Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-01/04-01/06**
Date: **3 December 2012**

THE APPEALS CHAMBER

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

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

Public Document

Mr Thomas Lubanga's appellate brief against Trial Chamber I's 10 July 2012 *Decision on Sentence pursuant to Article 76 of the Statute*

Source: **Defence Team for Mr Thomas Lubanga Dyilo**

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

Office of the Prosecutor
Ms Fatou Bensouda
Mr Fabricio Guariglia

Counsel for the Defence
Ms Catherine Mabille
Mr Jean-Marie Biju-Duval
Mr Marc Desalliers
Ms Caroline Buteau

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

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

Office of Public Counsel for Victims

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

1. In its appellate brief against the *Judgment pursuant to Article 74 of the Statute*[1] filed today, the Defence requests the Court to quash the Appellant's conviction and acquit him. In the alternative, the Defence wishes to submit the following grounds of appeal against the 10 July 2012 *Decision on Sentence pursuant to Article 76 of the Statute.*[2]

FIRST GROUND OF APPEAL: ERRORS OF LAW AND FACT IN THE ASSESSMENT OF THE CRIMES PROSECUTED

1. Error of law

2. The Chamber held that the sentence passed reflected the Chamber's finding that the recruitment and participation of "children" within the FPLC was widespread.[3]

3. While the Chamber at no time defines the category of "children" on which it relies to find that the commission of the crimes was "large-scale and widespread", it is clearly apparent from the impugned decision that the category of individuals to which the Chamber refers includes not only recruits under the age of 15 years but also "young people"[4] over that age.

4. In order to establish the widespread nature of the crimes prosecuted, the Chamber considered that the Appellant had committed acts of enlistment, which are entirely non-criminal acts insofar as they involved individuals aged 15 years and older. In so doing, the Chamber unfairly broadens the scope of the charges against the Appellant.

5. The Chamber has clearly erred in law by including in the scope of the charges acts which are not criminal.

[1] ICC-01/04-01/06-2948-Conf-tENG.
[2] ICC-01/04-01/06-2901.
[3] ICC-01/04-01/06-2901, paras. 49-50.
[4] ICC-01/04-01/06-2842 ("Judgment"), para. 49.

6. That error is such as to affect the length of the sentence passed in that it caused the Chamber to hold against the Appellant the fact that the crimes had been "large-scale and widespread".

2. Errors of fact

7. Referring to paragraphs 857, 911 and 915 of its Judgment,[5] the Chamber held that the UPC/FPLC was responsible for the widespread recruitment of young people, including children under the age of 15 years; that a significant number of children were used as military guards, escorts and bodyguards for members of the main staff; and that the UPC/FPLC used children under the age of 15 years to participate in hostilities.

8. The Appeals Chamber will note, firstly, that none of the Chamber's findings of fact support the finding that the crimes prosecuted were widespread in nature and, secondly, that the evidence called at trial shows instead that the enlistment of minors into the ranks of the FPLC was insignificant.

2.1 The Chamber's findings of fact

9. As the Chamber itself pointed out,[6] an examination of the evidence does not establish beyond reasonable doubt that the recruitment and participation of children under the age of 15 years in the UPC/FPLC between 1 September 2002 and 13 August 2003 was widespread.

10. The Chamber pointed out that it had "not reached conclusions […] beyond reasonable doubt, as to the precise number, or proportion, of the recruits who were under 15 years",[7] thus confirming the absence of any objective element allowing the determination of the proportion of children under the age of 15 years among the "young people" recruited.

[5] ICC-01/04-01/06-2901, footnote 84.
[6] ICC-01/04-01/06-2901, para. 50.
[7] ICC-01/04-01/06-2901, para.50.

11. It follows that the Chamber, having recognised that it was not possible to determine, even approximately, the number or the proportion of recruits under the age of 15 years, could not, without contradiction, hold that the crimes prosecuted had been widespread.

2.2 The evidence presented at trial

12. In its appeal against the *Judgment pursuant to Article 74*, the Defence challenges before the Appeals Chamber the Trial Chamber's findings that it had been demonstrated beyond reasonable doubt that between 1 September 2002 and 13 August 2003, children under the age of 15 years were indeed recruited into the UPC/FPLC and participated in the hostilities.

13. For that reason, without needing to rehearse herein the details of its arguments, the Defence requests the Appeals Chamber to examine, *mutatis mutandis*, all the facts and arguments submitted and propounded in Part Two of its appellate brief against the *Judgment pursuant to Article 74 of the Statute* filed today.

14. In the present brief, the Defence seeks to highlight the following errors of fact in particular:

15. Firstly, the Court will note that specific circumstances led to an erroneous and excessive assessment of the number of minors enlisted, notably because the assessment of the number of children under the age of 15 years within the FPLC was based exclusively on the witnesses' assessment of the age of individuals they had seen more than six years ago and on the Chamber's assessment of video footage submitted during the proceedings.

16. The Defence refers in this respect to Part Two of its appellate brief against the *Judgment pursuant to Article 74 of the Statute*.

17. Secondly, the Appeals Chamber will note that the Chamber committed serious errors of fact in its assessment of the factual evidence submitted for the purposes of proving the use of children under the age of 15 years by the FPLC. The Chamber could not reasonably find that the use of children under the age of 15 years by the FPLC (a) to participate in fighting; (b) as military guards; (c) as the bodyguards of military chiefs and other senior members of the UPC/FPLC; and (d) as Thomas Lubanga's bodyguards had been widespread.

18. The Defence refers in this connection to its observations set out at paragraphs 252 to 325 of its appellate brief against the *Judgment pursuant to Article 74 of the Statute*.

19. Furthermore, no evidence taken into account by the Chamber in its *Judgment pursuant to Article 74* supports its findings that the enlistment, conscription and participation of children under the age of 15 years in the FPLC were widespread.

20. On the contrary, the only evidence on which the Chamber based its finding that a "significant" or "large" number of children under the age of 15 years had been enlisted into the FPLC, far from demonstrating the widespread recruitment and use of children under the age of 15 years, instead puts that phenomenon into perspective.

21. The only evidence – if considered valid – providing information on the number of children under the age of 15 years in the FPLC during the material period indicates that the proportion was small in comparison to the number of FPLC soldiers as a whole:[8]

- P-0017 believed that approximately **45** child soldiers within the ranks of the FPLC who in the spring of 2003 were formed into a "*Kadogo* unit".[9]

[8] The Defence challenges the reliability of this information: see ICC-01/04-01/06-2773-Conf, paras. 426-428, 441-444 and 638-652.
[9] Judgment, para. 877.

However, the proportion of children under the age of 15 years in that unit has not been established. P-0017 states that that unit of 45 *kadogos* included the "majority of the child soldiers";[10]

- P-0046 declared that 71 children met in May 2004 had claimed to have been recruited or used between mid-May and mid-June 2003.[11] Contrary to the findings of the Chamber, the witness, after having checked his personal notes at the Prosecutor's request,[12] clarified that **26** children under the age of 15 years had stated that they had participated in the hostilities[13] and that she had no information on the number of children who were allegedly part of the UPC without participating in fighting;[14]

- P-0046 declared that she had spoken with approximately **6** UPC child soldiers under the age of 15 years in March 2003 in Rwampara.[15]

22. Moreover, certain witness evidence submitted by the Prosecution and held to be credible by the Chamber showed that the vast majority of recruits were over the age of 15 years[16] and confirms that there was no systematic recruitment.[17] For example, P-0041 stated that "the majority of the soldiers

[10] T-158-CONF-FRA-CT, p. 43, line 23.
[11] *Judgment*, para. 766.
[12] T-206-CONF-FRA, p. 3, lines 19 - 21.
[13] T-207-CONF-FRA, p. 13, lines 1 *et seq.*: "[TRANSLATION] A. I noticed at least 26 children participating in fighting during that period".
Q. And on top of that... on top of the 26 children who had taken part in the fighting, were there other children in the group of 167 who were part of the UPC, even if they hadn't taken part in the fighting?
A. Yes, indeed. There were children who told us that they had not taken part in the fighting and others who gave us no details about how they were associated with that armed group and I don't have the figures".
[14] T-207-CONF-FRA, p. 13, lines 3-8.
[15] Judgment, para. 796. The Defence submits that the Trial Chamber erred in taking account of that information. See ICC-01/04-01/06-2773-Conf, paras. 649 - 650.
[16] P-0017: Judgment, paras. 783 and 817. P-0055: Judgment, para. 794 "very few Kadogo"; P-0041: *Judgment*, para. 849.
[17] P-0041: Judgment, paras. 780-781 and T-125-CONF-FRA-CT, p. 68, lines 20-22; P-0016: T-189-CONF-FRA-CT, p. 78, lines 2-3.

serving in the UPC were over 22 years of age".[18] P-0055 stated that at the Rwampara training camp "they were mostly adults".[19]

23. Even greater uncertainty surrounds the number of children under the age of 15 years who were allegedly the victims of conscription; in this connection it should be pointed out that all the witnesses having claimed to be victims of that crime were rejected by the Chamber for lack of reliability; the remaining evidence in this regard appears extremely fragile and in no wise makes it possible to determine, even approximately, the number of children involved.[20]

24. Lastly, the Chamber erred in its indiscriminate use of the expression "children under the age of fifteen years" and others terms which do not necessarily denote children under the age of fifteen years, such as "children", "young people", "*kadogo*" or "PMF", to establish the existence of the crime.[21]

25. This multitude of errors in the appraisal of the factual material which may establish the widespread nature of the crimes under article 8(2)(e)(vii) vitiates the impugned decision insofar as such material was largely determinative of the sentence passed by the Chamber.

SECOND GROUND OF APPEAL: REFUSAL TO TAKE ACCOUNT OF THE VIOLATION OF THE APPELLANT'S RIGHTS IN THE DETERMINATION OF THE SENTENCE

26. The Chamber considers that the numerous violations of Mr Lubanga's fundamental rights do not merit a reduction in his sentence because any time spent in detention for the same crimes, including during the trial, will be deducted from the sentence.[22]

---

[18] P-0041: Judgment, para. 849.
[19] P-0055: T-175-CONF-FRA-CT, p. 75, lines 13-14; Judgment, para. 794.
[20] Judgment, paras. 775 and 911.
[21] As acknowledged by the Chamber: Judgment, paras. 636-640.
[22] ICC-01/04-01/06-2901, para. 90.

27. The Chamber's finding arises from an erroneous interpretation of the principles applicable to the compensation of accused persons for any prejudice resulting from a violation of their fundamental rights and from a misapprehension of the seriousness of the violation of the Appellant's fundamental rights.

1. Errors of law

28. Firstly, the Chamber errs in law by holding that, given that the period already spent by the Appellant in detention will be deducted from the sentence, he is not entitled to reparation in respect of the numerous violations of his fundamental rights.

29. However, it is established that any violation of the fundamental rights of the accused must give rise to effective reparation.[23] The ICTR and ICTY Appeals Chambers have confirmed that an accused whose rights have been violated is entitled to financial reparations in the event of acquittal or to a reduction in sentence if convicted,[24] notably in a case where the Prosecutor had violated the rights of the accused by breaching his disclosure obligation.[25]

30. That reduction in sentence granted by way of reparation to a convicted person in respect of the violation of his rights is added to the credit for the period already spent in detention,[26] which must be deducted from the sentence passed.[27]

---

[23] ICTR, *The Prosecutor v. Barayagwiza*, No. ICTR-97-19-AR72, *Decision*, 3 November 1999, para. 108; ICTR, *The Prosecutor v. Semanza*, No. ICTR-97-20-A, *Decision*, 31 May 2000, para. 125.
[24] ICTR, *The Prosecutor v. Semanza*, No. ICTR-97-20-A, *Decision*, 31 May 2000, Disposition; *The Prosecutor v. Barayagwiza*, No. ICTR-97-19-AR72, *Judgment* (Application by the Prosecutor for Review or Reconsideration), 31 March 2000, Disposition.
[25] ICTR, *The Prosecutor v. Ndindiliyima*, Case no. ICTR-00-56-T, *Decision on the Prosecutor's Duty of Disclosure*, 22 September 2008, para. 59, and Judgment, 17 May 2011, paras. 2192-2193.
[26] See, for example, ICTR, *The Prosecutor v. Semanza*, No. ICTR-97-20-A, *Judgement*, 20 May 2005, Disposition, p. 130: "ENTERS, Judge Pocar dissenting, a sentence of 35 years' imprisonment, subject to credit being given under Rule 101(D) of the Rules, for the period already spent in detention, and subject to a further six-month reduction as ordered by the Trial Chamber for violations of fundamental pre-trial rights" [emphasis added].
[27] Article 78(2).

31. Furthermore, an individual's conviction cannot warrant the refusal to make reparation for the prejudice caused to him or her in the context of the judicial proceedings having led to that conviction.

32. For example, in *Semanza*, although the Accused had been found guilty on six counts, the Tribunal granted him a six-month reduction in his sentence on account of the violation of his right to be informed of the charges against him and his right to challenge the lawfulness of his detention.[28] Likewise, *Barayagwiza,* the Accused, who was found guilty on five counts, had his sentence reduced from life to thirty-five years' imprisonment on account of similar violations.[29]

33. If follows that reparation of the prejudice caused to the convicted person must entail a genuine reduction in the sentence passed.

34. Secondly, the Chamber erred in law in finding that its rejection of the "Defence Application Seeking a Permanent Stay of the Proceedings"[30] affected the right of the Appellant to seek reparation for the breach of his fundamental rights.[31]

35. For one thing, the Defence relied for the first time on the violation of a fundamental right of the Accused to be tried within a reasonable period in its "*Observations sur la peine*".[32] No decision having the authority of *res judicata* may be relied upon against the Appellant in that connection.

36. For another, the Appeals Chamber will note that in its *Decision on the "Defence Confidential Application Seeking a Permanent Stay of the Proceedings"* of 23 February 2011, the Trial Chamber made no finding as to the actuality of the

[28] ICTR, *The Prosecutor v. Semanza*, Case No. 97-20-T, *Judgement and sentence*, 15 May 2003, para. 580.
[29] ICTR, *The Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, *Decision (Prosecutor's request for review or reconsideration)*, 31 March 2000, paras. 54 and 62; and *Judgement and sentence*, 3 December 2003, para. 1107.
[30] ICC-01/04-01/06-2657-tENG.
[31] ICC-01/04-01/06-2901, para. 90.
[32] ICC-01/04-01/06-2891.

violations alleged by the Defence in its observations on sentencing, or their extent. The Chamber merely held that "it is unnecessary, at this point, for the Chamber to reach any decision as to the various factual issues raised on this aspect of the application; accepting, for the sake of argument, the defence submissions at their highest, this is not a situation in which, as an exercise of judgment, a stay of proceedings is called for. The alleged failings on the part of the prosecution can be addressed as part of the ongoing trial process."[33]

37. In any event, the Chamber could not reasonably hold that the threshold of seriousness that must be reached in order to give rise to a permanent stay of proceedings would be identical to that giving rise to entitlement to reparation of the damage incurred by the Accused for violation of his fundamental rights.

2. Errors of fact

38. The impugned decision holds that "the Chamber has already considered, and rejected, an abuse of process challenge brought by the Defence in relation to many of the abovementioned issues and in any event it does not find that these factors merit a reduction in Mr Lubanga's sentence".[34]

39. The Appeals Chamber will note that, contrary to the findings of the Chamber, a number of fundamental rights of the Appellant were violated by the Prosecutor, thus granting the Appellant the right to effective reparation, thereby reducing his sentence.

40. The following fundamental rights of the Appellant were violated:

- The right to have access to all that is necessary for the preparation of the defence;

- The right to be tried within a reasonable time pursuant to article 67(1)(c);

[33] ICC-01/04-01/06-2690, para. 213.
[34] ICC-01/04-01/06-2901, para. 90 [emphasis added].

- The right to fair treatment.

2.1 The preparation of the defence was materially affected

41. In breaching his investigation and disclosure obligations, the Prosecutor deprived the Appellant of the means afforded to him to prepare and mount his defence.

42. The impugned decision finds that the Prosecutor deliberately neglected to fulfil his obligations with respect to investigations.[35]

43. In seeking to "establish the truth", however,[36] the Prosecutor is obliged to investigate "incriminating and exonerating circumstances"[37] and must scrupulously ensure that the evidence he intends to submit at trial is reliable.

44. This obligation to investigate exonerating circumstances is based on the principle that the Prosecutor is not simply a party in the trial, but is vested with the mandate to act impartially in the search for the truth on behalf of the Court and all of the parties and participants.[38] A corollary thereto is the Prosecutor's obligation of impartiality, often recalled by the ad hoc tribunals.[39]

45. One of the reasons underpinning this obligation is that the Defence is not afforded the same resources, authority, or institutional support as the Prosecutor to conduct its investigations. Given the scope and difficulty of the necessary investigations, which are beyond the Defence's capabilities, this

---

[35] *Judgment*, para. 482.
[36] Article 54(1)(a).
[37] *Idem*.
[38] See, *inter alia*, Cassese, A., Gaeta, P., Jones, J.R.W.D., *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, vol. 2, pp. 1164-1165. ICTY, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, *Decision on Communications Between the Parties and their Witnesses*, 21 September 1998, p. 3 para. ii). See also ICTR, *The Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, *Judgement*, AC, 31 March 2000, *Separate Opinion of Judge Shahabuddeen*, para. 68; STL, *Order regarding the detention of persons detained in Lebanon in connection with the case of the attack against prime minister Rafiq Hariri and others*, Case no. CH/PTJ/2009/06, Pre-Trial Judge, 29 April 2009, para. 25.
[39] ICTY, *Prosecutor v. Zoran Kupreškić et al., Decision on Communications Between the Parties and their Witnesses*, Case No. IT-95-16-T, 21 September 1998, p. 3.

obligation to investigate exonerating circumstances effectively and impartially is an essential condition for a fair trial.[40]

46. Under article 67(2), this obligation extends to searching for any evidence which "shows or tends to show the innocence of the accused or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence". More generally, this obligation refers to all evidence which, when examined, may help to resolve a factual issue in favour of the accused.[41]

47. The rights of the Defence both during the examination of Prosecution witnesses and as regards the presentation of exculpatory evidence can only be effectively and efficiently exercised if all the available evidence has been actively sought by the Prosecutor and then disclosed to the Defence in good time.

48. In the instant case, the Prosecutor has seriously failed in his obligation to investigate "incriminating and exonerating circumstances", particularly by deliberately neglecting to verify the identity and civil status of the witnesses called to appear and to ascertain the credibility of their statements,[42] and by using documents which were submitted by intermediaries and lacked any guarantees of reliability.[43]

---

[40] ICC-01/09-02/11-382-Red (*Muthaura, Kenyatta et Ali*), *Dissenting Opinion by Judge Hans-Peter Kaul,* para. 50-51.

[41] ICC-01/04-01/06-1311-Conf-Anx1, para. 94: "If the real possibility exists that this evidence may contribute to a resolution of material factual issues in the case in favour of the accused, he is to be provided with it, once protective measures, if relevant, have been implemented."

[42] As the Chamber underlined, the Prosecutor did not search the Independent Electoral Commission database, having assumed that children were not registered in the electoral lists: see transcript of the deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, p. 21 lines 18-19; and *Judgment*, para. 175; furthermore, the investigators did not seek to obtain the school records of the alleged child soldiers in order to cross-check their ages and their enrolment (see *Judgment*, paras. 161, 173 and 174); furthermore, P-0582 did not attempt to go to the schools where the relevant individuals had indicated they had been enrolled (see *Judgment*, para. 174).

[43] In this regard, the Defence refers to its arguments in its "Defence Application Seeking a Permanent Stay of the Proceedings": ICC-01/04-01/06-2657-Conf-tENG, paras. 245-247.

- *The Defence was compelled to devote most of its resources to demonstrate the fraudulent conduct of the intermediaries of the Office of the Prosecutor.*

49. The impugned decision holds that the Prosecutor particularly neglected to exercise his investigation duty, *inter alia,* by failing to verify and scrutinise the evidence prior to tendering it into evidence.[44]

50. The Chamber noted that the Prosecutor's failure to oversee his intermediaries and to verify the incriminating evidence resulted in the Prosecutor presenting before the Chamber testimonies which could not be safely relied upon due to a risk of fraudulent conduct by his intermediaries.[45]

51. The Chamber underlined, *inter alia*, that, as regards the witnesses portrayed as former child soldiers, the Prosecutor did not consult the archives of the civil registry or of the Independent Electoral Commission,[46] did not verify the educational background of these witnesses,[47] and did not try to establish contact with members of their family[48] or community[49] to verify the information provided by these witnesses. The Chamber also noted that the Office of the Prosecutor did not take the necessary measures to establish the children's age through objective evidence.[50]

52. The Chamber thus finds that the Prosecutor's failure to investigate the past of the alleged child soldiers has significantly undermined some of the evidence called by the Prosecution.[51] It further finds that "the Prosecution's negligence in failing to verify and scrutinise this material sufficiently before it was introduced led to significant expenditure on the part of the Court".[52]

---

[44] Judgment, para. 482.
[45] The Chamber noted that the lack of proper oversight of the intermediaries' work made it possible for them to take advantage of the witnesses they contacted. *Judgment*, paras. 482-483.
[46] See *supra*, footnote 42.
[47] *Idem*.
[48] Judgment, para. 160. It is also noted that the investigators did not speak with their families to arrange interviews with the children (*Judgment*, para. 172).
[49] Judgment, para. 173.
[50] Judgment, paras. 170-171.
[51] Judgment, para. 175.
[52] Judgment, para. 482.

53. Having noted that the presentation of this evidence led to significant expenditure on the part of the Court,[53] the Chamber could not reasonably disregard the fact that the presentation of this evidence also resulted in the mobilisation of most of the Defence's extremely limited resources.

54. In fact, to demonstrate the mendaciousness and fraudulent nature of these testimonies, and the fraudulent conduct of the intermediaries of the Office of the Prosecutor,[54] the Defence called 16 witness (out of 24) to testify and presented approximately 910 (out of 992) pieces of evidence. In addition, it prepared the examination of 5 Prosecution intermediaries and investigators. The Defence presented, *inter alia*, 41 pieces of evidence and called 4 witnesses to demonstrate the fraudulent nature of the testimonies of the 3 victims called to testify in the case.[55]

55. Thus, 20 out of 24 witnesses (83%) called by the Defence and approximately 950 out of 992 (97%) pieces of evidence presented by the Defence were used for the sole purpose of demonstrating the mendaciousness and fraudulent nature of many of the Prosecution witnesses, and the fraudulent conduct of the intermediaries of the Office of the Prosecutor and the 3 participating victims.

56. The Defence was thus compelled to use most of its resources to compensate for the Prosecution's failure to conduct investigations.

57. The Defence would never have been placed in such a situation had the Prosecutor conducted thorough investigations. In fact, in-depth investigations would either have precluded the Prosecutor from calling these witnesses or, in any event, caused him to collect exonerating evidence which, once disclosed, would have allowed the Defence to demonstrate the mendaciousness of the

[53] Judgment, para. 482.
[54] Intermediaries P-0143, P-0316, P-0321 and P-0031 and Witnesses P-0089, P-0007, P-0008, P-0010, P-0011, P-0157, P-0213, P-0293, P-0294, P-0297, P-0298 and P-0299.
[55] Victims a/0225/06, a/0229/06 and a/0270/07. Findings on this issue: *Judgment*, para. 502.

witnesses' statements, without having to devote most of its resources to this purpose.

- *The Prosecutor's late disclosure of exonerating evidence or of material necessary for the preparation of the defence of the Appellant was irreparably prejudicial to the Defence.*

58. The Accused's right to receive disclosure of potentially exculpatory evidence is absolute and constitutes a major prerequisite for a fair trial.[56] The Chamber ruled that the Prosecution is under an obligation to disclose potentially exculpatory material as soon as is practicable throughout the trial period, as is required by article 67(2) of the Statute,[57] as well as any rule 77 evidence, that is, any and all evidence that is material to the preparation of the defence,[58] be it internal communication within the Office of the Prosecutor, investigator's notes, or any other type of documents.[59] The Prosecutor must expeditiously fulfil his disclosure obligations throughout the trial.[60]

59. The Chamber has had cause to state on several occasions that the Prosecutor had been considerably late in fulfilling his statutory disclosure obligations in this case.[61]

60. On 5 February 2010 and 9 March 2010, the Defence provided to the Chamber a summary of disclosures for the period from 30 October 2009 to 5 February 2010, setting out the reasons for which it considered such disclosures to be late and the resultant prejudice to the Accused.[62]

---

[56] ICC-01/04-01/06-1311-Anx1, para. 94; ICC-01/04-01/06-1401, para. 77.
[57] ICC-01/04-01/06-1019, para. 28; ICC-01/04-01/06-1486, para. 42.
[58] ICC-01/04-01/06-1433, paras. 2, 77, 79-81.
[59] T-334-CONF-FRA-ET, p. 73, lines 8-19.
[60] ICC-01/04-01/06-2624, para. 20.
[61] T-99-FRA-ET, p. 4, lines 9-25; T-104-FRA-ET, p. 12, lines 2-16, and T-239-CONF-FRA-CT2, p. 6, lines 2-18.
[62] E-mails (and annexes) from the Defence addressed to the Chamber on 5 February 2010 at 16.27 and on 9 March 2010 at 15.57. Since February 2010, the Defence has received disclosure of a considerable number of documents which, in the Defence's view, should have been disclosed much earlier by the Office of the Prosecutor. Given the volume of such disclosures, the Defence cannot prepare an exhaustive list; however, it is submitting some illustrative examples to the Chamber. See: Annex 3 to

61. Furthermore, it was demonstrated on numerous occasions that the Office of the Prosecutor had misapprehended its disclosure obligations. Far from considering itself duty-bound to disclose exculpatory material in its possession to the Defence, the Prosecution's behaviour throughout the trial and to date shows that it discretionarily determined whether to make such disclosures.[63]

62. Three examples clearly illustrate the Office of the Prosecutor's misapprehension of its disclosure obligations:

63. The first example concerns the disclosure of information pertaining to a witness who claimed to be a former bodyguard of the Accused. Although the Defence had started presenting its evidence on 27 January 2010, the record of the Prosecution's interview with this witness was only disclosed on 21 October 2010. On this point, the Defence refers to its observations presented in its "Defence Application Seeking a Permanent Stay of the Proceedings" and to the grounds of appeal set out in its appellate brief against the *Judgment pursuant to Article 74 of the Statute* filed today.[64]

64. The second concerns the complete list of FPLC soldiers dated 11 December 2004 and signed by the Chief of Staff.[65] This document is of crucial importance in the instant case, firstly because it is apparently the only document of this nature in the case record and, secondly because it is drafted by one of the alleged co-perpetrators of the Appellant.

"Mr Thomas Lubanga's appellate brief against the 14 March 2012 *Judgment pursuant to Article 74 of the Statute*".

[63] See, *inter alia*, DRC-D01-0003-5985. E-mail from the Office of the Prosecutor to the Defence dated 25 October 2012 which justifies the disclosure of a potentially exculpatory document as "a courtesy". The Defence has sought leave to introduce this item of evidence at the appeals stage: ICC-01/04-01/06-2942-Conf-tENG, Annex 8, p. DRC-D01-0003-5987.

[64] ICC-01/04-01/06-2657-Conf-tENG, paras. 279-281 and the appellate brief against the *Judgment pursuant to Article 74 of the Statute*, paras. 70-75.

[65] DRC-OTP-0141-0009. The Defence has sought leave to tender this evidence at the appeals stage: ICC-01/04-01/06-2942-Conf, paras. 29-41 and Annex 7.

65. However, although this list had been in the Prosecutor's possession since 10 February 2006,[66] it was only disclosed to the Defence on 29 October 2012, long after the trial had ended and more than 6 years after it was obtained by the Prosecutor, and solely because the Defence specifically requested it.

66. And yet this list would have been essential to the preparation of the Appellant's defence. It could have been used by the Defence in its cross-examination of certain Prosecution witnesses who claimed to have been members of the FPLC, at least until December 2004. Moreover, this list corroborates the testimonies of certain Defence witnesses by confirming their presence within the ranks of the FPLC in December 2004.[67] Furthermore, the Defence was denied an opportunity to examine D-0037 on the precise circumstances surrounding the preparation of this list, since D-0037 served as private secretary to its signatory.[68] The list could also have been highly material to the investigations of the Defence, helping it, *inter alia,* to locate former FPLC soldiers.

67. Finally, since the identity of Intermediary P-0143 was only disclosed at an advanced stage of the Defence case, the Defence was unable to investigate this individual, in particular his ties to other witnesses and intermediaries whom the Chamber, in the final analysis, deemed to be credible (for example, P-0030).

68. It follows from the above submissions that the conduct of the Office of the Prosecutor seriously affected the Appellant's capacity to respond to the charges brought against him. The prejudice resulting from the loss of time and resources to which the Accused is, in principle, entitled to prepare and mount his defence is irremediable, and can be repaired, in the event of a conviction,

[66] See metadata for DRC-OTP-0141-0009.
[67] Including Witnesses D-0037 (whose name features on page DRC-OTP-0141-0009, line 7 of the list) and D-0006 (whose name features on page DRC-OTP-0141-0110, line 24 of the list).
[68] T-349-FRA-ET, p. 7, lines 25-27; p. 8, lines 8-12.

only if it is given effective consideration during the sentencing stage of the proceedings.

2.2 Violation of the right of the Accused to be tried without undue delay, guaranteed by article 67(1)(c)

69. The instant case clearly stands out for the sheer number of delays and interruptions that have plagued it. Most of them occurred because of the Prosecutor's flagrant breach of his statutory investigation and disclosure obligations, as noted by the Chamber.

70. The Prosecutor's breach of these obligations prompted the Trial Chamber to stay the proceedings on two occasions, giving rise to considerable delays in the case that added up to a total of 252 days:

- The Trial Chamber stayed the proceedings in June 2009 for 5 months (159 days), after noting that the Prosecution had incorrectly used article 54(3)(e), thereby breaching many of its obligations;[69]

- The Chamber ordered a second stay of proceedings on 8 July 2010 on account of the Prosecutor's material non-compliance with the Chamber's disclosure orders.[70] Proceedings resumed following an Appeals Chamber judgment handed down after a stay of 3 months (93 days).[71]

71. During these stays of proceedings, Mr Lubanga remained in detention, although his release had initially been pronounced by order of Trial Chamber I.[72]

---

[69] ICC-01/04-01/06-1401, para. 92.
[70] ICC-01/04-01/06-2517-Conf, para. 31.
[71] ICC-01/04-01/06-2582 OA18.
[72] ICC-01/04-01/06-1418 and T-314-FRA-ET, p. 20, line 2 *et seq*. The execution of these two decisions was stayed by the Appeals Chamber pending the outcome of the appeal against them. See ICC-01/04-01/06-2536 and ICC-01/04-01/06-1423 OA12.

72. Although these stays of proceedings were ordered on the grounds of protecting the rights of the Accused,[73] it is impossible to ignore the fact that they considerably extended the duration of the case. Consequently, the two stays of proceedings indubitably increased the prejudice suffered by the Appellant with respect to his right to be tried without undue delay.

73. Furthermore, the Chamber confirmed that the delays in the disclosure of the Prosecution's exculpatory and rule 77 material were considerable for the entire proceedings.[74] Indeed, many delays attributable to the Prosecutor accumulated in the course of the proceedings, *inter alia*: (1) the Prosecutor belatedly requested the implementation of protective measures for witnesses,[75] which led to the postponement of the commencement of the trial from 31 March 2008 to 23 June 2008,[76] a delay of 84 days; and (2) the slowness of the steps taken by the Prosecutor in approaching his sources in order to lift the restrictions imposed by confidentiality agreements caused significant delays.[77]

74. Lastly, the Chamber stated that on account of the Prosecutor's negligence, it "spent a considerable period of time"[78] investigating the false evidence of a large number of Prosecution witnesses.

75. Indeed, laxity in the Prosecutor's investigations led to the appearance of 9 alleged child soldiers[79] and their family members (P-0007, P-0008, P-0010,

---

[73] ICC-01/04-01/06-2517-Conf, para. 31 and ICC-01/04-01/06-1401, paras. 91-92.
[74] ICC-01/04-01/06-2433, para. 43.
[75] "[…] the process for the outstanding 24 witnesses was commenced significantly and unjustifiably late.37 This delay must similarly not be allowed to endanger the accused's right to a fair and expeditious trial." (ICC-01/04-01/06-1019, para. 20, Repeated by the Chamber: ICC-01/04-01/06-1311, para. 81*)* "The consequence of this disagreement over the decisions taken by the Unit, which the Chamber has been asked to resolve at this markedly late stage in the proceedings, is that the disclosure by the prosecution of the non-redacted evidence of the witnesses whose applications to the programme were refused has been delayed, and the prosecution only very recently took steps [REDACTED], or otherwise" [emphasis added], ICC-01/04-01/06-1311-Anx1, para. 80. See also: T-75-FRA-ET, p. 2, and p. 14, lines 21 *et seq*.
[76] ICC-01/04-01/06-1359, para. 17; T-75-FRA-ET, p. 2 *et seq*.
[77] On several occasions, the Chamber has, *inter alia,* mentioned the slowness of the steps taken by the Prosecutor in approaching his sources in order to lift the restrictions imposed by confidentiality agreements as well as the delays which this has caused. See ICC-01/04-01/06-1437, footnote 18.
[78] Judgment, para. 482.

P-0011, P-0157, P-0213, P-0293, P-0294, P-0297, P-0298 and P-299), 4 intermediaries whose conduct or ties to witnesses giving false testimony were deemed suspect (P-0143, P-0316, P-0321 and P-0031),[80] and 3 other witnesses who totally lacked credibility (P-0089, P-0015 and P-0038).[81] In addition to the above witnesses, there also appeared 16 Defence witnesses (D-0002, D-0003, D-0004, D-0005, D-0006, D-0009, D-0012, D-00014, D-0015, D-0016, D-0023, D-0024, D-0025, D-0026, D-0029 and D-0036) and 3 investigators from the Office of the Prosecutor (P-0581, P-0582 and P-0583) whose appearance became necessary to shed light on the investigation methods of the Office of the Prosecutor. Hence, the omissions of the Prosecutor had a considerable impact on the duration of the trial and on the Appellant's time in detention to await the verdict, an additional 77 trial days.

76. It follows that the Prosecutor's negligence alone prolonged Mr Thomas Lubanga's trial by more than 413 days.

2.3 Violation of Mr Lubanga's right to fair treatment

77. Throughout the proceedings, the Prosecutor misrepresented the facts and the conduct of the Accused and made inaccurate statements about the progress of the trial.[82] This constant attitude manifested by the Prosecutor, which is inconsistent with his duty of impartiality,[83] has not changed from 2006 to date. For instance, during a press conference held on 15 March 2012, the day after the judgment in the instant case was handed down, the Prosecutor commended the "child soldiers" who testified in the case, without specifying that the Chamber had set aside their testimonies in its judgment. He further

[79] For recognition of the false nature of their statements, see Judgment, paras. 247, 268, 288, 473, 406, 415, 429 and 441.
[80] Judgment, paras. 221, 373, 450 and 477.
[81] "Mr Thomas Lubanga's appellate brief against the 14 March 2012 *Judgment pursuant to Article 74 of the Statute*", 3 December 2012, paras. 30 and 276-278.
[82] ICC-01/04-01/06-2433, para. 52.
[83] Articles 45 and 67(1).

stated that the Chamber had confirmed that the investigations he carried out were "very good", contrary to the findings of the Chamber.[84]

78. Such misleading statements made by the Office of the Prosecutor are still available on the internet, and this continues to increase the prejudice caused to the Appellant. For example, the interview given by Ms Le Fraper du Hellen remains posted on the internet till date, with no refutation or rectification from the Office of the Prosecutor.

79. The combined effect of all these shortcomings, which are highly prejudicial to the Appellant, should lead the Chamber to recognise the Appellant's right to reparations in the form of a reduced sentence.

THIRD GROUND OF APPEAL: ERROR OF FACT IN APPLYING ARTICLE 78(2) AND REFUSAL TO CONSIDER THE PERIOD SPENT IN DETENTION BY THE APPELLANT IN THE DRC

80. The Chamber erred in fact in finding that it has not been demonstrated on the basis of the most probable hypothesis that Mr Lubanga was detained in the Democratic Republic of the Congo (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 years and using them to participate actively in hostilities.[85]

81. Article 78(2) provides that the Court may, in addition to the time previously spent in detention in accordance with its order, deduct from the sentence "any time otherwise spent in detention in connection with conduct underlying the crime" [emphasis added].

82. This provision reflects the intention of the drafters of the Statute to enable the Chamber to take account of the entire time spent in detention, regardless of

[84] Judgment, para. 482.
[85] ICC-01/04-01/06-2901, para. 102.

whether or not the person was held in custody pending surrender to the Court, so long as such detention originates from conduct related to the crime.[86]

83. Now, in holding that the Appellant had to demonstrate that he was detained for the crime of conscripting and enlisting children aged less than 15 years and using them to participate actively in hostilities, the Chamber failed to take account of the special circumstances of the instant case, namely that: (1) the Appellant was detained arbitrarily from 13 August 2003 to 16 March 2006 by DRC authorities for his activities as President of the UPC/RP from 2002 to 2004; (2) the mode of liability on which the Trial Chamber relied is founded essentially on the Appellant's role as President of the UPC/RP during that same period; and (3) while the Appellant was in arbitrary detention, the Prosecution conducted its investigations against him while maintaining regular contacts with Congolese authorities about these investigations.[87]

1. It is beyond dispute that the Appellant was detained in the DRC from 13 August 2003 to 16 March 2006

84. It has been demonstrated that the Appellant was detained by Congolese authorities from 13 August 2003, initially placed under house arrest at the Kinshasa Grand Hotel and the municipality of Limete, Funa neighbourhood, up to 10 March 2005,[88] and then transferred on 19 March 2005 to the *Centre Pénitentiaire et de Rééducation de Kinshasa* (CPRK), from where he was transferred on 17 March 2006 to the seat of the Court.[89]

---

[86] See *Prosecutor v. Tadić*, Case No. IT-94-1-A and IT-94-1-A *bis*, *Judgement in sentencing appeals*, 26 January 2000, para. 38.

[87] ICC-01/04-01/06-32-AnxB, paras. 20-21.

[88] As stated in the *Decision on the confirmation of charges*, Mr Thomas Lubanga was placed under house arrest on 13 August 2003 by DRC authorities in Grand Hotel, when he travelled on invitation to Kinshasa. ICC-01/04-01/06-796-Conf-tEN-Corr: The Pre-Trial Chamber states at paragraph 199 that Mr Lubanga was placed under house arrest as from 13 August 2003 and that this point has not been challenged by the Prosecutor. See also footnote 267 and paras. 371, 383, and 396. D-0019: T-341-FRA-ET, p. 42, lines 15-17.

[89] ICC-01/04-01/06-53-Conf-Anx5.5. D-0019: T-341-FRA-ET, p. 42, lines 15-17.

85. These periods of house arrest (13 August 2003 to 18 March 2005), and of detention at the CPRK (19 March 2005 to 15 March 2006) were purely arbitrary, thus leading to the violation of Mr Lubanga's fundamental rights: he was never officially informed of the charges against him or brought before a judge.

86. House arrest is a measure involving deprivation of liberty, whereby an individual is forced to live within the confines of a very narrow space such as his/her home, with strictly curtailed freedom of movement. There is no doubt, therefore, that Mr Lubanga was in detention from 13 August 2003 to 19 March 2005, when he was placed under house arrest.

87. The Prosecutor, who had the opportunity of filing a response to the observations of the Defence in his oral submissions on sentencing,[90] did not dispute Mr Lubanga's detention in the DRC from 13 August 2003 to 16 March 2006.

2. Mr Thomas Lubanga was detained in the DRC for conduct underlying the crimes

88. There is no doubt that Mr Lubanga was detained for essentially the same conduct for which he was sentenced by the Chamber, namely his activities as the President of the UPC/RP political and military group from 2002 to 2003.

89. Firstly, it must be emphasised that Mr Lubanga was placed by the Congolese authorities under house arrest (13 August 2003 to 18 March 2005) and in detention at the CPRK (19 March 2005 to 16 March 2006) because of his activities as President of the UPC/RP from 2002 to 2004.

90. For one thing, it emerges from the evidence filed in the case record by the Prosecutor of the ICC and the observations filed before the Court by Congolese authorities that:

[90] T-360-CONF-FRA, p. 33-38.

- Mr Lubanga was placed under house arrest by DRC authorities in Kinshasa in August 2003 as President of the UPC /FPLC;[91]

- Mr Lubanga was initially transferred to the CPRK in March 2005 for "Crimes against State security";[92]

- The DRC authorities conducted no investigations pertaining to Mr Lubanga;[93]

- The Prosecutor considers that "the file [in the DRC] in respect of Thomas Lubanga is empty … it is literally empty";[94]

- The Prosecutor also notes that the allegations made against the Appellant concerned, *inter alia*, "crimes allegedly committed by FPLC troops in the course of or after military attacks from May 2003 onwards".[95]

91. For another thing, the Prosecutor does not dispute the fact that Mr Lubanga was detained in the DRC for conduct underlying the crimes with which he was charged before the ICC.

92. Secondly, the mode of liability charged against the Appellant is based essentially on his role as President of the UPC/RP during this same period.

93. The Chamber held that the Appellant had agreed to, and participated in, the implementation of a plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. The Chamber states that it did not conclude that "[Thomas] Lubanga meant to conscript and enlist boys and girls under the age of 15 into the UPC/FPLC and to use them to

[91] ICC-01/04-01/06-348-Conf, pp. 5-6.
[92] ICC-01/04-01/06-32-US-AnxB1, p. 17/17.
[93] T-1-CONF-FR, p. 7, lines 4-5 (hearing of 2 February 2006); ICC-01/04-01/06-32-AnxB, para. 17.
[94] T-1-CONF-EN, p. 35, lines 7-8 (hearing of 2 February 2006).
[95] ICC-01/04-01/06-32-AnxB, para. 17. Also see ICC-01/04-01/06-32-Conf-AnxB, paras. 7-15.

participate actively in hostilities. Instead, the Chamber decided Mr Lubanga was aware that, in the ordinary course of events, this would occur."[96]

94. The Chamber based its findings pertaining to the "essential contribution" of the Appellant on factual considerations describing "Thomas Lubanga's role in the UPC".[97]

95. In any event, it is telling that the Prosecutor has been discussing the Appellant's case with DRC authorities at least since August 2005.[98]

96. It follows that the Chamber erred in the determination of Mr Lubanga's sentence by failing to take account of the period of his house arrest from 13 August 2003 to 19 March 2005, and his detention at CPRK from 19 March 2005 to 17 March 2006.

BREACH OF ARTICLE 74(2)

97. The impugned decision states that "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".[99] On that basis, the Chamber assumed that it was entitled to consider sexual violence[100] and mistreatment of recruits in determining the sentence that is to be passed, notwithstanding the fact that they did not form part of the confirmation decision.[101]

98. Hence, in evaluating the evidence relevant to the sentence, the Chamber did not only examine new evidence but assumed that it was entitled to take

[96] ICC-01/04-01/06-2901, para. 52.
[97] Judgment, paras. 1141-1223 [emphasis added].
[98] ICC-01/04-01/06-32-AnxB, para. 20, footnote 18.
[99] ICC-01/04-01/06-2901, para. 29.
[100] The Chamber ruled, *inter alia,* that "given the procedural safeguards, there will be no consequential unfairness if the Chamber decides that sexual violence is a relevant factor", ICC-01/04-01/06-2901, para. 68
[101] ICC-01/04-01/06-2901, paras. 59 and 67-68.

account of facts and circumstances which are not expressly set out in the confirmation decision.

99. This finding is inconsistent with the provisions of article 74(2) and constitutes an error of law.

100. Pursuant to article 74(2) "[t]he Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges […]" [emphasis added].

101. This requirement is dictated by the fundamental principle that the accused can be convicted only on the basis of the facts duly notified to him prior to the commencement of the trial and for which he mounted his defence with due regard for his fundamental rights enshrined in article 67.[102]

102. Contrary to the Chamber's determination,[103] this requirement, which does not make a distinction based on the accused's plea of guilty or not guilty, holds for both the verdict determining guilt and the sentencing decision. The "circumstances of the crime" and the "aggravating circumstances", which should be factored into the determination of the sentence pursuant to rule 145, form part of the charges and, as such, must be duly notified to the Accused prior to the commencement of the trial before they can be held against him.[104]

---

[102] ICTR, *The Prosecutor v. Ntakirutimana*, *Judgment*, 13 December 2004, para. 470; ICTY, *Prosecutor v. Kupreskic*, *Judgment*, 23/10/2001, paras. 88 and 114; ICTY, *Prosecutor v. Kvocka et al*, *Judgment*, 28 February 2005, para. 27; ICTR, *The Prosecutor v. Semanza, Judgment*, 20 May 2005, para. 85; see also ICTY, *Prosecutor v. Krnojelac, Decision on the Defence preliminary motion on the form of the indictment*, 24 February 1999, para. 12; ICTY, *Prosecutor v. Krnojelac*, *Decision on preliminary motion on the form of amended indictment*, 11 February 2000, paras. 17 and 18; and ICTY, *Prosecutor v. Brdanin & Talic*, *Decision on objections by Momir Talic to the form of the amended indictment*, 20 February 2001, para. 18; ICTY, *Prosecutor v. Naletilic & Martinovic*, *Judgment*, 3 May 2006, para. 23. ICTR, *The Prosecutor v. Niyitegeka*, *Judgment*, 9 July 2004, para. 195; ICTY, *Prosecutor v. Kvocka et al*, *Judgment*, 28/02/2005, para. 28; ICTY, *Prosecutor v. Simic et al*, *Judgment*, 17 October 2003, para. 120; ICTY, *Prosecutor v. Brdanin & Talic, Decision on objections by Momir Talic to the form of the amended indictment*, 20 February 2001, para. 52.

[103] Judgment, para. 29.

[104] ICTR, *The Prosecutor v. Semanza*, Case No. ICTR-97-20-T, *Judgment and Sentence*, 15 May 2003, para. 570. ICTY, *Prosecutor v. Kunarac et al*, Case No. IT-96-23-T & IT-96-23/1-T, *Judgment*, 22 February 2001,

103. Hence, the "circumstances of the crime" held against the Accused at the sentencing stage must, perforce, feature among the "facts and circumstances" set out in the confirmation decision.

104. Contrary to the Chamber's suggestion,[105] article 76(2) of the Statute does not allow the consideration of new facts which were not duly notified prior to the commencement of the trial but merely allows the presentation of "additional evidence […] relevant to the sentence".

105. Lastly, contrary to the Chamber's assumption, the failure to notify the Accused, prior to commencement of the trial, of the "facts and circumstances" held against him at the sentencing stage precludes the possibility that the Defence has had "a reasonable opportunity to address them".[106] The fact that during the trial, the Defence found itself responding without prior preparation to new accusations exceeding the facts and circumstances set out in the charges does not support the claim that the Defence was able effectively to exercise its rights.

106. However, this erroneous conclusion by the Chamber had no effect on the Appellant's sentence,[107] since the Majority concluded that the evidence does not support a finding beyond reasonable doubt that the sexual violence and mistreatment suffered by the children was widespread or that the Appellant ordered or encouraged their perpetration, that he was aware of them or that they can otherwise be attributed to him in a way that reflects his culpability.

---

para. 850; See also *Prosecutor v. Delalic et al*, Case No. IT-96-21-A, *Judgment*, 20 February 2001, para. 763 *et seq.*; See also: Khan, K. and Dixon, R., *Archbold: International Criminal Courts Practice, Procedure and Evidence*, 2005, Ed. Sweet & Maxwell, paras. 18-49. French Court of Cassation, Criminal Division, 21 November 2000: "[TRANSLATION] Noting articles 593 of the Code of Criminal Procedure, 6 and 13 of the European Convention on Human Rights; Considering that any accused person has the right to be informed in detail of the nature and cause of the charges against him and should be able, subsequently, to defend himself in respect of the various offences ascribed to him as well as each of the aggravating circumstances which may be held against him".

[105] ICC-01/04-01/06-2901, para. 29.

[106] ICC-01/04-01/06-2901, para. 29.

[107] ICC-01/04-01/06-2901, paras. 59 and 69-75.

107. Hence, the Defence does not intend formally to raise this ground of appeal in this brief.

108. Nonetheless, the Defence reserves the right to raise this clear error of law, if appropriate, in response to any ground of appeal which may be submitted by the Prosecutor in response to the Chamber's factual findings in this regard.

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

ADJUDGE AND DECLARE that the Trial Chamber committed errors of fact and law which could affect the length of the sentence in:

- Finding that the crimes attributed to the Appellant were "widespread";
- Finding that it was entitled to take into consideration the widespread nature of the crimes attributed to the Appellant to determine the sentence to be passed against him;
- Ruling that violations of the Appellant's fundamental rights do not justify a reduction of the sentence passed against him;
- Refusing to deduct from the Appellant's sentence the period he spent in detention in the Democratic Republic of the Congo from 13 August 2003 to 17 March 2006;
- Finding that it was entitled to consider facts that exceed the "facts and circumstances" set out in the charges.

SET ASIDE Trial Chamber I's Decision of 10 July 2012;

And

SET ASIDE or REDUCE the sentence handed down against Mr Lubanga.

[signed]

Ms Catherine Mabille, Lead Counsel

Dated this 3 December 2012, at The Hague