Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-01/06**
Date: **26 October 2006**

PRE-TRIAL CHAMBER I

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

Registrar: **Mr Bruno Cathala**

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

Public Document

Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006

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1. Introduction:[1]

1. On 23 May 2006, the Defence filed a request for the release of Thomas Lubanga Dyilo,[2] on the grounds that his continuing detention constituted a serious violation of human rights. The Defence subsequently specified that they were seeking unconditional release, in accordance with the abuse of power doctrine.
2. In terms of the factual basis for the request – the Defence referred to the following elements *inter alia*:
   - the fact that Thomas Lubanga Dyilo has was illegally arrested and detained for over two and half years without being notified of the basis for his arrest or formally charged;[3]
   - the conditions of detention within the DRC; [4] and
   - the fact that, as a civilian, he had been subjected to military processes in violation of his right to a fair and impartial trial under article 14 of the ICCPR.[5]
3. In terms of the responsibility of the ICC to order an appropriate remedy, the Defence submitted the following:
   - the transfer of Thomas Lubanga Dyilo to the custody of the ICC had been motivated by the fact that his right to a remedy might have been realised in March 2006.[6] The ICC therefore accepted the benefit of his illegal detention, and his subsequent transfer deprived him of the ability to seek a remedy before courts in the DRC, or before the African Court of Human Rights or the Human Rights Commission.[7]
   - the fact that the DRC referred the situation to the ICC, entered into a Memorandum of Understanding with the prosecution, and remained in constant contact with the prosecution in relation to the detention and investigation of Thomas Lubanga Dyilo impacts on the questions of jurisdiction, and the attendant obligations of the OTP to ensure the rights of Thomas Lubanga Dyilo;

[1] The page limit for documents supporting appeals against jurisdiction is prescribed by Regulation 58(5) which refers to documents supporting appeals.
[2] Application for release ICC-01/04-01/06-121(hereinafter, 'request for release').
[3] Request for release, paras. 1-26.
[4] See letter of Thomas Lubanga Dyilo dated 19 February 2005 attached to the *Conclusions en réplique à la réponse du Procureur à la demande de mise in liberté'* 10 July 2006, see also Response to the Observations of the Victims and the DRC dated 8 September 2006 at para 55.
[5] See page 7 of request for release, and page 9 of the *Conclusions en réplique à la réponse du Procureur à la demande de mise in liberté'* 10 July 2006
[6] Pages 14 – 15 of request for release
[7] Page 15 of request for release

- the unduly lengthy detention of Thomas Lubanga Dyilo in the DRC and at the ICC detention unit should be characterised as a continuing offence, which impacts on the question of jurisdiction and the obligation of the ICC to give effect to his right to a remedy, irrespective of the initial source of the breach.

4. On 3 October 2006,[8] the Honourable Pre-Trial Chamber issued its decision. The Pre-Trial Chamber:
   - firstly stated that the Defence allegations are confined to (i) the alleged arbitrary arrest by the DRC authorities on 13 August 2003 and the alleged illegal detention of Thomas Lubanga Dyilo in the DRC prior to 16 March 2006; and (ii) certain alleged irregularities in the execution of the Court's cooperation request for the arrest and surrender of Thomas Lubanga Dyilo sent to the DRC on 14 March 2006, in violation of article 59(2);
   - held that with respect to the application of Thomas Lubanga Dyilo's rights under article 59(2), "the words "in accordance with the law of the States" means that it is for national authorities to have primary jurisdiction for interpreting and applying national law", and that this obligation did not extend to an obligation to review the proceedings prior to 14 March 2006 "insofar as that detention was related solely to national proceedings in the DRC";
   - stated that the military authorities were competent to execute the ICC's cooperation request because Thomas Lubanga Dyilo was detained at the time in relation to national proceedings before the Congolese Military Court, and that as such, there was no material breach of article 59(2);
   - in terms of the Defence submissions concerning the abuse of process doctrine, concluded that under human rights law, the ICC is only obliged to examine violations which occurred prior to 14 March 2006 if "it has been established that there has been concerted action between the Court and the DRC authorities",[9] or alternatively, the violation was in "some way related to the process of arrest and transfer of the person to the relevant international

[8] Although the decision was dated 3 October 2006, it was not notified to the parties until 4 October 2006 (see annex 2). In accordance with Regulation 64, the document of appeal shall be filed within 21 days of notification. In a decision issued on 25 September 2006, the Honourable Pre-Trial Chamber concluded that Regulation 33(1)(b) regarding the calculation of time limits should be interpreted in a broad sense to encompass all filings (Decision on Prosecution's Response to Thomas Lubanga Dyilo's 21 September 2006 Request for Leave to Appeal ICC-01/04-01/06-466). The Defence has relied on this interpretation in calculating its deadline.
[9] At page 9

criminal tribunal",[10] and the violation amounts to "torture or serious mistreatment".[11]

- concluded that "in the course of the present proceedings under article 19 of the Statute, no issues has arisen to an alleged act of torture against or serious mistreatment of Thomas Lubanga Dyilo by the DRC national authorities"; [12]
- concluded that "there is no evidence that the arrest and detention of Thomas Lubanga Dyilo prior to the 14 March 2006 was the result of any concerted action between the Court and the DRC authorities".[13]

5. The Defence respectfully submits that the Honourable Trial Chamber committed the following significant errors of fact and law, which invalidate their findings:
   - Adopted an incorrect legal test for the determination as to whether to stay the exercise of jurisdiction over Thomas Lubanga Dyilo;
   - Failed to consider relevant and significant indicia concerning the relationship between the DRC and the ICC prosecution;
   - Applied an incorrect legal standard for assessing the relevant law of the DRC in the context of article 59(2); and
   - Failed to consider the cumulative effect of the violations of Thomas Lubanga Dyilo's rights;
   - Failed to consider whether a lesser remedy would be appropriate.

2. 1 The Appropriate Legal Test for Determining whether the ICC is obliged to remedy the violations of Thomas Lubanga Dyilo's rights.

6. As noted above, the Chamber concluded that under human rights law, the ICC is only obliged to examine violations which occurred prior to 14 March 2006 if the following conditions were met: either, "it has been established that there has been concerted action between the Court and the DRC authorities",[14] or alternatively, the violation was in "some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal",[15] and the violation amounts to "torture or serious mistreatment".[16]

[10] At page 10.
[11] At page 10.
[12] At page 10.
[13] At page 11.
[14] At page 9
[15] At page 10.
[16] At page 10.

7. The Defence submits that the jurisprudence cited by the Chamber supports the existence of the following grounds for seeking a remedy for violations which occurred before an accused/suspect is officially brought within the jurisdiction of the Court.
   - In the first scenario, the responsibility of the Court is triggered by aiding, abetting or accepting the benefit of a violation of the applicant's rights. In such circumstances, the ICC will as a matter of law be obliged to provide a remedy, which is appropriate in light of the alleged violation. Whilst 'concerted action' in itself triggers the responsibility of the Court, the Defence strongly rejects any suggestions that the acts of the ICC must have occurred contemporaneously with the acts of the national authorities.
   - The second scenario, which is typically exemplified by kidnapping or luring cases, pertains to a violation of state sovereignty. If the state in question has not complained and the alleged crimes are serious violations of international law (the Eichmann exception),[17] the violation of state sovereignty will not itself justify a stay of proceedings. It will either be necessary for the applicant to establish the involvement of the authorities of State X in an arrest in State Y,[18] which would invoke the first scenario, or that he incurred a violation of his rights in connection with the act which infringed state sovereignty, which would invoke the third scenario.
   - The third scenario only requires the applicant to establish that it would taint the judicial process to continue the proceedings in light of the gravity of the violations of the applicant's rights - irrespective of who is responsible for the initial violation.

8. The Chamber cited the following case law in support of its proposition that "any violations of Thomas Lubanga Dyilo's rights will be examined by the Court only once it has been established that there has been concerted action between the Court and the DRC authorities": the ECHR case of *Stocké v. Germany*[19] and *Klaus*

[17] See M. Scharf, 'The Prosecutor v. Slavko Dokmanovic: Irregular Rendition and the ICTY', 11 Leiden Journal of International Law, 369-382 (1998).
[18] The involvement of the authorities of State X would violate the accused's rights (in addition to State sovereignty) since "[a]n arrest made by the authorities of one State on the territory of another State, without the prior consent of the State concerned, does not, therefore, only involve the State responsibility *vis-à-vis* the other State, but also affect's that person's individual right to security under Article 5(1)"(Opinion of the Commission, cited by the ECtHR); thus the requirement of State cooperation was necessary in *Stocké* in order to trigger a breach of a right falling under the Convention; if other rights had been violated in connection with the arrest, it can be deduced that it would not have been necessary for the applicant to establish in addition, the involvement of the German authorities in the arrest.
[19] 11755/85 [1991] ECHR 25 (19 March 1991) (available on HUDOC)

Altmann v. France,[20] and the ICTR decisions in the cases of *Semanza*[21] and *Rwamakuba*.[22]

9. In light of the fact that the Defence has not asserted a challenge to jurisdiction on the basis of the second scenario, the Defence submits that the particular circumstances of this application cannot be assimilated to the case- law pertaining to kidnapping and luring cited by the Chamber. As such, the *Stocké* and *Altmann* cases, which primarily relate to extradition law and alleged violations of State sovereignty, are inapplicable.[23] Thus, whilst the phrase 'concerted action' may be appropriate in the context of technical breaches of extradition or transfer agreements, the Defence submits that it is misleading in the context of arbitrary and unreasonably lengthy detention, in conditions which significantly violate the minimum standards for detention.

10. The Defence also notes that in contradistinction to the Pre-Trial Chamber's focus on concerted action, an ICTY Trial Chamber concluded that general agreement between peacekeeping forces operating in Bosnia ("SFOR") and the ICTY prosecution,[24] gave "SFOR a role comparable to that of a police force in some domestic legal systems, and creates, as between itself and the Tribunal, through the Office of the Prosecutor, a relationship of which the analogue in such systems is the relationship between the police force, the prosecuting authority and the courts. This quasi police function of SFOR, whereby it virtually operates as an enforcement arm

[20] Decision of 4 July 1984, application No. 10689, 1984 (available on HUDOC).
[21] Appeals Chamber decision of 31 May 2000 at para 79. The Defence reiterates its submissions from it response to the observations of the DRC and the victims, at para, 31 that the *Semanza* Appeals Judgement did not overturn the findings of the Appeals Chamber in the November 1999 *Barayagwiza* decision: in fact, the November 1999 decision has been repeatedly reaffirmed (see *Todorovic* 'SFOR' decision, and *Nikolic* Appeals decision *inter alia*).
[22] Trial Chamber decision of 12 December 2000 – at para 30. The Defence further notes that the Defence was denied leave to file an interlocutory appeal on this issue, and, since Rwamakuba was subsequently acquitted (which thus highlights the inadequacy of reducing sentencing tariffs as a remedy), the issue was never addressed at an appellate level. In this regard, the Defence emphasises that the decision of 12 December 2000 was not followed by subsequent decisions on this issue, namely, the Appeals Chamber judgement in *Kajelijeli* dated 23 May 2005, which attributed responsibility to the Prosecution due to a lack of due diligence, and granted sentencing credit for detention which was solely attributable to an arrest warrant issued by Rwanda. This judgement will be further discussed in section 2.5.
[23] Factually, the *Altmann* case is very different as the applicant was arrested pursuant to a lawfully issued arrest warrant by a Judge in Lyons. Barbie was expelled from Bolivia on valid grounds – i.e the fact that he had fraudulently acquired nationality. After expulsion, he was immediately brought before a judge: habeas corpus was therefore not an issue. He was then transferred to Lyon where he was placed in custody in accordance with the lawfully executed arrest warrant for crimes against humanity. He was also afforded the right to challenge his detention in Lyon (he was put in custody in February –applied for bail in June). The French court of appeal noted the fact that he was guaranteed full Defence rights.
[24] Pursuant to Article VI, paragraph 4, of the Peace Agreement, SFOR's role was extended to provide for the detention, and transfer to the Tribunal, of persons indicted by the Tribunal for war crimes. In addition, a confidential agreement was concluded between SHAPE and the International Tribunal (for the benefit of the Prosecution) concerning practical arrangements for the detention and transfer to the International Tribunal of persons indicted for war crimes by the International Tribunal ("the SHAPE Agreement").

of the Tribunal, clearly impacts on the work of the Tribunal in the discharge of its fundamental purpose to prosecute persons responsible for serious violations of international humanitarian law. It would be odd if the Tribunal had no competence in relation to the exercise of certain aspects of this quasi police function […] There is clearly a strong functional, although not organic, relationship between SFOR and the Tribunal, through one of its organs, the Office of the Prosecutor."[25] On the basis of this analysis, the Chamber seised itself of a request for release and judicial assistance based on an allegedly illegal arrest conducted by SFOR.

11. The Defence also observes that concepts of state responsibility for enforcing human rights and providing a remedy have significantly evolved since the *Stocké* and *Altmann*[26] decisions were rendered. For example, the United Nations Human Rights Commission and the ECHR have adopted a more expansive concept of jurisdiction in order to ensure that there are no human rights 'black holes',[27] and

[25] Decision on Motion for Judicial Assistance to be provided by SFOR and Others Separate Opinion of Judge Robinson, *Prosecutor v. Todorovic* et al, 18 October 2000, at para 6. < http://www.un.org/icty/simic/trialc3/decision-e/01018EVT13779.htm>

[26] For example, in the *Altmann* position, the Court concludes that the ECHR "contains no provisions either on the conditions under which extradition may be granted or on the procedure to be applied before the extradition may be granted". This position has clearly been revised in light of the Soering judgment issued 1989. Thus, for example, in the case of *Ocalan v. Turkey*, Request no. 46221/99, 12 May 2005, (Grand Chamber) the ECHR stressed that mutual cooperation in criminal matters between States should be conducted in a manner which is consistent with the States' respective obligations under human rights law. It held that whilst the European Convention on Human Rights "does not prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to justice", such cooperation should not "interfere with any specific rights recognised in the Convention" at para. 86.

[27] See for example, the case of *Had' Boudellaa, Boumediene Lakhdar, Mohamed Nechle And Saber Lahmar Against Bosnia And Herzegovina And The Federation Of Bosnia And Herzegovina*, Decision On Admissibility And Merits, issued by Bosnian Human Rights Chamber (which is a mixed court comprised of international and national judges) on 11 October 2002. Cases Nos. Ch/02/8679, Ch/02/8689, Ch/02/8690 And Ch/02/8691 http://www.hrc.ba/database/decisions/CH02-8679%20BOUDELLAA%20et%20al.%20Admissibility%20and%20Merits%20E.pdf
The Chamber held, for example, that in view of the broad interpretation of jurisdiction under the ECHR, the obligation of BiH authorities to obtain and examine information as to the legal basis of the applicants' custody arose even if under the Dayton Peace Agreement the respondent Parties had no direct jurisdiction over US forces stationed in Bosnia and Herzegovina. Finally, even though applicants had been transferred to Guantanamo Bay i.e. a territory outside of the physical and legal jurisdiction of the Government of BiH, the BiH Human Rights Chamber concluded that the BiH government nonetheless retained a positive obligation to exhaust all appropriate measures to secure their human rights.

In addition regarding the question of a member State's obligations vis a via a person who has been subjected to human rights abuses in another jurisdiction, the Parliamentary Assembly of the Council of Europe promulgated a resolution, which set out the legal obligations of Member States of the Council of Europe *vis à vis* their relations with the United States government, in particular, with respect to the detention centre at Guantanamo Bay. The resolution stipulates that Member States are under the following obligations (*inter alia)*: to refuse to comply with any requests for extradition to the United States, if the suspect is liable to be detained at Guantanamo Bay; and to refuse to comply with United States' requests for mutual legal assistance in relation to Guantánamo Bay detainees, other than by providing exculpatory evidence, or unless in connection with legal proceedings before a regularly constituted court. Regarding detainees who are eventually transferred from Guantanamo Bay to a Member States of the Council of Europe, Member States were obliged to respect "the presumption of immediate liberty on arrival". *Council of Europe Parliamentary Assembly Resolution 1433: (*on the Lawfulness of Detentions by the United States in Guantanamo Bay)
http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1433.htm

have incorporated the Inter-American court concept of due diligence, which requires States to remedy violations committed by private actors. [28]

12. In this regard, the Defence presented lengthy submissions in its request and reply regarding the fact that the responsibility of an organisation may be triggered by aiding/abetting/benefiting from/or perpetuating a continuing breach.[29] The Defence further cited the positive obligation of the Court to ensure the rights of suspects which is triggered by article 55(1). In terms of the latter, Article 55(1) does not specify whether the acts (arbitrary arrest or detention) must be attributed to the Prosecutor or national authorities: all that is required to invoke the positive obligation to take all necessary measures to prevent or remedy arbitrary arrest or detention is that the acts must have occurred in the context of an investigation under the Statute. In this regard, the Defence refers to a statement of the ICTR Appeals Chamber that "the international division of labour in prosecuting crimes must not be to the detriment of the apprehended person":[30] thus the responsibility of the Prosecution can be invoked by its failure to take appropriate measures to remedy a violation of the applicant's rights occurring at the domestic level.

13. Since the DRC referred the situation to the Court in 2004, the Defence submits that the Court's obligation to ensure the rights of Thomas Lubanga Dyilo was triggered as soon as the Court became aware that he had been apprehended and detained in connection with investigations pertaining to crimes falling under the Rome Statute.[31] Even if the ability of the Court to remedy the violation may have been constrained by the fact that the violation occurred in another territory, the Court and the Prosecutor would nonetheless be obliged to "endeavour, with all the legal

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[28] See for example, General Comment 31 of the Human Rights Committee on the Nature of General Legal Obligations on State Parties to the Covenant at para 15: "failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy." < http://www1.umn.edu/humanrts/gencomm/hrcom31.html >

[29] See in particular, para 21 and footnote 27 of the Defence response to the DRC and victims, and para 32 (page 20) of Defence request for release.

[30] Judgement dated 23 May 2005 at para 220 (all ICTR decisions can be downloaded from www.ictr.org). The Defence also refers to the Decision of the ICTY Appeals Chamber concerning the Rule 11*bis* transfer of Savo Todovic to the Court of Bosnia and Herzegovina, in which the Chamber remarked that " as to the vagueness of the timing for the construction of the new prison to accommodate persons convicted by the State Court of BiH, the Appeals Chamber recalls the Prosecution's obligation to alert the Referral Bench in case there are serious concerns that the minimum standards or pre-trial – or in the face of a conviction, post-conviction – detention will not be met" Decision of 6 September 2006, at para 99. http://www.un.org/icty/rasevic/appeal/decision-e/tod-acdec060904e.pdf

[31] An analogous argument was employed by the Appeals Chamber in the 3 November 1999 Barayagwiza decision: the Chamber referred to the notion of supervisory powers "that may be utilised in the interests of justice, regardless of a specific violation. […] The use of such supervisory powers serves three functions: to provide a remedy for the violation of the accused's rights; to deter future misconduct; and to enhance the integrity of the judicial process" (at para 76).

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."[32]

14. The Defence also submits that the requirement of concerted action goes beyond that which is required to attribute ***criminal*** responsibility to individuals and officials under the Rome Statute,[33] in clear contradiction of the differences between these spheres of law, and the respective thresholds for establishing responsibility. In this regard, the Defence refers to the following demarcation between the two spheres of law, set out by the ICTY Trial Chamber in the *Kunarac et al.* Trial Judgement:[34]

> when referring to definitions which have been given in the context of human rights law, the Trial Chamber will have to consider two crucial structural differences between these two bodies of law: (i) Firstly, the role and position of the state as an actor is completely different in both regimes. 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. […] In the human rights context, the state is the ultimate guarantor of the rights protected and has both duties and a responsibility for the observance of those rights. In the event that the state violates those rights or fails in its responsibility to protect the rights, it can be called to account and asked to take appropriate measures to put an end to the infringements.[35]

15. Thus, in light of the rationale of human rights law, which is to protect individuals from the potentially oppressive or negligent abuses of a State, it is appropriate to adopt a lower threshold for imputing responsibility to a State, than that which is required for imputing criminal responsibility to an individual for crimes. Hence, the Defence urges the Appeals Chamber to resoundingly reject any approach which would utilise stricter criteria for adjudicating whether the Court is responsible for ensuring the fundamental human rights of Thomas Lubanga Dyilo, than are used to adjudicate his criminal responsibility under the Statute. It would be extremely

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[32] *Illascu and others v. Moldova and Russia* Application no. 48787/99) Judgment of 8 July 2004 at para. 333 (available on HUDOC).See also *Had' Boudellaa, Boumediene Lakhdar, Mohamed Nechle And Saber Lahmar v. BiH,* cited above at footnote 22.

[33] Article 25 includes *inter alia,* aiding, abetting or otherwise assisting in the commission or attempted commission of a crime; and in any way contributing to the commission or attempted commission of a crime in the knowledge of the group to commit the crime.

[34] 22 February 2001, at para 470. http://www.un.org/icty/kunarac/trialc2/judgement/index.htm

[35] See also the *Velasquez Rodrigez* Case Judgment of 29 July 1988: "The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of States responsible." (at para 134) Inter-American Court of Human Rights http://www.corteidh.or.cr/seriecpdf_ing/seriec_04_ing.pdf

surprising and disappointing if a court, which is willing to adopt such progressive standards in terms of victims' applications,[36] adopts such a retrograde position when the defendant is the victim.

16. In terms of the third scenario, the Chamber cites the ICTY cases of *Nikolic* and *Dokmanovic*,[37] and the ICTR cases of *Barayagwiza* and *Kajelijeli* in support of the proposition that "to date, the application of this doctrine, which would require that the Court decline to exercise its jurisdiction in a particular case, has been confined to instances of torture or serious mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the persons to the relevant international criminal tribunal". [38]

17. In the view of the Defence, the requirement that the applicant demonstrate a serious violation flows from the fact that technical breaches of the law in connection with arrest/transfer do not in themselves justify a stay of the proceedings: it does not however flow from this conclusion that an applicant must always demonstrate that the breach of his rights occurred in connection with arrest and transfer proceedings to the international judicial forum, or that each concrete breach must amount to torture or other serious mistreatment.

18. Although the scenario of an accused requesting a stay of proceedings has typically arisen in the context of arrest and transfer proceedings, the attendant case law has not restricted the application of the doctrine to these specific scenarios. For example, in the *Nikolic* Trial decision, the Chamber concluded that

> in a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. This would certainly be the case

[36] For example, extending the definition of harm to encompass moral harm.

[37] The applicability of the *Dokmanovic* decision to this application is highly questionable. The Chamber held that although Dokmanovic had been 'lured' from the territory of FRY to Croatia, luring does not itself constitute an offence, particularly in light of the fact that all States were obliged as a matter of law, to transfer indicted persons to the ICTY irrespective of the terms of their domestic extradition provisions (see paras 67 and 68). The decision therefore turned on the fact that the accused's rights had not been violated, as opposed to the question of the involvement of the OTP or the severity of the alleged violations of the applicant's rights. The reference to the *Toscanino* requirement of demonstrating "cruel, inhumane and outrageous conduct"(see para 75) should be read in the context of the degree of force or illegality required to transform an otherwise legal arrest/apprehension (or at least, one that is not prohibited under international law) into an illegal use of force which would justify a stay of proceedings. In light of the fact that there is a presumption that an arrest executed pursuant to a lawfully issued arrest warrant is *prima facie* valid, the Defence submits that there is a correspondingly higher threshold for justifying a dismissal of the case, as compared to the present application, which concerns proceedings that commenced with an arbitrary arrest, a complete failure of due process, and prolonged detention in inhumane and degrading conditions. Finally, the Defence observes that the Chamber specifically attached the caveat to its judgement that its reasoning was limited to considering whether the method utilised to arrest and detain Mr. Dokmanovic was justified and legal, and as such, it did not address arguments concerning whether the Court should divest itself of jurisdiction if the arrest was in fact illegal (see para 78).

[38] At page 10.

> where persons acting for SFOR or the Prosecution were involved in such very serious mistreatment. But even without such involvement this Chamber finds it extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated. This, the Chamber observes, is in keeping with the approach of the Appeals Chamber in the *Barayagwiza* case, according to which in cases of egregious violations of the rights of the Accused "it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights". The Prosecution support such an approach.[39]

19. The Defence extrapolates the following from this case law. Firstly, although the Trial Chamber expressly referred to inhuman, cruel or degrading treatment or torture, it implied that such violations will be at the higher end of the scale (this is connoted by the words 'maybe even'), in the sense that whereas other violations of less gravity may justify a stay of proceedings, torture or similarly egregious conduct would certainly justify such a stay. The Appeals Chamber further clarified that the categories of violations and the requisite level of seriousness "depends on the circumstances of each case and cannot be made *in abstracto*".[40]

20. In addition, in the *Barayagwiza* judgement, although the Appeals Chamber utilised the word 'egregious', it did so in relation to the applicant's circumstances *in totu*, based on its consideration of cumulative violations of the applicant's rights.[41] The Defence therefore submits that it is not necessary for the Defence to establish that each specific violation is tantamount to torture: what is required is that the cumulative effect of the alleged violation amounts to a serious infringement of the applicant's rights.

21. Secondly, the Defence submits that the phrase "if that person was brought into the jurisdiction of the Tribunal after having been serious mistreated" implies that the Chamber did not intend to limit the application of the abuse of process doctrine to violations committed in the actual arrest/transfer process. As previously noted, in the *Barayagwiza* case, the Appeals Chamber took into consideration a range of allegations, such as the length of detention prior to transfer, delays in scheduling the

[39] At para 114. The Appeals Chamber upheld the Trial Chamber's approach at page 30 of the Appeals decision, and furthermore, expressly reaffirmed the continued applicability of the 3 Nov 1999 Appeals Chamber decision in the *Barayagwiza* case.
[40] At para 30.
[41] The Appeals Chamber took into consideration the following issues "1) the right to be promptly informed of the charges during the first period of detention; 2) the alleged failure of the Trial Chamber to resolve the *writ of habeas corpus* filed by the Appellant; and 3) the Appellent's assertions that the Prosecutor did not diligently prosecute her case against him". (at para 73). The Chamber subsequently emphasised that "the circumstances set forth in this analysis must be read as a whole.[…] none of the findings made in this sub-section of the Decision, in isolation, are necessarily dispositive of this issue. That is, it is the combination of these factors and not any single finding herein that leads us to the conclusion we reach in this subsection. In other words, the application of the abuse of process doctrine is case specific and is limited to the egregious circumstances [emphasis added] presented by this case". At para 73.

initial appearance, and delays in hearing the application for habeas corpus, and cited with approval several decisions related the abuse of process doctrine, which were issued in connection with unreasonable delay.[42] The Defence further observes that the principle of abuse of process has been applied in domestic proceedings in the context of a breach of the defendant's right to a speedy trial, or due to unreasonable pre-trial detention, even in circumstances in which a fair trial could still be held.[43].

2.2 Failure of the Chamber to take into consideration relevant and probative indicia concerning the relationship between the DRC and the OTP

22. On this issue, the Chamber simply concluded that "there is no evidence indicating that the arrest and detention of Thomas Lubanga Dyilo prior to the 14 March 2006 was the result of any concerted action between the Court and the DRC authorities".[44]

23. The Defence requested access to the entire DRC case file for the purpose of verifying contacts between the OTP and the DRC authorities in order to challenge the legality of his arrest. This request was denied by both the Pre-Trial Chamber and the Appeals Chamber. The ability of the Defence to conduct inquiries in the DRC regarding the domestic proceedings against Thomas Lubanga Dyilo was frustrated by the deterioration in the security situation in August, which resulted in evacuation of the Defence team member.

24. Given the limited ability of the Defence to present factual submissions on this point, the Defence referred in particular to the principle under human rights law that "[i]n contrast to domestic criminal law, in proceedings to determine human rights, the State cannot rely on the defense that the complainant has failed to provide evidence when it cannot be obtained without the State's cooperation.". [45]

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[42] The Privy Council's decision in *Bell v. DPP of Jamaica*, and *R v. Oxford City Justices ex parte* Smith (DKB) cited at para. 75. The Appeals Chamber also subsequently observes that "violations of the right to a speedy disposition of criminal charges have resulted in dismissals with prejudice in Canada, the Philippines, the United States, and Zimbabwe"(at para 108). In terms of Zimbabwean case law, the Chamber cites the Mlambo case at para 111.

[43] See Emerson and Ashworth, Human Rights and Criminal Justice (Sweet and Maxwell, 2001) at pages 353 – 357, referring in particular to New Zealand and Canadian jurisprudence to the effect that "the psychological effects of delay on a defendant may constitute a strong argument that the delay is unreasonable, even if a fair trial could still be held" (at page 357).

[44] At page 11.

[45] *Velasquez Rodrigez* Case Judgment of 29 July 1988, Inter-American Court of Human Rights http://www.corteidh.or.cr/seriecpdf_ing/seriec_04_ing.pdf at para 135. See also *Affaire İpek C. Turquie (Requête no 25760/94)*17 février 2004 at paras. 111-113, cited in the Defence reply to the OTP dated 10 July 2006 at para 14, and *Orhan v. Turkey*, Judgement of ECHR of 2002 (Application no. 25656/94) Judgment 18 June 2002 FINAL 06/11/2002): " It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. A failure on a

25. Although the Chamber did not pronounce on the requisite standard for assessing whether there was 'concerted action' between the Prosecution and the Defence, if they had viewed the submissions of the Defence through the appropriate human–rights oriented lens, the following indicia should have provided sufficient evidence to conclude that the acts of the DRC authorities could be attributed to the ICC Prosecution. Their statement that there was 'no evidence' is thus plainly incorrect.

26. On 19 April 2004, the DRC referred the situation to the Court, and thus implicitly waived its primacy over investigations into alleged crimes falling under the Rome Statute. It is thus arguable that after the date of referral, any investigations into violations of the Rome Statute were implicitly conducted on behalf of,[46] or with the potential jurisdiction of the ICC in mind. This interpretation is supported by the fact that on 6 October 2004, the Prosecution signed an agreement for judicial cooperation with the DRC.[47] Notably, under Chapter 7 of the agreement, the DRC is obliged to notify the ICC OTP as soon as is practical of any investigations opened by domestic authorities in relation to crimes falling under the Rome Statute, and all subsequent developments in such investigations. In light of the aforementioned jurisprudence of the ICTY on the legal effect of the MOU between the ICTY OTP and SFOR, the Defence is of the view that the referral of the situation to the ICC and the subsequent memorandum of understanding created an agency relationship as between the DRC investigating authorities and the ICC OTP.

27. Subsequent to the DRC's referral of the situation to the DRC, the Prosecutor announced in April 2004 that he intended to concentrate on events in Ituri.[48] In light of the fact that during the hearing for the application of the arrest warrant, the Prosecution expressed its view that Thomas Lubanga Dyilo bore the greatest responsibility for events in that area (in the context of the gravity required to meet the jurisdictional threshold of proceedings before the ICC), the only reasonable

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Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations" at para 266 –see also para 274.

[46] "Although the ICC Statute is based on the principle of complementarity, which grants primacy to national courts, technically the state in question loses its primacy and the ICC gains control over the case once the case has been rendered admissible. The fact that Article 59(2) expressly leaves part of the proceedings to national authorities does not mean that the ICC lacks competence over the case. At this stage, the state involved is executing part of the proceedings *on behalf of the ICC.*" M. El Zeidy, 'Critical Thoughts on Article 59(2) of the ICC Statute' Journal of International Criminal Justice, 4 (2006) 449-465, at page 458. < http://jicj.oxfordjournals.org/cgi/content/short/4/3/448 >

[47] ICC-01/04-01/06-32-US-Exp-Anna8

[48] Prosecutor receives referral of the situation in the Democratic Republic of Congo The Hague, 19 April 2004 ICC-OTP-20040419-50-En < http://www.icc-cpi.int/pressrelease_details&id=19&l=en.html >

assumption can be that the Prosecutor had commenced its investigation of Thomas Lubanga Dyilo prior to his arrest by DRC authorities in March 2005. Accordingly, Thomas Lubanga Dyilo's rights under article 55 (1) would have been in force as of the time of his arrest in March 2005 (if not previously).

28. The Defence further submits that it is highly coincidental that exactly one month after his arrest, the Prosecution submitted an application to interview a witness or collect evidence on the basis of a unique investigative opportunity. The Defence submits that it is reasonable to assume that either the investigative opportunity was in some way connected to Thomas Lubanga Dyilo or the prosecution may have been seeking to benefit from the detention of Thomas Lubanga Dyilo by accessing evidence that they might not previously have had access to. However, since all decisions and filings concerning the prosecution's application remain *ex parte*, the Defence has been unable to verify whether there is any link between the Prosecution's application and its investigations into the UPC.

29. REDACTED;[49] REDACTED.[50]

30. REDACTED

31. In August 2005, representatives of the ICC prosecution met with the office of the Auditor Général;[51] it must therefore be assumed that the ICC prosecution was informed at this time that the DRC authorities had no intention to pursue Thomas Lubanga Dyilo for the allegations which formed the basis of his continued detention. It can also be assumed that it was at this point in time that the DRC authorities communicated their desire that the ICC conduct the investigations on behalf of the DRC and with the assistance of the DRC. However, despite the fact that the DRC authorities had acknowledged that they did not posses sufficient evidence to pursue the case against Thomas Lubanga Dyilo, they did not order his release, nor did the ICC OTP formally request that the ICC Pre-Trial Chamber issue an arrest warrant to the DRC in order to legitimise his continued detention for alleged crimes falling under the Statute of the ICC. The only conclusion can be that their solution to the admissibility bar of article 20 (3) was simply to do nothing, which would thus enable the ICC OTP to argue that the domestic proceedings were not being conducted in a manner which was consistent with an intention of bringing someone to justice (article 20(3)(b) of the Rome Statute). Indeed, it was only after Thomas Lubanga Dyilo was transferred to the ICC (that is, after his continued detention had been

[49] REDACTED
[50] REDACTED
[51] See footnote 18 of the Prosecution's further information filed on 25 January 2006.

secured) that the Auditor Général closed the domestic proceedings against Thomas Lubanga Dyilo (to avoid the problem of *ne bis in idem).* It can therefore be inferred that the sole purpose of maintaining the guise of domestic investigations was to ensure the continued detention of Thomas Lubanga Dyilo until such time that the ICC OTP was in a position to officially request his arrest in accordance with the evidentiary threshold set out in the Rome Statute.[52]

32. The Prosecutor subsequently met with the Auditor Général (or his representatives) in September 2005, December 2005, and January 2006,[53] during which meetings, it was confirmed to the Prosecutor that the DRC authorities had taken no further investigative steps against Thomas Lubanga Dyilo.[54] The Prosecutor was therefore actively working with the very same entity which was responsible for ordering the continued detention of Thomas Lubanga Dyilo.

33. Under the military law being applied to Thomas Lubanga Dyilo, after twelve consecutive months in detention, he had a right to be brought before a military judge in order to consider and contest the continued legality of his detention (which had previously been extended on a routine basis by the Auditor Général). In a filing before the ICC Pre-Trial Chamber, the Prosecutor noted that (in contradistinction to the Auditor Général, whom the Prosecutor met to discuss the Lubanga case on a recurring basis) the Prosecutor was "not privy to information as to the possible intentions of the competent military judge". The Prosecution was therefore concerned that "the apparent absence of investigative acts performed since the arrest of Thomas LUBANGA DYILO [would provide] sufficient legal basis for that judge to authorize his release".[55] It is therefore apparent that the rationale and timing of the Prosecution's application for an arrest warrant was to circumvent the possibility of Thomas Lubanga Dyilo exercising the fundamental human right of *habeas corpus* before a judicial entity.

34. In this regard, the Defence submits it is evident from the hearing of 2 February 2006 that the Prosecution was aware of problems pertaining to lack of due process, and arbitrary and prolonged detention (in extremely poor conditions) in the DRC, which had been extensively reported by NGOs, the Human Rights Committee,[56] and

[52] The Auditor Général also ordered that all documents in case file RMP No. 0123/NBT/05 be transmitted to the ICC (page 4 of Defence request for release).
[53] See footnote 18 of Prosecutor's further information and materials dated 25 January 2006. Reclassified as public on 23.03.2006 pursuant to decision ICC-01/04-01/06-46
ICC-01/04-01/06-39-AnxC
[54] Further information of 25 January 2006 at paras. 11, 20 and 21.
[55] At para 13.
[56] These reports will be discussed in further detail in Section 2.4.

MONUC.[57] The Prosecution was therefore put on notice that persons investigated by DRC authorities could be subjected to arbitrary detention in inhumane conditions and denied due process. However, it is also manifestly clear from the information provided by the Prosecutor to the Pre-Trial Chamber in connection with its application for an arrest warrant that at no point in time did the ICC Prosecution seek to ensure the rights of Thomas Lubanga Dyilo under article 55(1), or, despite the plethora of meetings between the Prosecutor and the Auditor Général, condition their cooperation with the relevant DRC authorities on the DRC's agreement to do so.

35. In light of the chronology of events, and the Prosecution's own admissions regarding its continued contacts with and assistance received from the Auditor Général, the Defence is simply unable to comprehend how the Pre-Trial Chamber could hold that there was no evidence, particularly given that the Chamber has been privy to far more *ex parte* information on these matters than the Defence.

2.3 Application of an incorrect legal standard for assessing the relevant law of the DRC in the context of article 59(2)

36. Article 59(2) provides that "a person arrested shall be brought before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

(a) The warrant applies to that person;

(b) The person has been arrested in accordance with proper process; and

(c) The person's rights have been respected."

37. In the impugned decision, the Pre-Trial Chamber concluded that "the words "in accordance with the law of that State" means that it is for the national authorities to have primary jurisdiction for interpreting and applying national law […] although this does not prevent the Chamber from retaining a degree of jurisdiction over how the national authorities interpret and apply national law when such an interpretation

[57] MONUC described the conditions of detention in the DRC as amounting to inhumane treatment. 'Rapport sur la détention dans les prisons et cachots de la RDC' April 2004 < http://www.monuc.org/downloads/Rapport_sur_les_prisons_octobre_2005.pdf#search=%22Rapport%20sur%20la%20d%C3%A9tention%20dans%20les%20prisons%20et%20cachots%20de%20la%20RDC%20MONUC%202004%22 >

and application relates to matters which […] are referred directly back to the national law by the Statute".[58]

38. The Chamber subsequently restricted its review of the actions of the DRC authorities to the question as to whether they conformed to domestic provisions governing proceedings before military courts, and concluded that the national authority which executed the arrest was competent to do so because Thomas Lubanga Dyilo "was being detained at that time in relation to national proceedings before the Congolese Military Courts". [59]

39. The Defence submits that the Pre-Trial Chamber erred by firstly, adopting a 'margin of appreciation test' which is peculiar to the member States of the Council of Europe and European Union; and secondly, failing to consider whether the actions of the DRC authorities complied with the DRC's obligations under the ICCPR and the African Charter of Human and Peoples' Rights.

40. Regarding the first issue, in support of its deference to the right of national authorities to interpret national law, the Chamber cites the ECHR cases of *Altmann v. France*, and *Winterwerp v. The Netherlands*. However, the Defence respectfully submits that the reference to the primacy of domestic interpretation is in fact an elucidation of the principle of 'margin of appreciation' which does not actually apply to the ICCPR[60] or the African Charter on Human and Peoples' Rights.[61] In light of the fact that the DRC has ratified both the ICCPR and African Charter (but obviously not the ECHR), it is highly inappropriate for the ICC to utilise the Council

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[58] At page 6 of the impugned decision.
[59] At page 8 of the impugned decision.
[60] See General Comment 29 regarding the restrictions on derogations under the ICCCPR. The Defence also refers to the case of *Lansman et al. v. Finland*, U.N. GAOR Human Rights Comm., 58th Sess., Communication No.671/1995 at para 10.5, U.N. Doc. CCPR/C/58/D/671/1995 (1996), in which the Human Rights Commission expressly rejected the application of the margin of appreciation doctrine to the ICCPR. See also General Comment No. 31 regarding the obligation of State parties to implements its obligations under the ICCPR "Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty."
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument
[61] UNISA address by Prof N Barney Pityana Inaugural Address 12/08/2003, University of South Africa **"***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***"** – at P24-25http://www.unisa.ac.za/contents/about/principle/inaugural_lecture_03.doc
The Professor draws comparison between the African Charter system and the ECHR. In this comparison, Pityana refers to the notion of margin of appreciation as a device of the European Court of Human Rights alone, implying that this notion is absent from the African Charter and its jurisprudence. See also René Provost Les Droits de l'Homme en Afrique : La Charte Africaine des Droits de l'homme et des Peuples--une Approche Juridique des Droits de l'homme Entre Tradition et Modernité Human Rights Quarterly 17.4 (1995) 807-812

of Europe's standard of margin of appreciation for evaluating whether the DRC complied with the applicable national law.[62]

41. In this regard, as submitted in the Defence reply to the DRC and victims, as a member of the monist legal tradition, upon ratification of these instruments, the DRC was automatically obliged to give effect to their provisions in the implementation of its internal law. Accordingly, in its assessment as to whether the execution of the arrest warrant was in accordance with "the law of that State", the Pre-Trial Chamber was required to analyse whether the actions of the DRC authorities complied with the DRC's obligations under the ICCPR and the African Charter.[63]

42. The Defence incorporates by reference the arguments set out in its request for release, its reply to the OTP, and its reply to the DRC and victims concerning the fact that the arrest warrant was executed by military authorities, and as such, Thomas Lubanga Dyilo did not have recourse to an impartial and independent judicial entity for this purpose. Although military tribunals are not prohibited *per se* under the ICCPR and African Charter,[64] in April 2006, the UN Human Rights Committee expressly referred to the absence of fair trial guarantees in the military court system in the DRC.[65] In addition, the question as to whether this particular military authority was likely to act in a fair and independent manner should also be considered in light of the fact that the very same military authorities had expressly

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[62] "The fact that Article 59(2) expressly leaves part of the proceedings to national authorities does not mean that the ICC lacks competence over the case. At this stage, the state involved is executing part of the proceedings *on behalf of the ICC."* M. El Zeidy, 'Critical Thoughts on Article 59(2) of the ICC Statute' Journal of International Criminal Justice, 4 (2006) 449-465, at page 458. < http://jicj.oxfordjournals.org/cgi/content/short/4/3/448 > In connection with article 59(2), the DRC authorities were also obliged to consider whether the arrest procedure complied with article 59(1), which provides that the State authorities shall arrest the person "in accordance with its laws and the provisions of Part 9" [emphasis added]. The latter reference to Part 9 is particularly significant because part 9 of the Rome Statute imposes an obligation on State parties to ensure firstly, under article 86 that they cooperate "in accordance with the provisions of this Statute", and secondly, under article 88 that they shall ensure that there are procedures available under their domestic law for all of the forms of cooperation which are specified under part 9. In view of the fact that article 21(3) of the Rome Statute stipulates that the provisions of the Rome Statute must be applied in a manner which is consistent with human rights law, it is arguable that article 59(1), when read in connection with articles 86, 88 and 21(3), translates into an obligation to ensure that the domestic procedures that the State party has in place to execute arrest warrants against ICC suspects are consistent with human rights laws.

[63] "Finally, the national authorities must determine whether the rights of the person arrested have been respected. One may think here of the rights of the person under national law and human rights treaties to which the requested State is a party." Cassese, Jones and Gaeta, , pages 1253-1254.

[64] Although in the case of International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation, the African Commission concluded that "removing cases from the jurisdiction of the ordinary courts and placing them before an extension of the executive branch necessarily compromises their impartiality, which is required by the African Charter. This violation of the impartiality of tribunals occurs in principle, regardless of the qualifications of the individuals chosen for a particular tribunal." http://hei.unige.ch/~clapham/hrdoc/docs/achprsaro-wiwacase.html

[65] 'Concluding Observations of the Human Rights Committee on the Democratic Republic of Congo' CCPR/C/COD/CO/3 26 April 2006,< http://www.ohchr.org/english/bodies/hrc/hrcs86.htm > At paras. 19-21.

acknowledged that they had arrested Thomas Lubanga Dyilo in 2005 due to political pressure from MONUC, and had also been responsible for the continued unlawful detention of Thomas Lubanga Dyilo since March 2005 onwards.

43. In terms of the Chamber's conclusion that the national authority which executed the arrest was competent to do so because Thomas Lubanga Dyilo "was being detained at that time in relation to national proceedings before the Congolese Military Courts", the Defence strongly rejects the assumption that the illegal genesis of an act can justify its continued illegality. Article 59 provides a remedy (albeit limited in nature) against illegal arrest and unnecessary detention; it is therefore incumbent on the ICC to ensure that national authorities implement the person's right to a remedy in an effective rather than illusory manner.[66] What possible chance did Thomas Lubanga Dyilo have to challenge whether he was arrested in accordance with due process or to seek interim release from the very same authorities which had agitated for the transfer of his case to the ICC and had actively worked with the ICC OTP to this end, and had been responsible for ordering his continued detention despite the lack of any evidence against him?

44. Finally on this point, in relation to the submissions of the DRC requested by the Pre-Trial Chamber, which were drafted and signed by the Auditor Général, although the Auditor Général has been designated as the entity which is responsible for liaising with the ICC OTP, this position does not represent the DRC government as such. Accordingly, the submissions filed 'on behalf of the DRC' did not constitute a neutral assessment of the acts of the Auditor Général, and the relationship between the Auditor Général and the ICC OTP.

[66] In its report entitled "Situation of detainees at Guantanamo Bay (available online at http://daccessdds.un.org/doc/UNDOC/GEN/G06/112/76/PDF/G0611276.pdf?OpenElement), Human Rights Commission held that the Combatant Status Review Tribunal (CSRT), a body composed of three non-commissioned officers to examine the legality of detentions of detainees held at Guantanamo Bay, infringed Articles 9 and 14 of the ICCPR. due to the fact that the judges of the commission are appointed by the "Appointing Authority", which is under the authority and the responsibility of the Department of Defense and ultimately of the President. As the Auditor Général of the Democratic Republic of Congo is under the ultimate responsibility of the President of the Republic then he would also fail to satisfy the requirement that review of pre-trial detention should be carried out by an independent judicial authority as stipulated under Articles 9 and 14 ICCPR. The Commission expressed further concern at the absence of an impartial judicial mechanism to review these decisions (see paragraph 32 of the Report). If the ICC – by utilising the principle of margin of appreciation - gives undue deference to the findings of the Auditor General under Article 59 of the Rome Statute, then the impartiality of the pre-trial review procedure in this matter is similarly impugned.
The Defence further refers to the United States Supreme Court decision of *Hamdan v Rumsfeld* delivered on July 29 2006, in which the Court found that the final review of the decisions of the Combatant Status Review Tribunal by the Secretary of Defense served to perpetuate and aggravate this lack of impartiality (See the Opinion of the Court at page 45 and the Separate Opinion of Kennedy J at page 15.)

2.4 Failure to consider the cumulative effect of the violations of Thomas Lubanga Dyilo's rights

45. At page 10 of the impugned decision, the Honourable Pre-Trial Chamber abruptly concludes "that in the course of the present proceedings under article 19 of the Statute, no issues have arisen to any alleged act of torture against or serious mistreatment of Thomas Lubanga Dyilo by the DRC national authorities".

46. The Defence respectfully takes issue with the Chamber's conclusion that no such issues have arisen. In 2003, Thomas Lubanga Dyilo was arbitrarily arrested,[67] and kept in house detention. During this time, he was deprived of his liberty, his right to family life, and was denied sustenance on a regular basis.[68] At no stage was he brought before a judge or permitted to challenge his continuing house arrest.[69] The fact that he was apprehended after having been lured to Kinshasa to attend peace talks, evidences the inappropriate links between the executive, the military and the judiciary, and the fact that as a well-known political target, Thomas Lubanga Dyilo could not subsequently rely on the independence and impartiality of military proceedings.

47. REDACTED. In this regard, the Defence refers to the well-known 'death row' phenomenon which attaches to persons who are kept in a prolonged state of uncertainty regarding the resolution of their case, and in particular, whether they will be subjected to the death penalty.[70] In light of the complete lack of independence in the proceedings, and the fact that he had previously been kept in house detention

[67] The Defence refers to its submissions in its reply to the victims and the DRC at paras 53 and 54 concerning the legal qualification of house arrest, and the attendant rights.

[68] In support of this allegation, the Defence refers to the following conclusions (regarding detention conditions) of the United States State Department Report dated 8 March 2006 on Human Rights Practices in the DRC during 2005; "Food remained inadequate, malnutrition was widespread, and there were unconfirmed reports of detainees starving to death. In several areas, the government has not provided food for years. In general, prisoners' family and friends were able to provide food and other necessities; however, local nongovernmental organizations (NGOs) reported that authorities sometimes moved prisoners without telling the families where they were sent. Family members were often forced to pay bribes to bring food to prisoners. Prisoners who had no relatives to bring them food could be subject to starvation" http://www.state.gov/g/drl/rls/hrrpt/2005/61563.htm

[69] Read together with article 2(3) of the ICCPR, State parties are also obliged to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant. See para. 1 of Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 8 (1994). The Defence further refers to the fact that the allegations of Thomas Lubanga Dyilo in the letter of 19 February 2005 to the Vice-President of DRC, complaining about the inhuman conditions of his forced residence, and asking to be liberated, were never answered nor contested by the DRC in its response to the Defence request for release. This letter was annexed to the Defence request for release.

[70] This phenomenon has been recognised by the ECHR, under the ICCPR, and by the UK Privy Council, and has been applied in circumstances in which the person has yet to be convicted: *Cox v. Canada,* 31 October 1994, Comm. 539/1993 UN doc. CCPR/C/52/D/539 1993 at para 16.1-16.7; *Einhorn v. France,* 16 October 2001 (Application no. 7155/01) at para. 126.

simply because he was a political target, Thomas Lubanga Dyilo had every reason to fear such an outcome.[71] The Defence further notes that the African Commission on Human and Peoples' Rights has declared that failure to comply with certain basic procedural safeguards for those deprived of their liberty[72] can be considered to constitute cruel, inhuman or degrading treatment.[73] The Defence also reiterates its assertion that Thomas Lubanga Dyilo was never officially served with an arrest warrant.[74] The Prosecution themselves referred in a filing before the Pre-Trial Chamber to a Human Rights Watch report concerning the fact that Thomas Lubanga Dyilo had been arrested by DRC authorities and held without charges "in clear violation of Congelese legal procedures".[75] The conditions of detention in the DRC alone have been described as amounting to inhumane treatment.[76]

48. Moreover, as submitted in section 2.1, the Defence is of the view that in assessing the severity of the violations of the applicant's rights, it is necessary for the Chamber to adopt a holistic approach. Thus, whilst one particular violation might not meet the requisite level of gravity, the overall circumstances of the applicants might be such to justify a stay of proceedings. This is particularly the case for continuing or cumulative breaches. In addition, since the application of the abuse of process doctrine is independent of the entity responsible for the breaches in question, it is necessary for the Chamber to take into consideration breaches of his rights which occurred both before and after his transfer to the ICC. Such an approach would be consistent with the jurisprudence of the ICTR, as referred to at paragraph 12 above.

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[71] This conclusion is supported by the fact that the Human Rights Committee expressed its concern "at the many death sentences handed down, especially by the former Military Court, against an indeterminate number of persons, and the suspension in 2002 of the moratorium on executions" at para 17 (Report dated 26 April 2006 *supra*).

[72] For example, ensuring the control of detention by properly and legally constructed regulations, ensuring that all detained persons are informed immediately of the reasons for their detention, ensuring that all persons arrested are promptly informed of any charges against them, ensuring that all persons deprived of their liberty are brought promptly before a judicial authority, having the right to defend themselves or to be assisted by legal counsel, preferably of their own choice.

[73] Res.61(XXXII)02 of the African Commission on Human and Peoples' Rights on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002) http://www.achpr.org/english/resolutions/resolution66_en.html

[74] This allegation is consistent with the findings of the Human Rights Committee that "while an arrest must be authorized by a warrant issued by the public prosecutor's office, such a warrant is often not produced". Concluding Observations of the Human Rights Committee on the Democratic Republic of Congo' CCPR/C/COD/CO/3 26 April 2006,< http://www.ohchr.org/english/bodies/hrc/hrcs86.htm > at para 19.

[75] Para 11 of Prosecution further information and materials dated 25 January 2006.

[76] MONUC Rapport sur la détention dans les prisons et cachots de la RDC' April 2004 < http://www.monuc.org/downloads/Rapport_sur_les_prisons_octobre_2005.pdf#search=%22Rapport%20sur%20la%20d%C3%A9tention%20dans%20les%20prisons%20et%20cachots%20de%20la%20RDC%20MONUC%202004%22

49. Since his transfer to the ICC deprived him of the right to challenge his detention in the DRC, in effect, he has been in detention for crimes under the Rome Statute without being charged for 1 year and 8 months.

50. The Defence immediately challenged the legality of his arrest before the Appeals Chamber, and, as soon as was practically possible, filed a request for his release before the Pre-Trial Chamber on 23 May 2006. Despite the importance of resolving an issue of such fundamental importance, the decision of the Chamber was not issued until the beginning of October. There was thus a delay of over four months in addressing the equivalent of a request for habeas corpus.

51. Although the Chamber issued an order for detention on 10 March 2006, it failed to review the legality of Thomas Lubanga Dyilo's continued detention after 120 days, irrespective of the mandatory requirement in the Statute and the Rules to that effect.[77] The mandate of the Registry to keep Thomas Lubanga Dyilo in detention therefore effectively expired on 10 July 2006. In order to ameliorate the continued effects of his detention, the Defence filed a request for interim release, which was summarily rejected in a decision dated 18 October 2006 (this decision is subject to an appeal). Thomas Lubanga Dyilo was therefore illegally kept in detention from 10 July 2006 until 18 October 2006: that is, 3 months and 8 days.

52. Although the confirmation hearing was initially scheduled for the end of June 2006, it has twice been delayed. Although the Prosecution has sought to attribute such delays to a desire to give effect to the rights of the Defence, the Defence emphasises that it never requested the delays in question, and has consistently and forcefully asserted the right of Thomas Lubanga Dyilo to expeditious (and fair) proceedings. The Defence has therefore repeatedly requested additional resources and assistance in order to enable the Defence to review Prosecution evidence and prepare its case as expeditiously as possible. As a result of these postponements, as of this date, Thomas Lubanga Dyilo has spent a total of three years, two months and 12 days without ever having been charged by a judicial authority.[78] Irrespective of which entity or entities bear responsibility for these delays, how can such a lengthy

[77] Article 60(3) of the Statute stipulates that the Chamber "**shall** periodically review its ruling on the release or detention of the persons." Rule 118(2) further elaborates that "The Pre-Trial Chamber **shall** review its ruling on the release or detention of a person in accordance with article 60, paragraph 3, **at least every 120 days**"[emphasis added]. The Defence incorporates by reference its arguments concerning the correct legal interpretation of these provisions, as set out in its appeal against the Chamber's decision on provisional release, dated 26 October 2006.

[78] The Defence incorporates by reference its submissions concerning unreasonable delay, as set out in its Appeal against the Pre-Trial Chamber's decision on interim release, dated 26 October 2006.

period of detention as an uncharged suspect not constitute a gross violation of Thomas Lubanga Dyilo's rights?

2.5 Failure to consider whether an alternative remedy would have been appropriate

53. For the reasons set out in its reply to the observations of the DRC and the victims,[79] the Defence strongly submits that a stay of the proceedings and unconditional release is the only appropriate remedy in the current circumstances.

54. The Defence respectfully submits that it is important to distinguish between the obligation of the ICC to provide a remedy, and its obligation to provide a particular remedy. The Defence thus submits that the Chamber must examine the violations in question in order to determine whether a stay of proceedings is appropriate in the circumstances, and if not, whether an alternative remedy is more appropriate.

55. Thus, by simply closing off any further inquiry into the actions of the DRC prior to 14 March 2006 with the statement that such actions did not raise any issues of torture or serious mistreatment, the Chamber committed a fundamental error in conflating the threshold criteria for considering whether the ICC is obliged to order a remedy, with the ultimate assessment – which should not be determined *in abstracto* - as to whether that remedy should be a stay of the proceedings.

56. In this connection, the Defence observes that the *Basic Principles and Guidelines on the Right to a Remedy and Reparation*,[80] which has been cited with approval by the Pre-Trial Chamber,[81] sets out the obligation to "provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and provide effective remedies to victims, including reparation, as described" (emphasis added).[82]

[79] At paras 42-44.

[80] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the General Assembly 21 March 2006, A/RES/60/147

[81] See Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the *Prosecutor v. Thomas Lubanga Dyilo* 29 June 2006 ICC-01/04-01/06-172

[82] In terms of the range of applicable remedies, the Declaration advocates the following: "18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. 19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law

57. In addition, in the *Kajelijeli* judgement cited in the impugned decision, although the Chamber had determined that the violations did not merit a stay of the proceedings, it nonetheless ordered that the calculation of pre-trial detention for sentencing credit "also covers the periods during which *Kajelijeli* was detained solely on the basis of the Rwandan warrant of arrest because this warrant was based on the same allegations that form the subject matter of this trial. In such circumstances, fairness requires that account be taken of the total period *Kajelijeli* spent in custody."[83]

58. In its request for interim release, the Defence incorporated by reference its arguments from its request for release and attendant filings, and argued that in assessing the length of detention, it was also necessary for the Chamber to take into consideration the period during which Thomas Lubanga Dyilo had been detained in the DRC. The Chamber completely failed to address this argument in either its decision on the Defence challenge to jurisdiction, or the Defence request for release. The Chamber therefore failed to exercise its overriding duty to ensure Thomas Lubanga Dyilo's right to an effective remedy.

3. Concluding Observations

59. The ICC is not a human rights court writ large. Nonetheless, the ability of this court to judge fairly, impartially and independently, and to above all, recognise that all persons have the right to the protection of the law, will serve as a barometer for all future such proceedings. The Prosecutor has raised serious allegations against Thomas Lubanga Dyilo, relating to alleged crimes under the Rome Statute. Nonetheless, he is at this point in time, an uncharged suspect, protected by the aegis of the presumption of innocence, who has the right to enjoy the full panoply of human rights – including the fundamental right to seek an effective remedy for the serious and ongoing violations of his human rights. If this court sanctions his arbitrary detention in inhumane conditions and a vacuum of due process, how can it possible live up to its task of eliminating impunity for such offences?

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or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: **restoration of liberty**, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property."

[83] At para 966.

4. Relief Sought

60. The Defence respectfully requests the Honourable Appeals Chamber to:

i. reverse the impugned decision; and

ii. order the immediate release of Thomas Lubanga Dyilo to a country other than the DRC.

For Mr. Jean Flamme, Defence Counsel for Thomas Lubanga Dyilo

Dated this 26th day of October, 2006

At The Hague