Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-01/06**
Date: **28 November 2006**

THE APPEALS CHAMBER

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 Reply to the Observations of the Victims' Representatives

The Office of the Prosecutor
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Introduction

1. On 3 October 2006, the Honourable Pre-Trial Chamber issued its Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute, in which the Chamber dismissed the Defence's challenge to jurisdiction and corollary request for release.
2. On 9 October 2006, the Defence filed its notice of appeal, and on 26 October 2006, the Defence filed its brief in support of the appeal.
3. On 21 November 2005, the authorities of the DRC filed their observations, and on 22 November 2006, the representatives of the victims filed their observations in response to the Defence appeal brief.

2. Submissions

4. The Defence observes that pursuant to rule 156(1) of the Rules of Procedure and Evidence, as soon as an appeal has been filed under rule 154 or as soon as leave to appeal has been granted under rule 155, the Registrar shall transmit to the Appeals Chamber the record of the proceedings of the Chamber that made the decision that is the subject of the appeal.
5. The Defence therefore submits that it is entitled to utilise its appeal brief to elaborate on particular arguments, rather than being required to set out afresh each and every argument which could be relevant to the Appeals Chamber's adjudication of the issues.
6. In this regard, the Defence observes that the victims' representatives have reiterated many of their arguments from their submission dated 24 August 2006. The Defence addressed these arguments in its reply dated 8 September 2006.[1]
7. Since these submissions are part of the appeal record, the Defence submits that it is not necessary for the Defence to expressly reiterate these arguments in the present reply. The Defence further notes that the Prosecution concurred with the Defence that

[1] The Defence addressed the issue as to whether the request for release could be categorised as challenge to jurisdiction at paras 5 -10; the issue as to whether release could create a potential risk to victims at para 11; the issue as to whether the ICC has jurisdiction to adjudicate on whether Thomas Lubanga Dyilo's rights were respected under investigations conducted by DRC authorities at paras 12-20; the principle of "male captus bene dententus", and corresponding cases from the ICTY and ICTR concerning wrongful arrest at paras 29-41; the issue as to whether release, as opposed to sentencing reduction or monetary compensation, is the most appropriate remedy at paras. 42-44.

the arguments submitted by the victims' representatives pertaining to the doctrine of *male captus bene detentus* were misconceived.[2]

8. The Defence further submits that several of the arguments raised by the victims' representatives go beyond the scope of the issues which are the subject of the appeal filed by the Defence.[3]
9. For example, the representatives of the victims have submitted that a challenge to arrest and arbitrary detention does not constitute a challenge to the personal jurisdiction of the ICC. They also assert that the Defence's reliance on the 3 November 2006 decision in the Prosecutor v. Barayagwiza is misplaced, in light of the fact that the remedy granted in that decision was revised in a subsequent decision issued in accordance with Rule 119, which governs the revision of a decision based on new facts of a decisive character.[4]
10. In this regard, victims' representatives reiterate arguments which they initially presented to the Pre-Trial Chamber. However, the Defence observes that in its decision dated 3 October 2006, the Pre-Trial Chamber did not accept these arguments. At page 10, the Chamber expressly concluded that "whenever there is no concerted action between the Court and the authorities of the custodial State, the abuse of process doctrine constitutes an additional guarantee of the rights of the accused". The Chamber further confirmed that "the application of this doctrine […] would require that the Court decline to exercise its jurisdiction in a particular case".
11. This statement also clearly implies that the Court could also be required to divest itself of its personal jurisdiction over Thomas Lubanga Dyilo if concerted action between the DRC authorities and the ICC Prosecutor is established.

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[2] Prosecution's Response to the Observations of the DRC and the Observations of the Victims in Application of Article 19 of the Statute, dated 7 September 2006, ICC-01/04-01/06-401

[3] The issues which formed the basis of the appeal were as follows - the impugned decision:
- 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);
- Failed to consider the cumulative effect of the violations of Thomas Lubanga Dyilo's rights; and
- Failed to consider whether a lesser remedy would be appropriate

See paragraph 5 of the Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006 ICC-01/04-01/06-620

[4] The victims' representatives also assert that the Defence have failed to mention that the 3 November 1999 decision was reversed: plainly, the victims' representatives failed to read paragraphs 38 and 42 of the Defence response to the observations of the victims and the DRC, dated 8 September 2006, or footnote 21 of the Defence appeal brief dated 26 Octoebr 2006.

12. The Defence further notes that the Honourable Pre-Trial Chamber cited the 3 November 1999 Appeals Chamber decision with approval at footnote 32 of the impugned decision.
13. The appeal filed by the Defence addressed the scope of the abuse of process doctrine, and whether the Chamber failed to take into consideration relevant information in determining whether the criteria for the abuse of process doctrine had been met. The submissions of the victims' representatives on this issue have therefore gone beyond the scope of the issues which are on appeal.
14. The representatives of the victims also submitted that article 59 of the Statute does not entitle the Court to examine any acts which occurred prior to the issuance of an arrest warrant by the Court. In this regard, the Defence submits that the victims' representatives have conflated different issues: the Defence referred to article 59 in the context of whether question as to whether execution of the arrest warrant issued by the ICC by military authorities constituted a breach of Thomas Lubanga Dyilo's right to be brought before an independent and impartial authority for that purpose;[5] in terms of the violations which related to the prior time-period, the Defence relied on article 55 of the Statute.
15. In this regard, the position of the victims' representatives that the Court is unable to consider any events which occurred prior to the issuance of an arrest warrant is plainly contradicted by article 55, which sets out a panoply of rights which apply prior to the issuance of an arrest warrant. It would be highly artificial to conclude that neither the Prosecutor nor the national authorities were investigating Thomas Lubanga Dyilo for alleged offences under the Statute prior to the issuance of the arrest warrant, particularly since it is clear from the evidence that the Prosecution had decide to concentrate its investigations on Thomas Lubanga Dyilo as a suspect at an early

[5] The Defence refers to its submissions at of its Appeals brief. The Defence further observes that President Kabila expressly recognised that the DRC was obliged to implement its obligations under the ICCPR into domestic practice, in particular, the obligation to eliminate the use of military courts. Thus, in a resolution concerning the Situation of human rights in the Democratic Republic of the Congo Commission on Human Rights (resolution 2002/14), the UN Human Rights Commission welcomed "The announcement by President Kabila that the Military Court shall no longer try civilians" and urged that "trials of civilians by the Military Court should cease entirely and all detention centres not under the control of the Public Prosecutor's Office should close".
http://209.85.129.104/search?q=cache:C57Gaf2Ha14J:ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2002-14.doc+working+group+arbitrary+detention+congo&hl=nl&gl=nl&ct=clnk&cd=35

stage,[6] and from at least March 2005, was working directly with the national authorities to obtain evidence against him.[7]

16. Moreover, since article 55(1)(d) enshrines the rights, under the Rome Statute, not to be subjected to arbitrary arrest or detention, and not to be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established under the Statute, Thomas Lubanga Dyilo has a statutory right to bring any complaints concerning such violations of the aforementioned rights before the ICC. It would therefore be a derogation of the Court's duty to uphold and enforce the provisions of the Rome Statute not to consider any violations of his rights which occurred prior to the issuance of the arrest warrant.
17. If the Court were to decide otherwise, the rights set out in article 55 would be meaningless. For example, a suspect would therefore have no remedy if he were interviewed by national authorities without being informed of his right to counsel or his right to remain silence.
18. Furthermore, under the article 21(1)(a) of the Statute, the Pre-Trial Chamber's primary reference for assessing whether the Court had a duty to remedy violations of Thomas Lubanga Dyilo's rights, which occurred prior to the issuance of the arrest warrant, was the Statute and Rules themselves. Thus, the Pre-Trial Chamber Chamber should have predicated its decision on article 55, rather than relying on outdated decisions of the ECHR. Since article 55 sets out rights which applied to Thomas Lubanga Dyilo prior to the issuance of the arrest warrant, the Chamber was obliged to consider whether these rights were violated, and if so, what would be the appropriate remedy. It was therefore impermissible for the Chamber to impose additional requirements (the existence of concerted action, or the establishment of an egregious violation of his rights) which are not to be found in either the Statute, or Rules.[8]

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[6] In the Prosecution's request for an arrest warrant, they noted that Thomas Lubanga Dyilo was aware that he was the subject of investigations being conducted by the ICC OTP. See footnote 15 of the Prosecution's Submission of Further Information and Materials Reclassified as public on 21.03.2006 pursuant to decision ICC-01/04-01/06-42 ICC-01/04-01/06-32-AnxB

[7] The Defence intends to file a motion to admit additional evidence in accordance with Regulation 62 of the Regulations of the Court, which will expressly address this issue. It has not been in a position to do so previously because it has only recently obtained the information, and the extremely onerous schedule of the confirmation hearing has thus far impeded its ability to draft the motion.

[8] In this regard, the Defence observes that the European Court of Human Rights that as a Human Rights Convention, the European Convention must effectively guarantee rights, and is not merely designed to provide theoretical rights, so as to avoid a protection that is 'worthless'. The Court has also held that in interpreting the scope of States obligations under the Convention,"it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties." (Wemhoff v Germany (2122/64) [1968] ECHR 2 (27 June 1968)).It would therefore be contrary to the principles of the ECHR itself for the ICC to rely on ECHR case to limit the application of rights within the Rome Statute.

19. In terms of their further submission that Thomas Lubanga Dyilo's complaints were adjudicated and thus disposed of by the Auditor General; the Defence notes that under article 59(4), national authorities do not have the right to consider whether the warrant of arrest was properly issued in accordance with article paragraph 58, paragraph (1)(a) and (b). Article 58(1) (a) governs the question of jurisdiction. Accordingly, it was not open to the national authorities to determine whether the ICC should refuse to exercise personal jurisdiction over Thomas Lubanga Dyilo on the basis that his rights were not properly respected during the investigation against him: such a challenge can only be brought before the ICC itself.
20. Thus, an explanatory note accompanying the implementing legislation of the United Kingdom provides as follows: [9]

> Article 59.2 states that a person arrested shall be brought promptly 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 the proper process; and (c) the person's rights have been respected. However, nothing in the Statute allows a State to refuse to surrender a person to the ICC on the grounds that the person has not been properly arrested or his rights have not been respected. The Government interprets the Statute as meaning that it will be for the ICC to determine the consequence of any violation of a person's rights or of proper procedure for his prosecution before the ICC. It would be open to the ICC, for example, to halt the prosecution on grounds of abuse of process or to award compensation.

21. The Defence further submits that to hold otherwise would be to deny the person a right to an effective remedy, and a right to challenge whether his rights were respected during the investigative phase before an independent and impartial entity: such a remedy could hardly be said to exist if the person were forced to seek recourse from the very entity which caused the violations.
22. Similarly, the Defence submits that victims' representatives' reference to the statements of Thomas Lubanga Dyilo at the initial hearing are misconceived.[10] The

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[9] Explanatory notes on the International Criminal Court Bill [HL]
as brought from the House of Lords on 20th March 2001 [Bill 70] http://www.parliament.the-stationery-office.co.uk/pa/cm200001/cmbills/070/en/01070x--.htm

[10] Para 10 of the observations.

Presiding Judge inquired as to whether the journey from the DRC to the Hague had been satisfactory,[11] and whether, by the time of the initial hearing, the arrest warrant had been read to him.[12] His statement in the affirmative cannot be taken to amount to an expressed or implied waiver regarding the violations of his rights, particularly since his duty counsel expressly informed the Court of the following in connection with his right to seek release:

> I myself have not had a lot of time. I was assigned on short notice and arrived on Sunday morning here. I was able to visit Mr. Lubanga in prison promptly, but we have not yet been able to discuss the matter of requesting interim release. We will, however, discuss this matter in some detail, and we will take a decision on this matter in the coming days.[13]

And subsequently during the hearing:

> We have to realise that my client has been deprived of his liberty since August 2003. He has been confined to forced residence in Kinshasa, and following that he was incarcerated on the date which is in the record. If I remember correctly, in March 2005. I questioned my client concerning the conditions in which he was arrested and deprived of his liberty and incarcerated. I was informed that this arrest was not under any specific warrant and that no hearing was held such as should have been held according to national and international standards, and therefore he was kept incarcerated for approximately one year without having right - - access to any trial and without having been informed of any of the charges held against him.[14]

23. Indeed, contrary to the assertions of the victims' representatives , the Defence has consistently, and from the earliest point possible, maintained its position regarding the impact of the on the question as to whether the proceedings against Thomas Lubanga Dyilo should be continued before the ICC. For example, the duty counsel for the Defence immediately filed a challenge to the issuance of the arrest warrant before the Appeals Chamber, and expressly stated that "questions arise in relation to the

[11] Page 5 of the Transcript http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-T-3_English.pdf, First appearance hearing in open session - 20.03.2006 ICC-01/04-01/06-T-3
[12] Page 7 of the Transcript
[13] Page 7 of the Transcript
[14] Page 9 of the Transcript

lawfulness of the accused's having been deprived of his liberty in the Democratic Republic of Congo since 13 August 2003 and of his imprisonment" ,and further, that "questions also arise in relation to the existence of charges in the Democratic Republic of Congo and, where applicable, the scope thereof".[15]

24. Regarding the submissions of the victims' representatives that even if the rights of Thomas Lubanga Dyilo had been violated, release would not be an appropriate remedy, the Defence reiterates its previous submissions that a reduction in sentencing is a manifestly inappropriate remedy in the case of someone who is presumed innocent. It is also quite callous to suggest that monetary compensation can ever properly address the impact that prolonged and arbitrary detention, in horrific conditions, has had on the physical and psychological well-being of both Thomas Lubanga Dyilo and his family.
25. The Defence further submits that reductions of sentence or monetary compensation do not address the underlying rationale of the abuse of process doctrine: that the violation in question would either render a fair trial impossible, or would call the integrity of the judicial system into question.[16]

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[15] Application by Duty Counsel for Extension of Time-Limit to Appeal and for Disclosure of the Office of the Prosecutor's Case-File, ICC-01/04-01/06-45, dated 20 March 2006.

[16] The Defence refers to the following cases, which demonstrate the application of the abuse of process doctrine:

A) Cases in which the proceedings were stayed because the circumstances were such, that it was no longer possible to guarantee a fair trial: *R v Bow St Stip Magistrate ex parte Cherry (1990) 91 Cr App R 283* Unlawful wounding. The delay in service of notices and the failure to interview until a year later was a delay which gave rise to prejudice and unfairness.

R v Birmingham and Others (1992) Crim LR 117: A video recording had not been disclosed to the Defence, even after specific requests for unused material to be served were made. By the time of the trial the tape could not be found and there was no prospect of it being found. It was held that the prosecution was under a duty to disclose; that the Defence was prejudiced as a result of the non-disclosure; and that a fair trial was therefore impossible. [*R v Birmingham* Unreported decision of7 June 1991, available online on Westlaw http://international.westlaw.com/search/default.wl?tempinfo=%7cMethodTNC%7cdbUK-CASELOC%7ctiduk_u%7cSearchByPartyNamesFNr+v+birmingham&spa=inthague-000&rs=WLIN6.11&eq=welcome%2fWestlawUK&action=Search&fn=_top&sv=Split&method=TNC&query=TI(r+%26+birmingham)&db=UK-CASELOC&vr=2.0&rp=%2fsearch%2fdefault.wl&mt=WestlawUK]

R v Schlesinger (1995) Crim LR 137: The prosecuting authority (Customs and Excise) urged foreign embassies to claim diplomatic immunity thereby depriving defendants of witnesses they wished to call and had been promised would be available. In addition the failure to disclose what had taken place kept the Defence in ignorance of the impropriety, thus preventing them from raising the matter with the judge. [*Schlesinger* Unreported Court of Appeal decision of 28 July 1994, available online on Westlaw: (westlaw number) WL 1060610

http://international.westlaw.com/search/default.wl?tempinfo=%7cMethodTNC%7cdbUK-CASELOC%7ctiduk_u%7cSearchByPartyNamesFNr+v+schlesinger&spa=inthague-000&rs=WLIN6.11&eq=welcome%2fWestlawUK&action=Search&fn=_top&sv=Split&method=TNC&query=TI(r+%26+schlesinger)&db=UK-CASELOC&vr=2.0&rp=%2fsearch%2fdefault.wl&mt=WestlawUK]

26. In this connection, the Defence observes that the former Prosecutor of the ICTY and ICTR, and present High Commissioner for Human Rights has publicly stated that:[17]

> it would appear that terrorist suspects are being arrested, detained and interrogated with no apparent intention of bringing them to trial. I say "it would appear" because the unprecedented level of secrecy that surrounds what democratic governments are doing in our name and on our behalf severely curtails examination and debate. And I say " with no apparent intention of bringing them to trial" because the circumstance of their arrest, detention and interrogation -take only the length of their detention- would in any credible jurisdiction amount to such an abuse of process that trial jurisdiction, if it ever existed, could never be exercised.

27. The Defence would like to draw the attention of the Honourable Appeals Chamber to the fact that the High Commissioner expressly stated that the length of detention alone would justify the application of the abuse of process doctrine, and their subsequent release. The issuance of this statement in the context of the alleged crime of terrorism also implies that the gravity of the alleged offence should not deprive the person of a right to a remedy.
28. Similarly, the Supreme Court of Canada has rejected the use of lower sentences as an appropriate remedy. In *Amato v The Queen* (1982) 69 CCC (2d) 31, 74, Estey J opined that:

B) Cases in which it would amount to a misuse of process because it offends the courts sense of justice and propriety to be asked to try the accused in the circumstances of the particular case: *R v Walsall Justices ex parte W (a minor) (1989) 3 All ER 460 R v Rotherham Justices ex parte Brough (1991) Cr LR 522:* A decision to adjourn a trial in order for a change in the law to take effect was held to be an abuse of process. [http://international.westlaw.com/search/default.wl?tempinfo=%7cMethodTNC%7cdbUK-CASELOC%7ctiduk_u%7cSearchByPartyNamesFNr+v+walsall+justices+&spa=inthague-000&rs=WLIN6.11&eq=welcome%2fWestlawUK&action=Search&fn=_top&sv=Split&method=TNC&query=TI(r+%26+walsall+%26+justices)&db=UK-CASELOC&vr=2.0&rp=%2fsearch%2fdefault.wl&mt=WestlawUK **]**

R v Great Yarmouth Magistrates ex parte Thomas and others (1992) Crim LR 116 and R v Norwich Crown Court ex parte Parker and Ward (1992) Crim LR 500: These two cases demonstrate that the prosecution may leave itself open to an abuse argument where it has brought additional charges on the expiry of custody time limits in order to prevent the release of an accused on bail.

Http://www.cps.gov.uk/legal/section13/chapter_c.html#_Toc3276993

[17] Speech of Louise Arbour, UN High Commissioner for Human Rights, Chatham House, Wednesday 15 February 2006 http://209.85.129.104/search?q=cache:PQNi1ysvYuIJ:www.chathamhouse.org.uk/pdf/research/il/ILParbour.doc+abuse+of+process+doctrine+ICTY&hl=nl&gl=nl&ct=clnk&cd=17

> The repugnance which must be experienced by a court on being implicated in a process so outrageous and shameful on the part of the State cannot be dissipated by the registration of a conviction and the imposition afterwards of even a minimum sentence. To participate in such injustice up to and including a finding of guilt and then to attempt to undo the harm by the imposition of a lighter sentence, so far from restoring confidence in the fair administration of justice, would contribute to the opposite result.[18]

29. This view was subsequently adopted by the unanimous Supreme Court of Canada, in *R v Mack* (1988) 44 CCC (3d) 513,[19] in which Lamer J emphasised that a right to release was not dependent on the guilt or innocence of the accused, the question as to whether a fair trial would not be possible, or by a need to discipline the police: the accused's release was warranted by the need to protect the integrity of the criminal justice system.
30. In this regard, the Defence observes that the victims' representatives have asserted that the unconditional release of Thomas Lubanga Dyilo to a country other than the DRC would not serve the objectives of the Court to eliminate impunity, and would risk injuring the sentiments of the victims, and an important section of the Congolese population.[20]
31. The Defence strongly disputes such a claim. If the ICC were to release Thomas Lubanga Dyilo, it would reaffirm the principle that all persons are entitled to the protection of their fundamental human rights, and that any violations of such rights must entail an appropriate remedy.
32. In this regard, the Defence refers to the ICTY case of the Prosecutor v. Talic, in which the Defence requested the unconditional release of the accused on humanitarian grounds. The Prosecutor opposed the request on the basis *inter alia*, that his release would constitute an affront to victims and would damage the integrity of the Tribunal. In its decision, the Chamber rejected these arguments, holding as follows:[21]

> The Trial Chamber has carefully balanced two main factors, namely the public interest, including the interest of victims and witnesses who have agreed to co-operate with the Prosecution , and the right of all detainees to be treated in a

[18] http://www.canlii.org/ca/cas/scc/1982/1982scc10020.html
[19] http://www.canlii.org/ca/cas/scc/1988/1988scc100.html
[20] At para 35 of their Observations.
[21] Decision on the Motion for Provisional Release of the Accused Momir Talic, 20 September 2002, http://www.un.org/icty/brdjanin/trialc/decision-e/20155759.htm

humane manner in accordance with the fundamental principles of respect for their inherent dignity and of the presumption of innocence. As a result it is convinced that what would indeed be extremely damaging to the institutional authority of the Prosecutor and even more so, that of this Tribunal, is if this Trial Chamber were to disregard the stark reality of Talic' s medical condition and ignore the fact that this is a Tribunal created to assert, defend and apply humanitarian law.

33. The Chamber therefore concluded that as an institution which is bound to apply humanitarian law, it could not ignore the fact that Talic's continued detention would breach the principles of detention set out under humanitarian law. Similarly, as a Court which is set out to apply humanitarian law, and adjudicate *inter alia*, the crimes of unlawful detention, outrages on personal dignity, and wilfully depriving persons of the rights of a fair and regular trial, the ICC cannot turn its back on its duty to apply this law to protect persons within its jurisdiction, including Thomas Lubanga Dyilo.
34. The Defence also submits that the release of Thomas Lubanga Dyilo would also reinforce the independence of the ICC in the sense that its dependence on State cooperation does not and cannot impact on its duty to adjudicate fairly and impartially.
35. Finally, the Defence submits that the position of the victims' representatives to the effect that if Thomas Lubanga Dyilo is released, he should be transferred to the DRC and not to a European State, is not supported by the clear terms of the Rules of Procedure and Evidence or article 21(3)(d).
36. In accordance with Rule 185(1) of the Rules of Procedure and Evidence, if a person is released because the Court does not have jurisdiction, in determining which State to transfer him to, the Court is obliged to take into consideration the views of the person. The Defence further observes that the Court may transfer the person to any State which agrees to receive him. In light of the fact that this issue did not form the subject of the impugned decision, the Defence submits that the issue would be more appropriately addressed with the assistance of the Registry after the Appeals Chamber has adjudicated the merits of the request for release.
37. In any case, the Defence notes that the DRC authorities have not requested that Thomas Lubanga Dyilo be extradited to the DRC if his request for release is granted. In addition, the Auditor-Generale expressly stated in the arrest warrant that in order to

avoid *ne bis in idem*, the domestic proceedings against Thomas Lubanga Dyilo were closed, and the case file was transferred to the ICC.[22]

38. Moreover, if the decision to release Thomas Lubanga Dyilo is predicated on the serious violations of his rights which occurred in the DRC, then it would constitute a violation of fundamental principles of human rights to extradite him to the country which was the genesis of these violations, and were it is likely that he may suffer retaliation as a result of his submissions before the ICC.[23] In this regard, the Defence notes that the ICTR has not transferred acquitted persons to Rwanda, presumably to avoid the problem of retaliation and/or *ne bis in idem.* [24] The Defence further observes that if Thomas Lubanga Dyilo were to be extradited to the DRC for the purpose of being subjected to domestic criminal proceedings, the ICC would be extraditing him to a country where he faces the prospect of receiving the death penalty. In this connection, the Defence also notes that as a UN institution, the ICTR has refused to transfer any cases to Rwanda unless Rwanda expressly agrees not to impose the death penalty.[25]

39. Finally, the victims' representatives submissions concerning the possibility that the persons they represent may face harm if he were to be released are completely irrelevant and unfounded: the is no basis to believe that Thomas Lubanga Dyilo would intimidate persons, he has not requested to be returned to the DRC, and the identities of the persons in question have not been disclosed to either him or his Defence team.

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[22] See Decision no. 001/2006 of 16 March 2006 issued by the Auditeur Général of the DRC Armed Forces: "Further decide to close the legal proceedings against the accused by the Auditorat Général in order to facilitate t he joinder of the proceedings at the ICC and due compliance with the ne bis in idem principle. Whereupon we he reby transmit to the ICC all the certified true photocopies of the documents in case file RMP No. 0123/NBT/ 05 opened in this regard. "

[23] The Defence submits that it is not necessary to establish the threat of torture or inhumane and degrading treatment in order to resist extradition on the basis that it would breach human rights of an applicant. This contention is widely supported in international jurisprudence. The UK House of Lords has confirmed the Strasbourg jurisprudence prohibits extradition not only in violation of Article 3 rights but also in the case of a risk of a serious violation of his rights guaranteed under articles 2, 5, 6, 8, and 9 [*R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26 at paragraph 21.
http://www.bailii.org/uk/cases/UKHL/2004/26.html]
A similar approach was adopted by the Human Rights Committee of the United Nations[23], interpreting the International Covenant on Civil and Political Rights when it ruled that the threat of violation of *all* the applicant's rights under the Covenant had to be considered in order to determine whether a deportation complied with the Covenant.
[*ARJ v Australia (Communication No 692/1996)* (unreported) 11 August 1997 at paragraph 6.8. http://www.unhchr.ch/tbs/doc.nsf/0/0d43d458173115688025671b005d7147?Opendocument]

[24] See ICTR/Acquittal - ICTR Struggles To Make Its Acquitals Recognized (Analysis) 17 October 2006, Hirondelle
http://www.hirondelle.org/arusha.nsf/LookupUrlEnglish/BA91D6EEC0D8B1A4C125720D003E8CA1?OpenDocument

[25] See Rule 11 bis of the ICTR Rules of Procedure and Evidence, and Decision on Rule 11*bis* Appeal, Prosecutor v. Bagaragaza, 30 August 2006. http://69.94.11.53/ENGLISH/cases/Bagaragaza/decisions/300806.htm

3. Relief Sought

40. For the reasons set out above, the Defence respectfully requests the Honourable Appeals Chamber to reject the submissions set out in the observations of the victims' representatives, and grant the relief requested by the Defence in its appeal brief dated 26 October 2006.

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Mr. Jean Flamme, Defence Counsel for Thomas Lubanga Dyilo

Dated this 28th day of November 2006

At The Hague