persons, the crime of conscripting children under the age of into the UPC to 15 years of imprisonment;

[38] Majority Decision, para. 35.
[39] Majority Decision, para. 98.

b. for having committed, jointly with other persons, the crime of enlisting children under the age of into the UPC to 15 years of imprisonment; and
c. for having committed, jointly with other persons, the crime of using children to participate actively in the hostilities to 15 years of imprisonment.

27. Pursuant to Article 78(3) of the Statute, the total period of imprisonment on the basis of the joint sentence is 15 years of imprisonment.



Judge Elizabeth Odio Benito

Dated this 10 July 2012

At The Hague, The Netherlands