Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-01/04-01/06**
Date: **22 November 2006**

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 THE CONGO
IN THE CASE OF
THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public Document

Observations of Victims a/0001/06, a/0002/06 and a/0003/06 with respect to the Defence appeal against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute

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NOTING the "Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute" rendered by Pre-Trial Chamber I on 3 October 2006;[1]

NOTING the Defence motion entitled "Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006" filed on 26 October 2006;[2]

NOTING the Appeals Chamber's directions to the participants which expressly state that "*The observations of […] the Victims a/0001/06 to a/0003/06 shall be submitted within 10 days after notification to them of the documents to be submitted by the Prosecutor and the Defence or the effluxion of the time stipulated for the purpose*";[3]

RECALLING our "Observations *[…]* Regarding the Challenge to Jurisdiction Raised by the Defence in the Application of 23 June 2006";[4]

RECALLING that, pursuant to the "Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing," only public documents are notified to the victims' representatives;[5]

The Legal Representatives of Victims a/0001/06, a/0002/06 and a/0003/06 submit the following observations.

[1] See the "Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute", No. ICC-01/04-01/06-512, 3 October 2006.
[2] See the "Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006" No. ICC-01/04-01/06-620, 26 October 2006.
[3] See the "Appeals Chamber's Request and Directions", No. ICC-01/04-01/06-569, 13 October 2006, para. 3, p. 2.
[4] See the "Observations of Victims a/0001/06, a/0002/06 and a/0003/06 Regarding the Challenge to Jurisdiction Raised by the Defence in the Application of 23 June 2006", No. ICC-01/04-01/06-349-tEN, 24 August 2006.
[5] See the "Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing", No. ICC-01/04-01/06-462-tEN, 22 September 2006, p.8.

1. The issues raised by the Defence have no bearing on the jurisdiction of the International Criminal Court

1. None of the grounds raised by the Defence has any bearing on the jurisdiction of the International Criminal Court over Thomas Lubanga Dyilo. Indeed, pursuant to article 12 of the Rome Statute, the Court has jurisdiction *ratione personae* if "*The State of which the person accused of the crime is a national*" is a State Party or if the crimes were committed on the territory of a State Party. Thomas Lubanga Dyilo is a Congolese national and the crimes set out in the "Document Containing the Charges" filed by the Prosecutor on 28 August 2006[6] were committed on Congolese territory.

2. A party who alleges lack of jurisdiction must do so under article 19(2) of the Rome Statute. However, the arguments made by the Defence in the "Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006"[7] are not founded on article 19(2) of the Statute. The Defence allegations that Thomas Lubanga Dyilo's arrest and detention were unlawful, if not arbitrary, has no bearing on the jurisdiction of the Court.

3. Accordingly, the Legal Representatives submit the following observations in the alternative.

2. Thomas Lubanga Dyilo's arrest resulted from the issuance by Pre-Trial Chamber I of a valid warrant of arrest under the Rome Statute and the Rules of Procedure and Evidence

4. The Defence argues that Pre-Trial Chamber I misconstrued articles 58 and 59 of the Rome Statute and that this error caused direct harm to the rights of Thomas Lubanga Dyilo.

[6] See the "Document Containing the Charges (Article 61(3)(a))", No. ICC-01/04-01/06-356-Anx4, 28 August 2006
[7] See the "Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006", *op cit.*, *supra*, footnote 2.

5. Clearly, it seems that the alleged violations cannot be attributable to the International Criminal Court prior to 16 March 2006, the date on which Thomas Lubanga Dyilo was notified of the warrant of arrest issued against him. As such, the Defence's reading of the instruments applicable within the Court is flawed.

6. Indeed, under article 58 of the Rome Statute, the Pre-Trial Chamber issues a warrant of arrest on the application of the Prosecutor. The warrant of arrest is transmitted to the competent authorities by means of a request for arrest and surrender under article 91 of the Rome Statute. Pursuant to regulation 110 of the Regulations of the Court, the request for arrest and surrender includes, where applicable, a copy of any relevant admissibility ruling.

7. Once arrested, the person is brought promptly before the competent authority in the custodial State, which determines that the warrant indeed applies to that person, that the person was arrested in accordance with the proper process and that his or her rights were respected pursuant to article 59 of the Rome Statute. In support of its appeal against the decision of Pre-Trial Chamber I of 3 October 2006, the Defence argues that the Chamber wrongly held that "*the words 'in accordance with the law of the State' means that it is for national authorities to have primary jurisdiction for interpreting and applying national law* [but that] *that 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 and application relates to matters which, like those here, are referred directly back to that national law by the Statute*".[8] In making this argument, the Defence challenges Pre-Trial Chamber I's finding that *"article 59(2) of the Statute does not impose any obligation on the competent DRC authorities to review the*

[8] See the "Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute", *op. cit., supra,* footnote 1, pp. 5-6. See also the "Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006", *op. cit., supra,* footnote 2, para. 39, pp. 16-17.

lawfulness of the arrest and detention of Thomas Lubanga Dyilo prior to 14 March 2006 insofar as that detention was related solely to national proceedings in the DRC".[9]

8. Article 59(2) of the Rome Statute does not apply to Thomas Lubanga Dyilo's detention prior to the transmission to Congolese authorities of the request for his arrest and surrender. This provision is not applicable to proceedings conducted solely at the national level, which are subject only to Congolese law, and which, as a result, cannot be attributed to an organ of the Court.[10]

9. Moreover, the Defence itself recognised that the applicant appeared before the *Premier Avocat Général* of the DRC Armed Forces on 16 March 2006[11] and that at that hearing the applicant's lawyer made a number of objections concerning his detention in the DRC[12] which were dismissed by the *Auditeur Général* of the DRC Armed Forces.[13]

10. Furthermore, at Thomas Lubanga Dyilo's first appearance, the Presiding Judge questioned him about his surrender to the Court[14] and, in accordance with article 60 of the Rome Statute,[15] asked him whether he had been informed of the

[9] See the "Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute", *cit. supra* footnote 1, p. 6. See also the "Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006", *op. cit., supra,* footnote 2, para. 38, p. 17.

[10] See the "Observations of Victims a/0001/06, a/0002/06 and a/0003/06 Regarding the Challenge to Jurisdiction Raised by the Defence in the Application of 23 June 2006", *op. cit., supra,* footnote 4, paras. 12-15, pp. 4-5.

[11] See the "Application for release", No. ICC-01/04-01/06-121, 23 May 2006, p. 4.

[12] *Ibid.*

[13] *Ibid.*, pp. 4-5.

[14] See the transcript of Mr. Thomas Lubanga Dyilo's first appearance, n° ICC-01/04-01/06-T-3, English version, p. 5.

[15] It is interesting to note that the Defence notes in its Application for Release (*op. cit.*, *supra*, footnote 11) that "*the Court evidently did not ensure that the arrest warrant it issued was served on Congolese territory*" (p. 17); at Mr. Thomas Lubanga Dyilo's first appearance before the Pre-Trial Chamber, the duty counsel replied in the affirmative to the Presiding Judge's question "May I just clarify whether the arrest warrant has been read to him?" (p. 7).

crimes which he is alleged to have committed.[16] The answers provided leave no doubt as to the validity of the process.

11. In conclusion, the Appeals Chamber, no more than the Pre-Trial Chamber, has no jurisdiction to review the lawfulness of Thomas Lubanga Dyilo's detention prior to his surrender to the International Criminal Court, as such a review falls solely within the purview of Congolese authorities. Moreover, and notwithstanding the fact that it is not for the Representatives of Victims a/0001/06 to a/0003/06 to comment on the lawfulness of Thomas Lubanga Dyilo's surrender to the Court and his conditions of detention, on the basis of the information that is publicly available, it appears that the provisions of the Statute and the Rules of Procedure and Evidence were respected in the course of the arrest and surrender to the Court of the person named in the warrant of arrest.

12. Consequently, the Legal Representatives make no comment with respect to the Defence allegation that the Pre-Trial Chamber failed to consider the cumulative effect of the alleged violations on Thomas Lubanga Dyilo's rights.[17]

3. The proper legal test for determining whether the Court should remedy any possible violations of Thomas Lubanga Dyilo's rights

13. If, by some remote chance, the Appeals Chamber were to decide that a violation of a suspect's rights – committed, moreover, through the act of a member State – affects the jurisdiction of the Court, it would be appropriate to consider the Defence's allegations in this respect.

[16] *Ibid.*, pp. 6-7.
[17] See the "Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006", *op. cit.*, *supra*, footnote 2, para. 45 et seq., p. 20 et seq.

14. The Defence submits that Pre-Trial Chamber I wrongly found that the alleged violations do not constitute acts of torture against or serious mistreatment of Thomas Lubanga Dyilo by the DRC national authorities[18] and that, because "*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*",[19] "*the Court will therefore not examine the lawfulness of the arrest and detention of Thomas Lubanga Dyilo by the DRC authorities prior to 14 March 2006*".[20]

15. To support its claims, the Defence refers to a number of decisions rendered by international criminal tribunals, as it did in its application of 23 May 2006. However, the fact of the matter is that it is mistaken about the conditions under which these decisions apply.

16. Because it is not for the Legal Representatives of the victims to determine whether, in this case, there is evidence to prove the Defence allegation that there was concerted action between Congolese authorities and the Office of the Prosecutor,[21] it must first of all be noted that Thomas Lubanga Dyilo's arrest by Congolese authorities since 2003 in no way resulted from the warrant of arrest issued by Pre-Trial Chamber I on 10 February 2006. It is therefore distinguishable from the facts that led the Appeals Chamber of the International Criminal Tribunal for Rwanda, in its decision of 3 November 1999, to order the immediate release of Jean-Bosco

[18] See the "Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute", *op. cit., supra,* footnote 1, p. 10.
[19] *Ibid.*
[20] *Ibid.*
[21] See the "Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006", *op. cit., supra,* footnote 2, para. 22 et seq., p. 12 et seq.

Barayagwiza.[22] What is more, the Defence continues to refuse to take into account the fact that that decision was reversed on review.[23]

17. Indeed, in its decision of 3 November 1999, the Appeals Chamber found that the International Criminal Tribunal for Rwanda had failed in its obligation to promptly inform the suspect of the charges brought against him; that the period of the suspect's provisional detention in Cameroon violated article 40*bis* of the Rules of Procedure and Evidence of the International Tribunal and that the Prosecutor was responsible for the excessive delays in transferring the suspect to the detention unit in Arusha, Tanzania; and that the suspect's right to promptly appear before a court was likewise violated.[24]

18. However, the Defence makes no reference to the fact that this decision was reversed on review by the Appeals Chamber on the basis of new facts presented by the Prosecutor. While affirming that "*the Appellant's rights were violated, and that all violations demand a remedy*", the Appeals Chamber held that "*the violations suffered by the Appellant and the omissions of the Prosecutor are not the same as those which emerged from the facts on which the Decision is founded*".[25] Consequently, the remedy ordered by the Chamber in its decision, which put an end to the proceedings and effected the appellant's release, was revised and the Appeals Chamber decided that "*for the violation of his rights the Appellant is entitled to a remedy, to be fixed at the time of judgement at first instance, as follows: If the Appellant is found not guilty, he shall receive*

[22] *Ibid.* p. 11.
[23] See *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR, Decision (Prosecutor's Request for Review or Reconsideration) (Appeals Chamber), 31 March 2000. Available on the ICTR's website at: http://www.ictr.org/English/cases/Barayagwiza/decisions/31032000.htm.
[24] See *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19, Decision, 3 November 1999, para. 113. Available on the ICTR's website at : http://www.ictr.org/ENGLISH/cases/Barayagwiza/decisions/dcs991103.htm.
[25] See *Jean-Bosco Barayagwiza v. The Prosecutor*, *op. cit., supra,* footnote 23, para. 74.

financial compensation; If the Appellant is found guilty, his sentence shall be reduced to take account of the violation of his rights."[26]

19. The *Barayagwiza* case is not the only one in which a chamber of an *ad hoc* tribunal has based the dismissal of a complaint of unlawful arrest or kidnapping on the *male captus, bene detentus* maxim.[27]

20. As stated by the Defence and Pre-Trial Chamber I,[28] some accused persons before the international criminal tribunals have challenged their arrest in order to be surrendered to the relevant tribunal on the basis of unlawfulness. Thus, Dokmanović,[29] Todorović[30] and Nikolić[31] based their applications for release before the International Criminal Tribunal for the Former Yugoslavia on the alleged irregularity of their arrest, as did Semanza,[32] Kajejijeli[33] and Rwamakuba[34] before the International Criminal Tribunal for Rwanda.

21. In short, whenever an *ad hoc* tribunal found that the violation of an accused's rights was attributable to the Tribunal, it considered that releasing the accused

[26] *Ibid.*, para. 75.

[27] The maxim *male captus*, *bene detentus* ("illegally captured, legally detained") means that "*a court may exercise jurisdiction over an accused person regardless of how that person has come into the jurisdiction of that court*." See *The Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal (Trial Chamber), 9 October 2002, para. 70.

[28] See the "Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006", *op. cit., supra,* footnote 2, paras. 16-17, p. 10.

[29] See *The Prosecutor v. Mile Mrkšić, Miroslav Radić, Veselin Šljivancanin et Slavko Dokmanović*, Case No. IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanović (Trial Chamber), 22 October 1997.

[30] See *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović et Simo Zarić*, Case No. IT-95-9, Decision on Motion for Judicial Assistance to be Provided by Sfor and Others, 18 October 2000.

[31] See *The Prosecutor v. Dragan Nikolić*, *op. cit., supra,* footnote 27.

[32] See *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision (Appeals Chamber), 31 May 2000.

[33] See *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44-1, Decision on the Defence Motion concerning the arbitrary arrest and illegal detention of the accused and on the Defence Notice of urgent motion to expand and supplement the record of 8 December 1999 hearing, 8 May 2000.

[34] See *André Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44-A, Decision (Appeal against dismissal of motion concerning illegal arrest and detention (Appeals Chamber), 11 June 2001.

would be a disproportionate remedy in relation to the acts for which the accused was being prosecuted, and decided that financial compensation would be awarded to the accused if found innocent or his or her sentence reduced if convicted.[35] The violation can only be attributed to the Tribunal as of the person's arrest at the behest of the relevant Tribunal.

22. In any event, the maxim *male captus, bene detentus* is not applicable to Mr Thomas Lubanga Dyilo, since he was arrested on the basis of a warrant of arrest validly issued by Pre-Trial Chamber I under the Rome Statute and the Rules of Procedure and Evidence, and his surrender to the Court also appears to comply with the requirements of the relevant instruments.

23. Moreover, the Defence argues that Pre-Trial Chamber I wrongly refused to consider whether the actions of the DRC authorities complied with the obligations incumbent on the DRC as a state which has ratified the African Charter of Human and Peoples' Rights and the International Covenant on Civil and Political Rights.[36] It is not for the International Criminal Court to monitor such compliance; such a role belongs to the organs set up to expressly deal with it. And, as the Defence correctly states, "[t]*he ICC is not a human rights court writ large*".[37]

24. Indeed, both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights include provisions supporting the principle of

[35] See *Laurent Semanza v. The Prosecutor*, *op. cit., supra,* footnote 32, paras. 127-129 and the disposition. See also *Jean-Bosco Barayagwiza v. The Prosecutor*, *op. cit., supra,* footnote 23, para. 75.
[36] See the "Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October2006", *op. cit., supra,* footnote 2, para. 39, p. 17.
[37] *Ibid.*, para. 59, p. 24.

the prohibition against arbitrary detention,[38] but it is the responsibility of the Working Group on Arbitrary Detention to interpret them.[39]

25. In fact, said Working Group received several communications concerning detainees of the international criminal tribunals.[40] In the case of General Talić, the communication made the following complaints against the Statute of the International Criminal Tribunal for the Former Yugoslavia and its Rules of Procedure and Evidence: detention is the rule and release the exception (breach of article 9, paragraph 3, of the International Covenant on Civil and Political Rights); no grounds are given in arrest warrants and detention orders, making detentions arbitrary (breach of article 9, paragraph 1, of the Covenant); the period of detention is indefinite (breach of article 9, paragraph 5, of the Covenant); the Rules of Procedure and Evidence make no provision for compensation of persons unlawfully arrested or detained (breach of article 9, paragraph 5, of the Covenant).

26. After detailed analysis of the various complaints, the Working Group noted that "[…]*insofar as the administration of justice by an international criminal court is*

[38] See articles 7, 10, 11, 18, 19, 20 and 21 of the Universal Declaration of Human Rights. See Resolution 217 (III) of the General Assembly of the United Nations of 10 December 1947. Available on the United Nations website at: http://daccessdds.un.org/dov.RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement. See also articles 14, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights. See the International Covenant on Civil and Political Rights, adopted by the General Assembly on 19 December 1966, *United Nations Treaty Series*, vol. 999, p. 171. The Covenant is available on the website of the Office of the United Nations High Commissioner for Human Rights at: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

[39] This working group was created by resolution 1991/42 of the Commission on Human Rights adopted on 9 March 1991 and tasked with investigating cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments.

[40] See the Report of the Working Group on Arbitrary Detention, doc. E/CN.4/2001/14, paras. 12-33, concerning a communication received by the Working Group from General Talić (International Criminal Tribunal for the Former Yugoslavia) and the Report of the Working Group on Arbitrary Detention, doc. E/CN.4/2003/8, paras. 49-60, concerning communications received by Working Group from Jean-Bosco Barayagwiza and Laurent Semanza (International Criminal Tribunal for Rwanda). Reports of the Working Group are available on the website of the Office of the United Nations High Commissioner for Human Rights at: http://www.ohchr.org/english/issues/detention/annual.htm.

concerned, the legal guarantees of a fair trial such as those provided by the Statue and Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia are consistent with the relevant international norms."[41]

27. On their part, Jean-Bosco Barayagwiza and Laurent Semanza criticized the Appeals Chamber of the International Criminal Tribunal for Rwanda for having recognized that their rights had been violated on the ground that they had not been promptly informed of the nature of the charges brought against them and that their motions challenging the lawfulness of their detention had not been considered by the Trial Chamber, without, however, ordering their release. The Appeals Chamber considered that releasing the accused would be a disproportionate remedy and decided that financial compensation would be awarded to the accused if they were found innocent or their sentences reduced if convicted.[42]

28. The Working Group on Arbitrary Detention considered that "[…]*it* [*did*] *not have a mandate to express a view on the conformity of a decision taken by an international court with the norms of international law.*"[43]

29. Moreover, it is incumbent upon the African Commission on Human and Peoples' Rights to interpret article 6 of the African Charter of Human and Peoples' Rights, [44] which protects all individuals from arbitrary arrest or detention, and not upon the International Criminal Court.

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[41] See the Report of the Working Group on Arbitrary Detention, doc. E/CN.4/2001/14, para. 33.
[42] See *Laurent Semanza v. The Prosecutor*, *op. cit.*, *supra,* footnote 32, paras. 127-129 and the disposition. See also *Jean-Bosco Barayagwiza v. The Prosecutor*, *op. cit.*, *supra,* footnote 23, para. 75.
[43] See the Report of the Working Group on Arbitrary Detention, doc. E/CN.4/2003/8, para. 60.
[44] See the African Charter on Human and Peoples' Rights, adopted in Nairobi on 27 June 1981, *United Nations Treaty Series*, vol. 1520, p. 217. The Charter is available on the website of the African Union at: http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf.

30. Finally, the Defence argues that "*Article 55(1)* [of the Rome Statute] *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*."[45]

31. However, the Defence is mistaken about the applicability, in this case, of article 55(1) of the Statute, which is applicable only within the well-defined framework of "*an investigation under the* [Rome Statute]". The Legal Representatives of Victims a/0001/06 to a/0003/06 cannot, on basis of the information that is publicly available, determine whether Thomas Lubanga Dyilo was questioned by representatives of the Office of the Prosecutor between 14 March 2006, the date on which the request for arrest and surrender was transmitted to Congolese authorities, and 16 March 2006, the date on which Thomas Lubanga Dyilo was actually surrendered to officials of the International Criminal Court. In any event, and contrary to what the Defence maintains, it was only as of 14 March that article 55(1) of the Statute could have been applicable to any detention prior to any intervention of the Court and falling wholly under Congolese law.

4. Country to which Thomas Lubanga Dyilo would be transferred were he to be released

32. The Defence requests the Appeals Chamber to reverse the decision of Pre-Trial Chamber I and consequently to order the immediate release of Thomas Lubanga Dyilo to a country other than the Democratic Republic of the Congo.[46]

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[45] See the "Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006", *op. cit., supra,* footnote 2, para. 12, p. 8.
[46] *Ibid.*, para. 60, p. 25.

33. In any event, rule 185 of the Rules of Procedure and Evidence must be applied. It establishes the procedure to be followed on the release of a person from the custody of the Court other than upon completion of sentence. In particular, when a person is released because the Court is found not to have jurisdiction, the Court has to "*make such arrangements as it considers appropriate for the transfer of the person,* […] *to a State which is obliged to receive him or her, to another State which agrees to receive him or her, or to a State which has requested his or her extradition with the consent of the original surrendering State*."

34. Thomas Lubanga Dyilo was arrested in the Democratic Republic of the Congo to be tried there for war crimes and crimes against humanity.[47] But, the surrender of Thomas Lubanga Dyilo to the Court only stayed the proceedings in course in the Congo. Thus, if the appeal were to be allowed, Thomas Lubanga Dyilo would have to be transferred to the Democratic Republic of the Congo to be tried there pursuant to the principle of complementarity. Moreover, since Thomas Lubanga Dyilo is a Congolese national, the Democratic Republic of the Congo has a duty to receive him on its territory.

35. Releasing Thomas Lubanga Dyilo in a European country would result in the Court's intervention causing an end to the detention ordered by Congolese authorities of a person prosecuted for war crimes and crimes against humanity[48] and to have him subsequently released, while proceedings against his accomplices and co-perpetrators continue in the Democratic Republic of the Congo. This would not serve the objective of the fight against impunity enshrined in the Rome Statute and would be likely to upset not only the victims, but the entire Congolese population.

[47] See the decisions of the *Auditorat Général* in document No. ICC-01/04-01/06-39-US, 18 March 2006, pp. 1-9.
[48] *Ibid.*

36. Releasing Thomas Lubanga Dyilo would enable him to resume the leadership of the UPC, as he did when he was on supervised release in Kinshasa, and to obstruct the investigation and frustrate the proceedings before the Court, even if he were to be handed back to Congolese authorities.

37. A possible release of Thomas Lubanga Dyilo might be viewed by the victims as an encouragement for the UPC/FPLC to continue perpetrating war crimes such as those set out in the warrant of arrest issued by Pre-Trial Chamber I,[49] at a time when re-recruitment of child soldiers is being reported.[50]

38. Finally, releasing Thomas Lubanga Dyilo would pose a direct threat to the victims who have taken risks in order to participate in the proceedings.

FOR THESE REASONS,

MAY IT PLEASE THE APPEALS CHAMBER:

To dismiss the Defence appeal against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute.

[signed]

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[49] See the "Warrant of Arrest", No. ICC-01/04-01/06-2, 10 February 2006.

[50] Some child soldiers who had been demobilised have been re-recruited into the ranks of the UPC/FPLC. In the video presented by the Office of the Prosecutor at the hearing of 14 November 2006, No. EVD-OTP-00060, the UPC Pacification Minister, under the control of Thomas Lubanga Dyilo, reported these practices. See the English version of the transcript, No. 01/04-01/06-T-34, lines 20 *et seq*.

Luc Walleyn and Franck Mulenda
Legal Representatives of Victims a/0001/06, a/0002/06 and a/0003/06

Dated the 21 November 2006

At The Hague, The Netherlands