Cour Pénale Internationale

International Criminal Court

Original : **English**

No.: **ICC-01/04-01/06**
Date: **17 November 2006**

THE APPEALS CHAMBER

Before: **Judge Georghios M. Pikis, Presiding**
Judge Philippe Kirsch
Judge Navanethem Pillay
Judge Sang-Hyun Song
Judge Erkki Kourula

Registrar: **Mr Bruno Cathala**

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

Public Redacted Document

Prosecution's Response to Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006

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Procedural History

1. Thomas Lubanga Dyilo ("the Appellant") was surrendered and transferred to the Court on 17 March 2006, pursuant to a warrant of arrest issued by Pre-Trial Chamber I on 10 February 2006.[1] The Appellant was served with a copy of the warrant of arrest on 16 March 2006, and was thus informed of the charges against him at that time.[2] The Appellant made his initial appearance before the Court on 20 March 2006.[3]
2. On 23 May 2006, the Appellant filed an "Application for Release".[4] The Prosecution filed the "Prosecution's Response to Application for Release" on 13 June 2006,[5] to which the Appellant filed a Reply on 10 July 2006.[6] Observations on the Application for Release were also filed by the DRC[7] and the representative of victims.[8]
3. On 3 October 2006, Pre-Trial Chamber I issued the "Decision on the Defence Challenge to Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute".[9]
4. The Appellant lodged an appeal against the Decision on 9 October 2006,[10] and filed its substantive "Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006" on 26 October 2006.[11]
5. The Prosecution hereby files its response to the Appeal Brief.[12]

Background – the nature of the Appellant's request and the context of the proceedings

6. The Prosecution agrees with the Appellant that "[t]he ICC is not a human rights court writ large".[13] Unlike human rights courts and bodies, the role of this Court is not to supervise

[1] Decision on the Prosecutor's Application for a warrant of arrest, article 58, ICC-01/04-01/06-8-US-Corr Anx I ("Decision on Arrest Warrant").
[2] See Prosecution's Response to Application for Release, ICC-01/04-01/06-149-Conf, 13 June 2006, paras. 19(iii), 20 and 22, and authorities cited therein.
[3] Order Scheduling the First Appearance of Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-38, 17 March 2006.
[4] ICC-01/04-01/06-121-tEN ("Application for Release"). On 31 May 2006, in response to an order from the Pre-Trial Chamber, the Appellant specifically clarified that the Application for Release was not asking for interim release (ICC-01/04-01/06-131-tEN, p. 2). On 17 July 2006, in response to a further order from the Pre-Trial Chamber, the Appellant "recharacterise[d] the scope of its application as a challenge to jurisdiction" (Submissions Further to the Order of 13 July 2006, ICC-01/04-01/06-197-tEN, p. 3, para. 8).
[5] ICC-01/04-01/06-149-Conf, 13 June 2006 ("Response to Application for Release").
[6] ICC-01/04-01/06-188-Conf-tEN, 10 July 2006 ("Defence Reply to Prosecution").
[7] ICC-01/04-01/06-349-Conf, 17 August 2006.
[8] ICC-01/04-01/06-349, 24 August 2006. These observations were filed pursuant to an invitation of the Chamber (ICC-01/04-01/06-206, 24 July 2006); the Prosecution (ICC-01/04-01/06-401-Conf, 7 September 2006) and the Appellant (ICC-01/04-01/06-406-Conf, 8 September 2006 – "Defence Reply to Victims and DRC") responded.
[9] ICC-01/04-01/06-512 ("the Decision" or "the impugned Decision").
[10] ICC-01/04-01/06-532.
[11] ICC-01/04-01/06-619-Conf ("Appeal Brief").
[12] The Prosecution filed a Request for an Extension of the Page Limit (ICC-01/04-01/06-696 OA4, 13 November 2006). The Appeals Chamber subsequently ruled that the page limit for an appeal against a decision on jurisdiction is 100 pages (01/04-01/06-703 OA4, 16 November 2006).

the activities of State authorities to ensure that domestic proceedings comply with human rights standards, or to provide a remedy to every individual who may have suffered a violation of their rights at the hands of their national state; nor is it the role of this Court to displace the State in relation to the investigation of even the most serious crimes. This Court was created expressly "to put an end to impunity",[14] and the Prosecution submits that this Chamber should resist attempts by the Appellant to change the mandate of this Court.

7. The Prosecution acknowledges and endorses the principle that justice must be done with full respect to the rights of the suspect or accused. However this does not require that the Court provide a remedy – and in particular divestiture of ICC jurisdiction[15] – for violations that occurred outside of its jurisdiction, custody or control, and in respect of separate national investigations or proceedings. This Court does not have the same responsibilities to an individual as does the State, and the Prosecution submits that principles drawn from human rights jurisprudence should be read with these differences in mind.[16] The Court also has an obligation to appropriately respect state sovereignty. The Prosecution submits that the attempt by the Appellant to vest the Court with the responsibility for alleged violations committed not within its jurisdiction, by its agents, or at its direction, should be rejected.

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[13] Appeal Brief, para. 59.
[14] Preamble to the Rome Statute. The Prosecution notes that the Court was also specifically created to perform this task in situations where national judicial systems may not be adequately functioning (see e.g. Article 17).
[15] The Appellant "recharacterise[d] the scope of its application as a challenge to jurisdiction" and specifically asked the Court to divest itself of jurisdiction to try him and to "reject the Prosecutor's criminal proceedings" (ICC-01/04-01/06-197-tEN, 17 July 2006, pp. 3-4). The Appeal Brief seeks no lesser relief, but only asks that the Decision be reversed and that the Appeals Chamber order the immediate release of the Appellant (para. 60).
[16] For example, in *Nikolic*, the ICTY "hesitate[d] to apply this case law [relating to human rights and abductions] automatically *mutatis mutandis* to the issue at hand. Those cases were decided in the specific context of whether a State should be held responsible for the violations of human rights it was duty-bound to respect. Furthermore, in all those cases, the States against which the applications were lodged were themselves involved in the forced abductions of the victims." – *Prosecutor v Nikolic*, IT-94-2-PT, Decision on the Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 113 ("*Nikolic*, Trial Chamber Decision").
These differences are well illustrated by the very authority cited by the Appellant: "Human rights law is essentially born out of the abuses of the state over its citizens and out of the need to protect the latter from state-organised or state-sponsored violence" - Appeal Brief, para. 14, quoting *Prosecutor v Kunarac et al,* IT-96-23&23/1-T, Judgement, 22 February 2001, para. 470. That same judgment went on to recognize "crucial structural differences between these two bodies of law" (human rights and international criminal law), which lead the Chamber to be "wary not to embrace too quickly and too easily concepts and notions developed in a different legal context. Despite these differences, the Appellant refers to States and the Court interchangeably when discussing responsibility for providing an effective remedy –e.g. Appeal Brief, para. 15.
In relation to the analogy that the Appellant seeks to draw at paras. 14-15, the Prosecution notes that criminal law is about the liability of a person for their own actions, including those actions which intentionally made a contribution to a crime committed by another. The Appellant, in this appeal, seeks instead to vest the ICC with responsibility for the actions of an independent actor.

8. The Appellant never discusses the implications of the relief that he seeks: that the Court would be ruling that the violations of his rights were so severe as to justify granting him impunity for the crimes with which he is charged. In making this assessment, the Prosecution submits that the Court should be conscious of the need to maintain "the correct balance ... between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law."[17] It is only egregious violations of the rights of the accused that would serve to divest the Court of jurisdiction:[18] "Apart from such exceptional cases, however, the remedy of setting aside jurisdiction will ... usually be disproportionate."[19]

9. Prior to 14 March 2006, when "execution of the Court's Cooperation Request ... was set into motion",[20] any violations of rights relate solely to the conduct of domestic authorities in respect of the investigation and prosecution of crimes unrelated to the present case and under domestic law.[21] Promptly upon his arrest pursuant to the ICC warrant, the Appellant was informed of the charges against him. He was transferred to The Hague on 17 March 2006, was assigned legal counsel,[22] and made his initial appearance before the Pre-Trial Chamber on 20 March 2006. The Appellant has availed himself of the right to apply for interim release; he has received substantial disclosure of both incriminating and exculpatory materials; the Prosecution has filed a detailed document containing the charges with supporting evidence; a full confirmation hearing under Article 61 is presently

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[17] *Prosecutor v Nikolic*, IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003 ("*Nikolic*, Appeals Chamber Decision"), para. 30; *Prosecutor v Kajelijeli*, ICTR-98-44A-A, Judgement, 23 May 2005 ("*Kajelijeli*, Appeals Judgment"), para. 206. See also *Nikolic*, Trial Chamber Decision, para. 112.
[18] *Kajelijeli*, Appeals Judgment, para. 206.
[19] *Nikolic*, Appeals Chamber Decision, para. 30. The Decision held that the abuse of process doctrine does operate even in the absence of concerted action between the Prosecution and the relevant state. However the remedy must always be proportionate, and an egregious violation of rights should always be required before a Court would consider divesting itself of jurisdiction to try an international crime (see e.g. *Nikolic*, Appeals Chamber Decision, paras. 32-33). In the absence of any link between the Court and the alleged violation, the Prosecution submits that only the most extreme violation of rights would justify denying the Court jurisdiction to prosecute a person for one of "the most serious crimes of concern to the international community as a whole". See further paras. 22-23, below.
[20] Decision, p. 7.
[21] Decision on Arrest Warrant, paras. 38-39. The Prosecution notes that alleged violations of the Appellant's procedural rights since the date of transfer to the Court are the subject of separate proceedings, including the appeal against the Decision on Interim Release. In this case, as confirmed by the findings of the Pre-Trial Chamber, the detention of the Appellant was not initiated by the ICC (as was the case in, for example, *Kajelijeli*, Appeals Judgment,, para. 210), nor did the ICC intervene to prolong the period during which he was detained in the national system without being informed of the charges or brought before a judge (as was the case in, for example, *Prosecutor v Semanza*, ICTR-97-20-A, Decision, 31 May 2000, para. 88; *Prosecutor v Barayagwiza*, ICTR-97-19, Decision, 3 November 1999 ("*Barayagwiza*, 3 November 1999 Decision"), para. 44).
[22] See Désignation de Maître Jean Flamme comme conseil de permanence pour assister M. Thomas Lubanga Dyilo, ICC-01/04-01/06-40, 20 March 2006.

underway. At every step in this procedure, the rights of the Appellant have been scrupulously respected.

First Ground of Appeal – the Chamber made no error in its interpretation or application of the relevant law

10. The interpretation and application of the relevant legal principles in the Decision was correct and reasonable. The Pre-Trial Chamber rejected the Appellant's contention that the initiation of an investigation in a situation and the conclusion of a cooperation agreement *vis-à-vis* that situation,[23] in and of themselves, make the ICC responsible for alleged violations of the rights of a person who is detained in relation to a domestic charge, but who might also subsequently be subject to the jurisdiction of the ICC. The Chamber, having considered the alleged violations, properly determined that the ICC was only responsible for a violation of rights if it was involved in the action that led to that violation. The standard of "concerted action" with the relevant actor is supported by the jurisprudence and is appropriate in these circumstances. Such a requirement is not only correct, but also necessary, for to have accepted the Appellant's assertion would leave the ICC's ability to exercise its jurisdiction hostage to the compatibility of national systems and proceedings, which the Court cannot influence, with international norms.

11. The Prosecution further submits that the Pre-Trial Chamber also properly determined that any violations of the rights of the Appellant in the DRC, prior to 14 March 2006, were not so egregious that to exercise jurisdiction over him would be an abuse of the process of the Court. The Chamber correctly stated the law, consistent with the Statute and the relevant jurisprudence, and exercised its discretion in a manifestly reasonable manner.

The First Aspect – there is no obligation on the ICC to provide a remedy for alleged violations by DRC authorities in relation to investigation of crimes under national law

12. In seeking to attribute to the Court alleged violations of rights that occurred prior to his arrest and surrender for the present crimes, the Appellant consistently ignores the context of the jurisprudence on which he relies. The Appellant further never cogently explains why the standard of "concerted action" adopted by the Pre-Trial Chamber is incorrect.[24]

13. The authorities cited in the Appeal Brief do not support the legal principles asserted by the Appellant, which rely on a substantial expansion of existing legal principles; nor do they

[23] See e.g. Defence Reply to Prosecution, para. 12; Defence Reply to Victims and DRC, para. 16.
[24] At most, the Appellant observes that certain authorities cited in the Decision involved a different factual scenario, and claims that the legal standard has allegedly evolved.

contradict or demonstrate any error in the Decision. In contrast, the history and context of the Statute, and Article 55 in particular, demonstrates the opposite proposition to that advocated by the Appellant: that the ICC was not intended to supervise national investigations, and that the ICC would only be responsible for (and therefore have an obligation to provide a remedy for) violations of rights of a person in an investigation by the ICC, which includes actions of national authorities committed in concerted action with the ICC.

14. The Statute sets out that an individual has rights under it "[i]n respect of an investigation under this Statute".[25] This both extends the scope of the rights of a person (beyond investigative activities of the Prosecutor directly and to include steps taken by other authorities at its behest), and also limits it (those steps must be for an investigation under the Statute). Commentaries to the Statute confirm what a plain reading suggests – rights under Article 55 attach primarily in respect of actions of the ICC Prosecutor, and also of national authorities where they are performed pursuant to a formal request for cooperation under Part 9 of the Statute.[26] The detention of the Appellant in the DRC prior to 14 March 2006 was pursuant to neither.

15. The Appellant attempts to stretch this provision beyond its natural and contextual meaning,[27] and to effectively impose upon the ICC a duty, or vest an authority, to judge the propriety of every investigation by national authorities of conduct which might be classified as an international crime even when the ICC is not investigating that conduct itself. This proposition, however, runs contrary to the drafting history of the Statute, which demonstrates that States were at pains to ensure that the ICC did not become a court of appeal, assessing the quality of national actions (with the exception of determinations on complementarity).[28] The interpretation proposed by the Appellant leads to absurd

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[25] Article 55(1).

[26] "those rights [Article 55(1)] are granted to anybody during an investigation by the organs of the ICC, or by other bodies acting at the request of the ICC" – Zappala, *Human Rights in International Criminal Proceedings* (2003), p. 80 (later referring to "during an investigation by the ICC." – p. 81); see also Zappala, "Rights of Persons during an Investigation", in Cassese et al (eds) *The Rome Statute of the International Criminal Court* (2002) at p. 1200. This interpretation is actually supported by the ICTR case which the Appellant cites. The reference to "the international division of labour in prosecuting crimes must not be to the detriment of the apprehended person" (Appeal Brief, para. 12, citing *Kajelijeli*, Appeal Judgment, para. 220) referred to the state arresting a person at the specific request of the ICTR (para. 210), and the fact that where two entities work together to carry out a task, then both are responsible for safeguarding the rights of the individual in question (see e.g. para. 221). This also supports the Pre-Trial Chamber's position that in cases of "concerted action", violations may be at least partly attributable to the ICC as well as to the state.

[27] Appeal Brief, paras. 12-13.

[28] See para 49 and footnote 91, below. See further Holmes, "The Principle of Complementarity", in Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999), at 68.

conclusions at both ends of the spectrum: the ICC would be responsible for violations by national authorities during investigations in which it had no involvement and over which it had no control;[29] and national authorities would be in violation of the Statute if they did not comply with "such procedures as are established in this Statute"[30] for detention in respect of a purely domestic investigation, simply because the conduct being investigated by the State might also fall within the scope of an ICC investigation.

16. The crux of the Appellant's argument seems to be that "the responsibility of an organization may be triggered by aiding/abetting/benefiting from/or perpetuating a continuing breach".[31] The Pre-Trial Chamber did not accept the Appellant's submissions, which he merely repeats without any showing of error. The Prosecution submits that neither the Prosecution nor any other organ of the Court aided or abetted any alleged violation of the Appellant's rights at the hands of the DRC authorities in respect of those national investigations and charges, and that accordingly this principle has no relevance to this appeal. As stated above, the rights of the Appellant have been scrupulously respected since he was surrendered to the jurisdiction of the ICC, and accordingly there has also been no "perpetuati[on of] a continuing breach".

17. The Prosecution further submits that the assertion that an organization takes responsibility for violations of the rights of an individual by "benefiting from" those violations is not supported by the authorities cited in the Appellant's pleadings.[32] The Appellant never clearly articulates the benefit gained by the Court. If the "benefit" meant by the Appellant is merely that his custody in the DRC, on domestic charges, allowed him to be surrendered immediately to the ICC, then the only "benefit" gained by the Court is that the Appellant

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[29] The Appellant's reference to the ECHR case of *Illascu and others v Moldova and Russia*, to support the proposition that the Prosecution was obliged to "endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention" (para. 13) is another example of the Appellant misrepresenting a legal principle by ignoring the context in which the statement of principle was made. That statement was made in the context of the obligation on Moldova to attempt to secure the rights of persons within their territory, but in an area which was *de facto* under the control of separatists. The obligation was based on the formal jurisdiction over the persons and specific obligations under the ECHR. The Prosecution submits that this is also the proper interpretation of the Human Rights Committee *General Comment 31* (cited at Appeal Brief, footnote 28).

[30] Article 55(1)(d).

[31] Appeal Brief, para. 12.

[32] This proposition was initially raised by the Appellant in the context of the abuse of process doctrine, where "even if a state may not, in the true sense, be held liable for violations" (Application for Release, para. 33). Furthermore the three ECHR cases cited in support of this proposition by the Appellant (*Mansur v Turkey*, *Kalashnikov v Russia* and *Illascu and others v Moldova and Russia*) refer to a continuing action by the same State which breached obligations under the Convention but had commenced prior to the Convention coming into force for that State. These cases have no bearing on the liability of one entity for alleged breaches by another entity, and certainly do not support an assertion that such liability is made out by "benefiting from" a breach in some unspecified way.

would been deprived of an opportunity to attempt to evade its jurisdiction.[33] Leaving this aside, the Prosecution acknowledges that States may have an obligation not to encourage breaches of certain *erga omnes* norms, including by not benefiting from such breaches.[34] However the Prosecution submits that even this does not vest the second State with responsibility for the original breach.[35] The Prosecution submits that to impose such responsibility for the purpose of ousting the Court of jurisdiction, in the circumstances of this case, would constitute a major expansion of the existing law on the responsibility of international organizations. Furthermore, international criminal law already has a process for dealing with such situations: where a court or tribunal has taken custody of an individual as a result of alleged violations of his rights by a third party, any purported benefit gained is properly addressed by considering whether the exercise of that jurisdiction is an abuse of process, as the ICTY did in *Nikolic*[36] and as the Pre-Trial Chamber did in this Decision.

18. In seeking to attack the reasoning of the Pre-Trial Chamber, the Appellant creates artificial distinctions. The Appellant mistakenly contends the ECHR cases relied upon in the Decision are inapplicable, for example, because they relate primarily to extradition law and state sovereignty.[37] The cases relied upon by the Pre-Trial Chamber considered alleged violations of Article 5(1) of the ECHR – protection against unlawful detention – and dealt specifically with the circumstances under which an alleged violation of rights through unlawful detention by the sending state leads to an obligation on the receiving

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[33] The Prosecution notes that the Appellant, in his "Defence Appeal Against the 'Décision sur la demande de mise en liberté proviso ire de Thomas Lubanga Dyilo", complained that the Pre-Trial Chamber failed to take into account whether he would have voluntarily surrendered to the Court, and complained that he was not able to surrender voluntarily (ICC-01/04-01/06-618, 26 October 2006, para. 60).

[34] For example, a violation on the prohibition of torture: *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2005] UKHL 71 para. 34. The Prosecution notes that in respect of evidence obtained under torture, this would be inadmissible before this Court under Article 69(7).
The Prosecution also notes, however, that this principle of responsibility is based on the positive obligations owed by States, and cannot necessarily be applied mutatis mutandis to international organizations, to which different principles of responsibility apply – this was emphasized in the Draft Articles On State Responsibility With Commentaries Thereto Adopted By The International Law Commission On First Reading (1996), pp. 68-69, Article 13 para. (9). Furthermore, the House of Lords referred to the *jus cogens* nature of the prohibition of torture (at paras. 33, 34). Prosecution submits that alleged violations of the rights of the accused in this instance do not rise to the level which has triggered responsibility even as against States for benefiting from the violation.

[35] Indeed, the Appellant acknowledged as much – see footnote 32, above.

[36] *Nikolic*, Trial Chamber Decision, 9 October 2002. In that case, the Chamber considered "whether the fact that SFOR and the Prosecution, in the words of the Prosecution, became the 'mere passive beneficiary of his fortuitous (even irregular) rendition to Bosnia' could, as the Defence claims, amount to an 'adoption' or 'acknowledgement' of the illegal conduct "as their own" (para. 66). The Chamber held that there was no adoption of the prior illegal activity by merely benefiting from it (para. 67), and therefore went on to consider whether the exercise of jurisdiction would nonetheless constitute an abuse of process. See discussion of this issue at paras. 21-25, below.

[37] Appeal Brief, para. 9.

authority to remedy that violation,[38] the very point in issue. The Prosecution submits that none of the Appellant's submissions detract from the applicability of this jurisprudence, and the principles distilled from it by the Chamber, for the purposes of attribution of alleged violation of rights between successive but distinct detaining authorities.

19. The cases from the international criminal tribunals cited in the Decision and in the Appeal Brief not only do not support the Appellant's submissions, but actually suggest that activities by national authorities will only be attributable to (and therefore necessarily require a remedy from) an international tribunal where that international tribunal has had sufficient involvement in, or responsibility for, the violations.[39]

20. Finally, the analogy that the Appellant seeks to draw between the ICC/DRC and the ICTY/SFOR relationships[40] is also not appropriate and ignores the manifestly different

[38] *Stocké v Germany* considered whether the German government could be held liable for unlawful activities of an informer outside of Germany, which went beyond the scope of the agreed cooperation between the government and that informer (see e.g. paras. 51, 54); *Altmann (Barbie) v France* considered whether the continued detention of a person by French authorities could be rendered unlawful by the manner in which he was treated by Bolivia, and the level of involvement of France in his expulsion (on valid legal grounds) from Bolivia. Further ECHR cases cited by the Appellant attempting to demonstrate that "concepts of state responsibility for enforcing human rights and providing a remedy have significantly evolved" (Appeal Brief, para. 11 and footnote 26) are not relevant to the issue in these proceedings. *Ocalan v Turkey* considered whether the interception of the applicant before being arrested was a result of acts by Turkish officials that violated Kenyan sovereignty and international law: failing to find any such violation the Court concluded that the arrest and detention were in accordance with "a procedure prescribed by law" (see in particular paras. 93-99). *Soering v UK* related to the obligation of a state not to send someone to a jurisdiction where there existed a real risk that their rights would be violated; it has no relevance to questions of under what circumstances an authority can be held liable for violations in a separate state committed prior to the person being transferred into its custody. The Prosecution submits that there is a fundamental difference between these two principles, and submits that other cases relating to the responsibility of a State or organization not to send a person to a jurisdiction where his rights may not be respected (such as *Prosecutor v Todovic*, IT-97-25/1-AR11*bis*, Decision on Todovic's Appeals Against Decisions on Referral under Rule 11*bis*, 6 September 2006, cited in Appeal Brief, footnote 30) are not relevant to the instant appeal. The same principle applies to *Council of Europe Parliamentary Assembly Resolution 1433* (Appeal Brief, footnote 27), which obliges States not to send a person to a jurisdiction where their rights will be violated, or actively assist and participate in an ongoing violation of those rights; but has nothing to do with secondary responsibility for past violations by other parties.

[39] In *Rwamakuba*, the Chamber had no jurisdiction to assess the legality of the detention in Namibia because the Namibian authorities had not acted upon a formal request from the Prosecutor and the Prosecutor did not ask for the continued detention of the Accused on behalf of the Tribunal (ICTR-98-44-T, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, 12 December 2000, at paras.22-23, 27, 30, 33 and 45). In *Semanza*, the ICTR Appeals Chamber similarly addressed only periods of detention which were specifically pursuant to a request of the Tribunal (ICTR-97-20-A, Decision, 31 May 2000, see e.g. paras. 81, 88 and 101). The case of *Kajelijeli* also dealt with a scenario where the accused "was arrested at the request of the Tribunal's Office of the Prosecutor" (ICTR-98-44A-A, Judgement, 23 May 2005, para. 210; see also para. 223, 232). The one case which unequivocally involved a violation of rights without the involvement of the Tribunal, *Prosecutor v Nikolic*, IT-94-2, the challenge to jurisdiction and appeal was dismissed. The sole mention of the illegal nature of his initial arrest in the Sentencing Judgement, 18 December 2003, was in the procedural history.

[40] Appeal Brief, para. 10.

contexts. The DRC authorities are not the "police force" of the ICC.[41] The relationship is like that between the ICTY or ICTR and a national state, to which the tribunal could make a request for cooperation: it is based on an obligation on an independent entity to cooperate, not a "functional" relationship of control.[42]

The Second Aspect – the doctrine of "abuse of process" was properly applied

21. In respect of this second aspect of the first ground of appeal,[43] the Prosecution submits that the Appellant has similarly failed to demonstrate any error on the part of the Pre-Trial Chamber. The manner in which the Pre-Trial Chamber exercised its discretion on whether in all the circumstances it would constitute an abuse of process to exercise jurisdiction over the Appellant[44] was entirely reasonable and consistent with established jurisprudence. The Prosecution submits that the treatment of the Appellant, on the basis of the facts found in the Decision, does not approach the level of egregious abuse which could conceivably justify a ruling that an international tribunal was barred from exercising jurisdiction over the Appellant for the serious international crimes with which he is charged.

22. The Prosecution agrees with many of the statements of the law in the Appeal Brief. Whether the violations of the rights of a person would render the exercise of jurisdiction an abuse of process indeed "depends on the circumstances of each case".[45] This requires that the Chamber balance all the relevant factors,[46] such as the nature of the violation of the rights of the person, which can include the cumulative effect of the alleged violations of rights,[47] and also the seriousness of the crimes with which they are charged and the interest of the international community in ensuring accountability for serious violations of

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[41] Nor is the relationship "the analogue [to] the relationship between the police force, the prosecuting authority and the courts." (Appeal Brief, para. 10, quoting *Prosecutor v Todorovic*, Decision of 18 October 2000). See further, paras. 26-43, below on the nature of the relationship between the Prosecution and the DRC.

[42] Swart affirms that the co-operation system in the Statute is "a mixture of the 'horizontal' and the 'vertical'" which, because of its consensual character, is "more akin to the structure of inter-State cooperation" than to the system of the *ad hoc* tribunals based on Chapter VII of the UN Charter. Regarding the Court's control over co-operating authorities, the author remarks that "while the Statutes of the *ad hoc* Tribunals confer a general power on the Tribunals to review national procedures for providing assistance and to pass judgement on the question of whether they satisfy their needs, Articles 88, 93, and 99 of the Statute leave more discretion to the States Parties in determining how requests for assistance will be handled" ("General problems", in Cassese *et. al.* (eds.), *The Rome Statute of the International Criminal Court: a Commentary* (2002), at 1594-1595); see further Kress et al, "Part 9", in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999), p. 1049.

[43] Appeal Brief, paras 16-21.

[44] See e.g. *Kajelijeli*, Appeal Judgment, para. 206.

[45] Appeal Brief, para. 19.

[46] *Nikolic*, Trial Chamber Decision, para. 112.

[47] Appeal Brief, para. 20. See further, paras. 57-61, below.

international humanitarian law.[48] The Prosecution also acknowledges that there is no strict requirement that the violations in question necessarily be directly connected with the arrest and surrender process.[49] The Prosecution submits, however, that the proximity or relationship between any alleged violations, and the nature of the jurisdiction being exercised, is one circumstance that must be considered by the Court in exercising its discretion whether the prosecution of a person would be an abuse of process.[50]

23. None of these elements are however inconsistent with the general statement of legal principle in the Decision.[51] The Pre-Trial Chamber accurately noted that "to date" the cases in which this question has arisen in the context of international crimes and tribunals have "in some way related to the process of arrest and transfer". The Pre-Trial Chamber also correctly noted that "serious mistreatment", or torture, is required for a Court to divest itself of jurisdiction over such serious crimes. This is entirely consistent with the established jurisprudence, which refers to "an accused [being] very seriously mistreated"[52] or "egregious violations of the rights of the Accused".[53]

24. Moreover, the Appellant has failed to demonstrate, or even to raise any argument, that the Pre-Trial Chamber erred in the exercise of its discretion in this case:[54]

- The Appellant implies that the Pre-Trial Chamber erred in "limit[ing] the application of the abuse of process doctrine to violations committed in the actual arrest/transfer

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[48] *Nikolic*, Appeals Chamber Decision, para. 30, *Kajelijeli*, Appeals Judgment, para. 206. See also *R v Mullen* [2000] QB 520 - "In the discretionary exercise, great weight must therefore be attached to the nature of the offence involved in this case" (quoted in *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2005] UKHL 71, para. 21).

[49] Appeal Brief, paras. 18, 21. However, as conceded by the Appellant such violations "typically" will be so connected - Appeal Brief, para. 18.

[50] The two decisions in *The Prosecutor v Barayagwiza* underscore that the authority responsible for the alleged violations is also a factor which must be considered. The 31 March 2000 Review of the original decision reversed the earlier finding, in large part because "new facts diminish the role played by the failings of the Prosecutor", as well as the intensity of the violations, and that the previous finding (that the prosecution of the accused "would be a travesty of justice" - Decision, 3 November 1999, para. 112) "now appears disproportionate in relation to the events." (31 March 2000, para.71). The Prosecution submits that in general, there must be some connection between the alleged violation of rights and the crimes investigated or the prosecuting authority. Where the alleged violations of rights are completely unrelated to the current exercise of jurisdiction – where they are committed by unrelated parties and in connection with other allegations – then it would only be in the most exceptional circumstances that the violations would mean that exercising that jurisdiction was an abuse of process (one example might be where jurisdiction could not be exercised for humanitarian reasons), as to do so would effectively grant a person impunity for crimes unrelated to the alleged violation of his rights.

[51] Decision, p. 10, first paragraph.

[52] *Nikolic*, Trial Chamber Decision, para. 114.

[53] *Nikolic*, Trial Chamber Decision, para. 114; *Barayagwiza*, 3 November 1999 Decision, para. 73, see also Shaw, *International Law (5th ed)* (2003), p. 605, citing torture as an example.

[54] Decision, p. 10, second paragraph. Nowhere in paras. 16-21 of the Appeal Brief does the Appellant articulate the error allegedly committed by the Pre-Trial Chamber with reference to the Decision. The Appellant merely offers an alternative set of "extrapolat[ions]" (para. 19) from a case cited in the Decision, without demonstrating how the Decision is inconsistent with this interpretation.

process."[55] However in applying the general principles to the facts of this case, the Decision makes no mention of the link, or lack thereof, to the process of arrest and surrender. The Appellant cannot create a non-existent error.[56]

- Similarly, the Appellant has not demonstrated that the Pre-Trial Chamber required that the Appellant "establish that each specific violation is tantamount to torture".[57] The Chamber referred to torture, but also found "no issues has arisen to any ... serious mistreatment",[58] sufficient to justify the Court divesting itself of the jurisdiction to try the Appellant. The cases relied upon by the Chamber in establishing the relevant principles further make it clear that the Chamber was not limiting itself to incidents of torture or discrete violations, but considered whether the violations overall were sufficiently serious.[59] The Decision in this respect was entirely reasonable and within the discretion of the Chamber, and the Prosecution submits that the Appellant has demonstrated no error justifying appellate intervention.[60]

25. The Prosecution submits that accepting the Appellant's submissions, that the Court is obliged to remedy alleged violations of rights by national authorities where there is no concerted action and no serious mistreatment, would seriously undermine the mission of the Court. Not only would it impose upon the Court the very role that the drafters were at pains to avoid: that of the Court regularly judging the quality of national proceedings. In addition, such submissions create an impractical system where the ability of the Court to

[55] Appeal Brief, para. 21

[56] The Appellant appears to have confused a factually accurate statement of the historical development of a principle (Decision, p. 10, first paragraph) with the exercise of the discretion of the Chamber in the instant case (Decision, p. 10, second paragraph), thus misunderstanding the Decision.

[57] Appeal Brief, para. 20.

[58] Decision, p. 10, second paragraph. The Chamber stated that "no issues has arisen to any alleged act or torture or serious mistreatment". The Prosecution recognizes that the manner in which the Chamber phrased its findings might be read as requiring that there be at least one incident which in itself constitutes serious mistreatment. However this cannot sustain an allegation that the Chamber required the Appellant to prove that every violation is tantamount to torture. Further, the Prosecution submits that even on this interpretation, it would be a reasonable approach by the Chamber, as in the absence of any serious mistreatment or violation of rights then the Chamber would be hard-pressed to find that the totality of the circumstances justified so extreme a measure as divesting the Court of jurisdiction to try the accused for the alleged crimes.

[59] For example, in *Barayagwiza*, 3 November 1999 Decision, the Appeals Chamber considered a range of factors in combination to justify the invocation of the abuse of process doctrine: the violation of the appellant's right to be promptly informed on the charges, the failure to resolve his writ of habeas corpus in a timely manner; and the violation of his right to an initial appearance without delay (para. 73); in *Kajelijeli*, Appeal Judgment, the Appeal Chamber also considered a series of alleged violations, none of which amounted to torture, such as periods of detention (including arbitrary provisional detention in Benin), without variously an arrest warrant, being informed on the reasons of his detention, or being brought before a judge, and violations of the right to counsel and an initial appearance without delay (paras. 251-3).

[60] The similarity in the language used by the Chamber ("no issues has arise to any alleged act or torture or serious mistreatment" – p. 10, second paragraph) and the very language in the Appeal Brief (the Appellant acknowledges a "requirement that the applicant demonstrate a serious violation" – para. 17) underscores the propriety of the Decision in this regard.

fulfill the object and purpose of the Statute can be seriously undermined by prior unrelated activities of national authorities,[61] and its role to investigate and prosecute would be displaced by a new task: to verify the degree of compliance of national jurisdictions with human rights standards in domestic proceedings.

Second Ground of Appeal – The alleged failure to consider relevant and probative indicia concerning the relationship between DRC and the OTP

26. Section 2.2 appears[62] to invoke an alleged error of fact by the Pre-Trial Chamber, in concluding that there was "no evidence" substantiating the alleged concerted action between the Office of the Prosecutor and the DRC authorities pertaining to the Appellant's detention in the DRC. The Prosecution submits that the burden on the Appellant is to demonstrate that the Chamber erred in its factual findings. Under the applicable standard of review, the Appeals Chamber should show deference to factual findings of the original Chamber, and should only overturn a finding of fact where: (a) the evidence relied upon could not have been accepted by any reasonable tribunal of fact; (b) the conclusion is one which no reasonable tribunal of fact could have reached on the evidence; or (c) the factual finding or the evaluation of the evidence was wholly erroneous.[63]

27. The Prosecution submits that the Appellant has failed to meet this burden, and is only offering, at most, speculative conclusions and inferences, as well as various instances of gross misstatement of the facts. Absent a showing by the Appellant that the Pre-Trial Chamber's conclusions were wholly unreasonable, those conclusions should remain undisturbed on appeal. The Prosecution further submits that the Chamber's conclusion that there was no evidence supporting the Appellant's theory of collusion between the OTP and the DRC authorities reflects reality: the Appellant's submissions distort a proper relationship of cooperation between national authorities and the Court, as intended by the Statute and regulated by Part 9, in an effort to present a non-existent relationship of complicity *vis-à-vis* the alleged violation of his rights. Nothing in the record can support this theory: at no time did the Prosecution, or any other organ of this Court, move outside the formal relationship of cooperation, governed by Part 9. In particular, and as shown by the same documents relied upon by the Appellant, at no time did the Prosecution, prior to

[61] Such a remedy might even provide States with a mechanism to shield individuals from the jurisdiction of this Court: States could intentionally disregard the human rights of a person when executing cooperation requests from the Court in order to prevent the Court from exercising jurisdiction over such person.
[62] The Appellant does not specify what type of error it is alleging before the Appeals Chamber.
[63] See e.g. *Musema v Prosecutor*, ICTR-96-13-A, Judgement, 16 November 2001 at para 17; *Prosecutor v Blaskic*, IT-95-14-A, Judgement, 29 July 2004 at paras 16-18.

the issuance and transmission of the warrant of arrest against the Appellant, engage in any specific discussion with the DRC authorities pertaining to him, his case or his detention.

The Appellant's Access to Evidence

28. The Appellant firstly argues that since his request for the entire case file, allegedly made for the purposes of "verifying contacts between the OTP and the DRC authorities in order to challenge the legality of his arrest", was not granted, and his ability to conduct inquiries in the DRC was allegedly affected by the security situation, the Appellant should not be required to provide evidence if such evidence could not be obtained without the State's cooperation.[64] The Prosecution rejects the proposition that the Appellant – either legally or factually – was in a position comparable to that of an applicant in a human rights case, with no possibility of access to the necessary information to substantiate his or her claim.

29. First, the Prosecution stresses that the Appellant has had access to material on the situation and case files, including the relevant documents pertaining to the Appellant's arrest and transfer to the seat of the Court as verified by the Single Judge,[65] and to disclosure materials provided by the Prosecution. Second, the Appellant never challenged this decision of the Single Judge, which rejected his application for access to the entire case file and regulated his access to the material and submissions filed with the Pre-Trial Chamber.[66] Third, the Prosecution notes that the Appellant never sought whatever orders and/or measures he deemed necessary, for the purposes of obtaining the materials he now claims remained out of his reach, from the Pre-Trial Chamber.[67] Rather, the Appellant appears to have decided not to pursue the available avenues to obtain any such material,

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[64] Appeal Brief, paras. 23-24, citing jurisprudence pertaining to onus probandi in human rights cases in support.
[65] "Decision on Access by Duty Counsel for the Defence to All Documents Relating to the Case Against Mr. Thomas Lubanga Dyilo", ICC-01/04-01/06-61-Conf, 30 March 2006, p. 4 noting that the defence enjoyed access to redacted and formatted versions of all documents "relating to the issuance of a warrant of arrest against Mr. Thomas Lubanga Dyilo and/or of the record of the situation in the DRC" and that the documents which remained *ex parte* "directly related to those documents. REDACTED
[66] The Appellant wrongly claims that his request for access to the entire case file was "denied by...the Appeals Chamber" (Appeal Brief, para. 23, with no references included). The Appeals Chamber merely rejected a misguided request for an extension of time based on an alleged lack of access to necessary materials, ruling that the Appellant had not explained in what way the undisclosed material would cast light on the issues under appeal or aid in their presentation (see 30 May 2006 Decision on the Appellant's Application for an Extension of the Time Limit for the Filing of the Document in Support of the Appeal and Order Pursuant to Regulation 28 of the Regulations of the Court, ICC-01/04-01/06-129, para. 8). Leaving aside the misstatement as to the scope of the Appeals Chamber's decision, the Appellant should not expect to draw procedural advantages from adverse rulings stemming from clear shortcomings in the Appellant's own submissions.
[67] Such as requests for assistance under Art 57(3)(b). The Prosecution does not concede that the Appellant's submissions, which the Prosecution considers wholly unsubstantiated, would have sufficed for the purposes of activating the Chamber's ancillary jurisdiction. To the contrary, the sort of speculation advanced by the Appellant could only be accepted as an adequate basis for relief under Art 57(3)(b) at the cost of permitting fishing expeditions into the materials of States.

and simply to complain on appeal about the alleged lack of access. The Prosecution submits that it is the duty of every party to bring whatever difficulties it may be experiencing before the first instance Chamber, so that the Chamber can properly assist him or her. A party "cannot remain silent on the matter only to return on appeal" to seek a reversal of the original decision.[68]

The Alleged "Agency Relationship"

30. The Appellant's claim that the combination of the deferral made by the DRC authorities with the subsequent Memorandum of Understanding somehow created an agency relationship between the ICC and the DRC authorities[69] is misconceived. A referral under Article 14 of the Statute is a triggering mechanism which activates the Court's jurisdiction. It does not, and cannot, alter the status of a State and its sovereign rights, and somehow turn it into nothing less than an agent of the Court.[70] This position does not change in the event of a self-referral.[71]

31. The memorandum of understanding between the OTP and the DRC authorities is a device aimed at facilitating the implementation of the duties of cooperation that every State Party has under Part 9 of the Statute. The agreement primarily sets out the practical arrangements necessary to facilitate cooperation between the OTP and the DRC within the scope of Part 9, pursuant to the Prosecutor's power to conclude such agreements under Article 54.[72] In the same manner that Part 9 of the Statute does not create any relationship of agency between the Prosecution and State Parties cooperating with the Court, pursuant to their statutory duties, a supplementary memorandum of understanding detailing the

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[68] See *Prosecutor v. Tadic*, IT-94-1-A, Judgment, 15 July 1999, para. 55 (and previous discussion at paras. 52ff).
[69] Appeal Brief, para. 26.
[70] The Prosecution notes that before an agency relationship can be said to exist between international legal persons (a) the principal and the agent must be separate entities, (b) the relationship must be consensual and (c) the principal must be able to exercise control over the acts of its agent. See Sarooshi, "Some Preliminary Remarks on the Conferral by States of Powers on International Organisations", Jean Monnet Working Paper 4/03, at p. 38 *ff* and authorities cited therein. It is submitted that at a minimum the last requirement is manifestly missing in the relationship between the ICC and the DRC.
[71] The Statute makes no distinction, but rather establishes for all situations and cases a framework for cooperation between national authorities and the ICC in relation to specific requests and whereby State Parties act as the proximate source of compliance, as required by Part 9. See footnote 42, above.
[72] The Appellant makes particular reference to Chapter 7 of the agreement, which addresses the sharing of information between the DRC authorities and the OTP with regard to national proceedings. Far from signaling the existence of an "agency" relationship between the OTP and the DRC authorities, these provisions are a clear manifestation of the "burden sharing" between the two entities (see *Informal Expert Panel: Complementarity in Practice*, p18-19, Claus Kress, " 'Self-Referrals' and ' Waivers of Complementarity'" (2004) 2 JICJ 944, 946) .

manner in which such cooperation shall be effected cannot magically create that relationship either.[73]

The Indicia Allegedly Disregarded by the Chamber

32. The Appellant submits that on the basis of the material and submissions before the Pre-Trial Chamber, the only reasonable assumption is that the Prosecutor commenced its investigation of Thomas Lubanga Dyilo prior to his arrest by the DRC authorities in March 2005, and that accordingly his rights under Article 55 (1) would have been in force as of the time of his arrest.[74] The Prosecution fails to see the relevance of this statement. Leaving completely aside the Appellant's speculative assertion that the investigation would have involved him at the time of his arrest by the DRC authorities, Article 55 of the Statute, as already stated, vests persons with certain rights in the specific framework of *ICC investigations*,[75] and not unrelated national proceedings. The mere fact that a potential suspect for the purposes of ICC investigations happens to be in custody in relation to parallel and independent national proceedings does not, and cannot, mean that the panoply of ICC rights becomes applicable to that person *in those proceedings*.[76]

33. The Appellant liberally draws a number of inferences from certain materials pertaining to the DRC proceedings involving the Appellant.[77] The crux of the Appellant's position appears to be that the DRC authorities, acting in collusion with the ICC OTP officers, were determined not to move the national proceedings forward. The domestic proceedings were, according to this theory, artificially kept alive only for the purposes of keeping him

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[73] To accept any broader proposition would fundamentally burden States who are in a position to cooperate with the Court.

[74] Appeal Brief, para. 27.

[75] As clearly stated by one commentator, "the Statute of the ICC provides for general rights for persons *in respect of an investigation of the Court*" (See Zappalà, *Human Rights in International Criminal Proceedings*., (2003), p. 55, emphasis added). See further paras. 13-15, and authorities cited in footnote 26, above.

[76] For instance, it would be wholly misconceived to expect that any questioning of this person by the national authorities for the purposes of those unrelated national proceedings is to be conducted under the terms of ICC Rule 112, instead of the applicable domestic provisions.
The Appellant also claims that it is reasonable to assume that the Article 56 proceedings triggered in the DRC investigation were either connected to the Appellant, or that the Prosecution was trying to benefit from Appellant's arrest. The Appellant concedes, however, that due to the ex parte nature of the application, the Appellant cannot verify whether there is any link between the application and the UPC (see Appeal Brief, para. 28). It is submitted that, contrary to the Appellant's assertion, he had all the elements in his possession to conclude that the Article 56 proceedings triggered in the DRC situation were *not* related to his case. As already noted, the Appellant has had access to all the materials in the DRC situation file related to his case, albeit in some cases in redacted or formatted versions. Since the Pre-Trial Chamber issued public redacted versions of its orders related to the Article 56 procedures (see e.g. Decision on the Prosecutor's Request for Measures under Article 56, ICC-01/04-21, 26 April 2006), the Appellant could easily verify whether within the materials he was granted access to, these orders and any other related documents were included. If they were not, it was because the material in question did not relate to the Appellant's case, as pleaded by the Prosecution (See the Single Judge's 30 March 2006 Decision, cited above).

[77] Appeal Brief, paras. 29-32.

in detention until such time as the Prosecution was in a position to make a successful application for an arrest warrant.[78] It is respectfully submitted that the Appellant's conclusions find no support whatsoever in the same documents that he cites, which are misconstrued and misrepresented by the Appellant in a transparent effort to portray a (non-existent) picture of collusion between the OTP and the DRC authorities.

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41. Finally, the Appellant appears to argue that the Prosecution was aware of the alleged irregularities of his detention, and that the "rationale and timing" of the application for an arrest warrant was to circumvent the possibility of the Appellant's exercising his right of *habeas corpus* before a judicial authority.[79] The Appellant misrepresents the Prosecution's submission to the Pre-Trial Chamber, on which the he bases his conclusion. The submissions before the Pre-Trial Chamber pertaining to the urgency of the application were twofold: they related on the one hand to the general political situation in the DRC at that time; and, on the other, to the problems affecting the existing national proceedings against the Appellant and the risk of release involved,[80] which included the possibility of release by the military judge in charge of reviewing the Appellant's detention after a given number of months.[81] The possibility of the Appellant himself seeking *habeas corpus* relief is not even mentioned.

42. Further, the Prosecution submits that it is perfectly within the boundaries of its duties and authorities to seek an arrest warrant from a Pre-Trial Chamber if the Prosecution concludes that delaying that decision may lead to the frustration of the execution of the warrant in the future. Conversely, there is *no duty* on the Prosecution to postpone

[78] Appeal Brief, para. 31.
[79] Appeal Brief, para. 33 relying again on the Prosecution's Submission for Further Information and Materials (referred to in footnote **Error! Bookmark not defined.**, above).
[80] See Prosecution's Submission for Further Information and Materials (referred to in footnote **Error! Bookmark not defined.**, above), paras. 5-7, and 8-15.
[81] *Ibid.*, para. 13.

investigative efforts in order to allow suspects to exercise procedural rights in domestic proceedings first, or to wait until specific procedural steps have been exhausted by the intervening domestic authorities.[82] It falls entirely within the Prosecution's discretion to determine the timing for the filing of an application for a warrant of a arrest; if all requirements of Article 58 are met, then Pre-Trial Chambers of this Court are under a duty to issue the requested warrants, upon consideration of the exhaustive list of factors and requirements set forth in that provision.[83]

43. It is respectfully submitted that the Appellant has completely failed to demonstrate that the Pre-Trial Chamber misapprehended the evidence before it or otherwise reached unreasonable conclusions. Instead, the Appellant merely offers a "conspiracy theory" based on speculative inferences and misrepresentations of the material before the Pre-Trial Chamber. The Appellant's second ground of appeal must accordingly be rejected.

Third Ground of Appeal – the Pre-Trial Chamber committed no error in the legal standard for assessing compliance with Article 59 (2)

44. The Prosecution submits that the Pre-Trial Chamber committed no error of law on the legal standard it adopted. This ground of Appeal is based on two fundamental misconceptions of the Appellant. Firstly, the Appellant has misconstrued the purpose and the scope of Article 59 (2). Secondly, the Appellant has mischaracterized the Decision of the Pre-Trial Chamber as an application of the "margin of appreciation" test.

The purpose and scope of Article 59 (2)

45. The purpose of Article 59 (2), as correctly stated by the Pre-Trial Chamber, is to oblige the relevant national authorities to determine whether the rights of the Appellant were respected in the execution of the ICC warrant of arrest and request for surrender.[84] Article 59 (2) does not impose an obligation on the national authorities, or on the ICC, under the Statute to review the legality of any previous detention of the Appellant for national criminal proceedings unrelated to the ICC.[85]

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[82] The Prosecution further notes that the Appellant was not hampered in any manner by the ICC in his ability to exhaust whatever domestic remedies were available to him, nor did the Court in any manner oppose any request for relief sought by the Appellant before domestic courts pertaining to his detention prior to the ICC warrant of arrest being issued and transmitted to the DRC authorities.

[83] See Article 58 (1): The Pre-Trial Chamber "*shall*....issue a warrant of arrest".

[84] Decision, p. 6.

[85] Decision, p. 6. See for example the description of the elements of the review under Article 59(2) in Schlunck, "Article 59 – Arrest proceedings in the custodial State" in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999), pp. 767-768 – stating that "The arrest proceedings are governed by the law

46. It is clear from the provisions of Article 59 (2) that there is a division of responsibilities between a State and the ICC during the arrest and detention process.[86] It is not the role of the Pre-Trial Chamber to delve into, and pass judgment on, the internal division of responsibilities within the domestic system:[87] "The law of the custodial State would determine which judicial authority is competent to examine the person arrested".[88]

47. Similarly, the primary responsibility for the interpretation of the national law of a State concerning its compliance with Article 59 (2) is vested in that State, and the ICC is only obliged to intervene exceptionally when there have been egregious violations of the rights of an Accused during the arrest and detention process. The Pre-Trial Chamber consequently did not err in law in respecting the primacy of the DRC national authorities in the interpretation and application of its national law regarding matters linked to the ICC Statute.[89]

48. It must be emphasised at the outset, that the discretion afforded to States in the implementation of their cooperation obligations under the Statute exists regardless of the political and judicial structures in place, and would accordingly equally apply to Article 59 detention and review carried out by military authorities, as long as they constitute the "competent judicial authority", referred to in Article 59 (2), under the laws of the State in question. In this sense, the Prosecution submits that the Appeals Chamber should resist the Appellant's apparent efforts to induce the Court into a task of assessing national procedures and judicial structures and their compatibility or lack thereof with human rights principles. The role of the Court, contrary to the Appellant's submission, must

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of the custodial State. Article 59 does not tackle the criteria of proper process. Basically it means that the warrant be duly served of the person arrested" and referring to "the suspect's right to be informed about the charges and the grounds for the detention." Contrary to the submission of the Appellant, nothing in Article 59(2) nor in any other provision of the Statute imposes upon the ICC an obligation to "ensure that national authorities implement the person's right to a remedy in an effective rather than illusory manner" (Appeal Brief, para. 43) with respect to allegations unrelated to a request from the ICC for arrest and surrender – this is the very task of human rights bodies, which by the Appellant's own admission the ICC is not. Thus insofar as the Appellant's argument is based on alleged failure to provide a remedy for other breaches, it must necessarily fail.

[86] In its discussion on Article 53 which later became Article 59, the preparatory committee dealt with the division of responsibilities between national authorities and the Court. It was suggested that the issues of detention prior to surrender should be determined by national authorities and not by the Court, and that the transfer of the accused to the Court could be an appropriate point for shifting the primary responsibility over the accused from national authorities to the Court: Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/51/22 (Vol. I)(Supp) para. 323-4.

[87] In this regard, the Prosecution submits that the Appellant's criticism of the designation of the Auditor Général as the responsible authority in the DRC for liaison with the Court (para. 44) should be disregarded.

[88] Schlunck, "Article 59 – Arrest proceedings in the custodial State" in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999), p. 767.

[89] Decision, p. 6.

necessarily be confined to reviewing the degree of compliance of the national authorities with the terms of Article 59, and in particular those of Article 59 (2).

49. The Prosecution submits that giving *prima facie* primacy to national law and the interpretation of such law by national authorities does not mean that the Chamber is refusing to assess a State's compliance with Article 59 (2) or that it is excluding relevant international human rights provisions.[90] However it must be emphasized again that the Court is neither a global human rights monitoring body nor an appellate court with a mandate to review the laws of States or decisions of their judicial bodies, a role consciously discarded by the drafters of the Statute.[91] Attributing such a role to the Court may have significant repercussions for State sovereignty and the division of responsibilities envisaged under the Statute.[92]

50. The Pre-Trial Chamber in interpreting the applicable law under Article 59 (2), stated that "in accordance with the law of the State" means that national authorities have primary jurisdiction for interpreting and applying national law. This interpretation is consistent with the Statute as well as pertinent human rights cases.[93] The Chamber nevertheless stated that this does not prevent the Chamber from retaining a degree of jurisdiction over how the national authorities interpret and apply national law.[94]

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[90] As the Pre-Trial Chamber stated in the Impugned decision, it is not prevented from retaining a degree of jurisdiction when such an interpretation and application relates to matters referred directly back to the national law by the Statute.

[91] The drafting history of Article 69(8) provides clear evidence of the intention of the drafters not to establish an international court of appeal from domestic jurisdictions – see e.g. Proposal for Articles 5, 27, 37, 38, 44 and 48, submitted by The Netherlands, UN Doc. A/AC.249/WP.6, 16 August 1996, Article 44b; and Amnesty International, The International Criminal Court: Making the right choices - Part V: Recommendations to the diplomatic conference, AI No. IOR 40/10/98, May 1998, at 62-63. The drafters also did not intend the Court to be an international court of human rights – see e.g. Draft Proposal by Italy on Article 35 (Issues of admissibility), Non-Paper/WG.3/No.4, 5 August 1997, Article 35(2)(ii), and Non-paper submitted by Italy: article 26 *bis* (Notification of national investigations and proceedings), Non-Paper/WG.4/No.21, 14 August 1997, article 26 bis(1). These two proposals (empowering the Court to rule on the violation of any human right by domestic authorities investigating and prosecuting crimes within the jurisdiction of the Court; and obliging States to report to the Court any such investigation or prosecution) were rejected (see also footnote 28, above).

[92] See above, paras. 7, 15. This is also evidenced by the impossibility for the Court to provide a remedy binding on the relevant domestic authorities should it find that domestic authorities have misapplied domestic law or violated international human rights. The remedy suggested by the Appellant, the discontinuance of proceedings before this Court, would not redress the alleged violation of the Appellant's rights by domestic authorities, nor prevent future similar violations by those authorities.

[93] Contrary to the suggestion of the Appellant in paragraph 40 of the Appeal Brief, in *Hertzberg et al. v. Finland,* Case No. 61/1979, UN Doc. No. CCPR/C/15/D/61/1979, 2 April 1982, the Human Rights Committee recognises in para. 10.3 that a certain margin of discretion must be accorded to the responsible national authorities as there is no universally applicable common standard for defining public morals.

[94] See Decision, pp. 6 and 7. It is clear from these pages that the Chamber considered the compliance of the DRC authorities with article 59 (2) and concluded on page 9 that "no material breach of article 59 (2) of the Statute can be found in the procedure followed by the competent Congolese national authorities during the execution of the Court's Cooperation Request.

51. Support for the primacy of national law in the implementation of Statutory obligations, and the primacy of national authorities in the interpretation of that law, especially provisions dealing with the initial arrest and detention of a suspect, can be found in other provisions of the Statute.[95] It can be clearly extrapolated from Article 59 (1), that there is a link between the provisions of Article 59 and Part 9 on International Cooperation and Judicial Assistance. Consistent with Article 59 (2), Article 59 (1) also provides that a request to a State for the arrest of a person shall be effected in accordance with the laws of the State and the provisions of Part 9.[96] The narrow ambit of any role that the Pre-Trial Chamber may have in ensuring compliance with Article 59 (2) is further confirmed by Article 59 (3).[97] The Court's limited supervisory role in relation to the manner in which States perform cooperation tasks is further emphasized by Article 99(1), which establishes as a general rule that requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State. Moreover, regarding the collection of evidence by co-operating States, Article 69 (8) provides that "when deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law".

52. It is clear from a close and objective analysis of the Decision that the Pre-Trial Chamber acting within the parameters of the Statute, appropriately reviewed the compliance of the DRC authorities with article 59 (2), contrary to the suggestion of the Appellant.

Margin of appreciation test.

53. The argument of the Appellant that the Pre-Trial Chamber adopted a margin of appreciation test, strictly so called, is purely semantic and in any case, irrelevant.[98] The Pre-Trial Chamber did not explicitly rely on any such concept but rather entered a ruling

[95] A degree of deference to national legal systems, judicial structures, and domestic interpretations of national law is also consistent with the principle of complementarity.
[96] See for instance Articles 86, 87, 88 and 89.
[97] See also Articles 59 (4), (5) and (6). The arrested person has the right to seek interim relief from the competent authority in the custodial state. Article 59 (5) clearly demonstrates that the national court has primacy in providing that the custodial state is vested with the authority to deal with a request for interim release - it is not bound by, but must give "full consideration" to, the recommendations of the Pre-Trial Chamber.
[98] The "margin of appreciation" doctrine, as developed by the jurisprudence of the European Court, does not relate to the issue of whether or not national authorities have complied with national laws. It relates to the question of whether or not such laws or the application of such laws amount to an impermissible derogation of rights protected by the European Convention on Human Rights (ECHR). The margin of appreciation doctrine has been broadly defined as "the freedom to act; maneuvering, breathing or "elbow" room; or the latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention's substantive guarantees." It is in short, "the line at which international supervision should give way to a State Party's discretion in enacting or enforcing its laws." *See* H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague 1996), at 13.

in accordance with the provisions of the Statute establishing the primacy of national jurisdictions for the purposes of Article 59 (2). As the Prosecution has set out above, this is entirely consistent with the Statute.

54. These considerations should suffice for the purposes of refuting the Appellant's arguments. The Prosecution further notes that the Appellant's argument that the principles underlying the margin of appreciation test are peculiar to the member States of the Council of Europe and the European Union appear to be wrong: the underlying principles, contrary to the Appellant's assertion, have also been applied in the context of the ICCPR.[99]

The compliance of the DRC with the ICCPR and the African Charter on Human and People's Rights

55. The Prosecution disagrees with the argument by the Appellant that the Court must analyse the compliance of the DRC authorities with their obligations under the ICCPR and the African Charter on Human and People's Rights.[100] The Prosecution reiterates that there is no obligation on the Pre-Trial Chamber to embark on a review of a State's entire judicial process or its compliance with its human rights obligations including under the ICCPR or the African Charter on Human and People's Rights.[101] The Court's duty is primarily limited to ensuring that Article 59 (2) is complied with.

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[99] Yuval Shany has stated that international courts and tribunals seem generally supportive of the doctrine and confirmed the application of the principle to *inter alia* the ICCPR and the Inter-American Court of Human Rights ("Toward a general margin of appreciation doctrine in international Law", 16(5) *European Journal of International Law* at p. 929). Furthermore, the case of *Lansman v Finland* referred to in footnote 60 of the Appeal brief did not expressly reject the application of the margin of appreciation doctrine to the ICCPR. There was no express mention of the margin of appreciation test. The Committee did review the action of the State but was unable to reach a conclusion on whether there was a violation of the Covenant.
The inaugural address of Professor Pityana, cited by the Appellant, also does not support the argument of the Appellant that the margin of appreciation test is a "device of the European Court of Human Rights alone" (Appeal Brief, footnote 61). No such statement or conclusion can be found in the inaugural address: *"Hurdles and Pitfalls in International (Human Rights) Law: The Ratification process of the protocol to the African Charter on the establishment of the African Court on Human and Peoples' Rights"* (12th August 2003). Professor Pityana actually appears to endorse the primacy of national courts. On page 13-14, he refers to a statement by Chief Justice Arthur Chaskalson, then President of the Constitutional Court of South Africa that decisions of bodies like the UN's Human Rights Committee, the European Commission on Human Rights and the European Court of Human Rights may provide guidance as to the correct interpretation of a constitutional provision. It was therefore wrong for the Appellant to state that provisions of the ECHR may not be utilised in the African context. Furthermore, Professor Pityana refers to the exhaustion of local remedies and states that an international tribunal serves as a forum of last resort (pp. 20-21, further citing the case of *Erkalo v The Netherlands* in support of the rule of exhaustion of domestic remedies under Article 26 of the Convention). Professor Pityana went on to observe that the Court's task in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities (pp. 22-23, citing *Hertel v Switzerland*, 59/1977/843/1049, 25 August 1998, p. 32).

[100] Appeal Brief, para. 41

[101] Arguments to the contrary lead to absurd conclusions and could severely hamper the activities of the Court as envisaged in the Statute. For example, pursuant to the Appellant's contention, the Court could be prevented from

56. The Prosecution further notes that the execution of a warrant of arrest by military authorities cannot automatically mean that the Appellant did not have recourse to an impartial and independent judicial entity. The Appellant has failed to demonstrate any egregious violation of his right or adduce any cogent argument on how the military court that supervised the execution of the ICC arrest warrant lacked impartiality and independence. The military court is part of the DRC's judicial system and this factor was taken into account in the Impugned Decision.[102] As the Appellant concedes, "military tribunals are not prohibited per se under the ICCPR and African Charter".[103]

Fourth Ground of Appeal – the Pre-Trial Chamber properly considered the cumulative effect of the alleged violations of the Appellant's rights

57. The Prosecution notes that the Appellant has not characterised the nature of the error it is alleging, but it appears to be an alleged error of fact – that the Pre-Trial Chamber erred in finding that "no issues have arisen of any alleged act of torture against or serious mistreatment of [the Appellant] by the DRC national authorities" based on the evidence presented – and the Prosecution will respond to it accordingly.[104] The Prosecution submits that this finding must be read in the context of the Decision. It is clear from the impugned Decision that the Pre-Trial Chamber did consider the full range of violations alleged by the Appellant.[105] The mere fact that the Pre-Trial Chamber arrived at a Decision different from the one requested by the Appellant, and that he "takes issue with" the factual finding of the Chamber, does not constitute sufficient reason to justify the intervention of the Appeals Chamber.[106]

58. None of the arguments advanced by the Appellant demonstrate that the Decision of the Pre-Trial Chamber was one that no reasonable Chamber could have come to based on the evidence before it. Nor has he demonstrated that the Pre-Trial Chamber failed to "adopt a

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exercising jurisdiction or relying on the cooperation provided by a state that is "unable" in the sense of Article 17 of the Statute, if the said inability, as it is likely to happen in the circumstances, prevents such state from complying with its international human rights obligations. See further paras. 6, 15 and 25, above.

[102] Decision, pp. 7-9.

[103] Appeal Brief, para. 42.

[104] To the extent that the Appellant's submissions could also be read as alleging a procedural error (an error in the Pre-Trial Chamber exercising its discretion whether the cumulative violations warranted the Court divesting itself of jurisdiction as an abuse of process), then the submissions merely repeat the same allegation from the first ground of appeal. The Prosecution specifically refers to and incorporates its submissions in response above.

[105] The Chamber considered the alleged arbitrary arrest by the DRC in 2003, subsequent detention prior to 16 March 2006 and the alleged irregularities in the execution of the Court's cooperation request – Decision, p. 5.

[106] See above, para. 26.

holistic approach".[107] The Prosecution submits that the factual considerations of the Pre-Trial Chamber are a reasonable exercise of their discretion. The submissions of the Appellant are largely limited to repeating assertions made before the Pre-Trial Chamber without demonstrating any specific error. The Appellant has also inappropriately brought a fresh factual allegation for the first time before the Appeals Chamber – the denial of sustenance on a regular basis[108] – without indicating any evidence on the record substantiating the alleged fact or seeking to adduce additional evidence (which would have required a specific application under Regulation 62).

59. The Prosecution emphasises once more that the initial detention of the Appellant was not in relation to an investigation of offences under the Statute but it was in relation to Congolese criminal proceedings. In respect of these proceedings, and contrary to the allegations of the Appellant, the Prosecution submits that the Appellant was not detained or placed under house arrest until shortly before his formal arrest in the DRC on 19 March 2005. The Prosecution submits that throughout 2003 and 2004, the Appellant was able to move freely, communicate without restrictions, and continued to fulfill his duties as President of the UPC and Commander in Chief of the FPLC.[109]

60. The Prosecution further submits that many of the factors raised by the Appellant are irrelevant to the determination at hand. The alleged failure of the Pre-Trial Chamber to

[107] Appeal Brief, para. 48. This assertion of the Appellant appears to be based on nothing more than a belief that such an approach could only have resulted in a finding in his favour.

[108] Appeal Brief, para 46. The United States State Department Report cited in the Appeal Brief dealt with general prison conditions in the DRC in 2005 and there is no explicit link or reference to any violations of the rights of the Appellant during his detention (footnote 68 of the Appeal Brief). Furthermore the report dealt with conditions in the prison which must be distinguished from the period of alleged house arrest of the Appellant in 2003. In addition, the reference to the "death row" phenomenon regarding the detention of the Appellant in 2005 is rather general, broad and irrelevant. It does not sufficiently prove that the Appellant specifically sustained any serious violations of his rights because of this phenomenon.

[109] Response to Application for Release, paras. 8-10 (in particular para. 9(ii)) and references cited therein; see further Observations des Autorités Judiciaires Militaires Congolaises en rapport avec le mémoire déposé à la Cour pénale internationale par le Conseil de Monsieur Thomas Lubanga Dyilo, ICC-01/04-01/06-348-Conf, 24 August 2006. In this regard, the statement of the Appellant that he has been in detention for three years, two months and 12 days without ever having been charged by a judicial authority (Appeal Brief, para. 52) is inaccurate and misleading. Furthermore, contrary to the Appellant's submission that he was not informed of the charges leading to his initial detention by the DRC authorities, the "Note Synoptique"referred to in para 12 of the Prosecution Reply confirms that the Appellant was informed of the allegations that resulted in his arrest in the DRC. The Prosecution submits that as far as his detention by the ICC is concerned, he was made fully aware of the charges against him when he was served with the warrant of his arrest on 16 March 2006 (Impugned Decision, p. 9, referring to the confirmation by the counsel for the Appellant during his first appearance on 20 March 2006 that the arrest warrant was read to the Appellant). The Appellant was subsequently served with a detailed document containing his charges on 28 August 2006.

review the detention of the Appellant under Rule 118(2) was addressed by the Pre-Trial Chamber in a different proceeding, and is the subject of a separate appeal.[110]

61. The Prosecution submits that there is nothing in the detention conditions described in the Appeal Brief demonstrating acts of torture against or serious mistreatment of the Appellant by the DRC authorities that may result in an abuse of process before this Court.[111] Nor are any other arguments presented by the Appellant which demonstrate that the Pre-Trial Chamber so gravely miscarried the exercise of its fact-finding function that it would justify the Appeals Chamber over-turning its factual determination in this case.

Fifth Ground of Appeal – the Chamber did not err in respect of possible lesser remedies

62. The Prosecution submits that the Chamber committed no error in the form of allegedly failing to consider an alternative remedy. Any obligation to provide a remedy is based on a breach for which the Court bears some responsibility; as the Prosecution has set out above, the Court has no such responsibility in this case. In these proceedings, the Appellant did not request any alternative remedies. He sought, and continues to seek, expressly and solely that the Court declare that it does not have the jurisdiction to try him and that it order his immediate and unconditional release.[112]

63. Finally, the alternative remedy of a reduction in sentence alluded to by the Appellant[113] is inappropriate in these circumstances: matters of sentencing are for the Trial Chamber to determine, if charges are confirmed and the Appellant is duly convicted. Furthermore, as previously discussed and in contrast to the case of *Kajelijeli*, the detention of the Appellant in the DRC related to different crimes.[114]

Conclusion

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[110] The issues raised by the Appellant in paras 50 to 52 on, *inter alia*, the lack of review of his detention after 120 days and the application for interim release are not relevant to the present appeal. They are currently before the Appeals Chamber in other proceedings, and the Prosecution respectfully requests the Appeals Chamber to disregard these submissions in the present Appeal. Furthermore, any alleged delay in the initial rendering of the impugned Decision (Appeal Brief, para. 50) was not unreasonable, and is therefore incapable of contributing to any purported "serious mistreatment". Furthermore, the Prosecution notes that the Appellant contributed to the extended proceedings by continually recharacterising his application – see footnote 15, above .

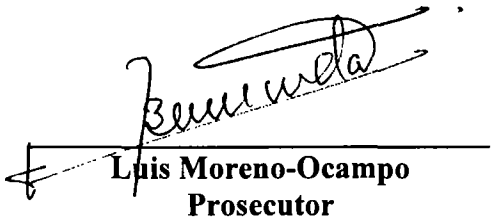
[111] The conditions of detention of the Appellant cannot be assessed against the general prison conditions described in the Appeal Brief but against his specific detention – initially the house arrest and subsequently, his detention by the Congolese military authorities.

[112] See para. 8 and footnote 15, above.

[113] Appeal Brief, para. 57.

[114] Decision on Arrest Warrant, paras. 37 et seq; see further, Prosecution Response to Appeal against Interim Release, paras. 34 and footnote 69.

64. For the abovementioned reasons, the Prosecution respectfully requests that the Appeals Chamber deny the appeal in its entirety and the relief sought therein.



Luis Moreno-Ocampo
Prosecutor

Dated this 17th day of November 2006
At The Hague, The Netherlands