Cour
Pénale
Internationale

International
Criminal
Court

Original : **English**

No.: **ICC-01/04-01/06**
Date: **1 November 2006**

THE APPEALS CHAMBER

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

Registrar: **Mr Bruno Cathala**

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

Public

Prosecution's Response to Defence Appeal Against the 'Décision sur la demande de mise en liberté provisoire Thomas Lubanga Dyilo'

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Senior Trial Lawyer
Mr Fabricio Guariglia, Senior Appeals Counsel

Counsel for the Defence
Mr Jean Flamme
Ms Véronique Pandanzyla

Office of Public Counsel for the Defence
Ms Melinda Taylor

Procedural History

1. Thomas Lubanga Dyilo ("the Appellant") was surrendered and transferred to the Court on 17 March 2006, pursuant to a warrant of arrest issued by Pre-Trial Chamber I on 10 February 2006.[1] The Appellant was served with a copy of the warrant of arrest on 16 March 2006, and was thus informed of the charges against him at that time.[2]

2. The Appellant made his initial appearance before the Court on 20 March 2006, at which stage he did not make an application for interim release.[3]

3. On 24 March 2006, the Appellant lodged an appeal against the decision to issue the arrest warrant based on the inadmissibility of the case.[4] After a series of filings, the Appellant abandoned this appeal and on 6 September 2006 the Appeals Chamber dismissed the appeal.[5]

4. On 23 May 2006, the Appellant filed an "Application for Release".[6]

5. On 28 August 2006, the Prosecution filed its Document Containing the Charges and the List of Evidence.[7]

6. On 20 September 2006, the Appellant filed a "Request for further information regarding the confirmation hearing and for appropriate relief to safeguard the rights of the Defence and Thomas Lubanga Dyilo", which included a request for interim release.[8]

7. On 9 October 2006, the Prosecution filed the "Prosecution's Response to the Defence Request for Interim Release".[9]

8. On 18 October 2006, the Single Judge rendered the "Decision on the Application for the interim release of Thomas Lubanga Dyilo".[10] The Appellant lodged an appeal against the

---

[1] Decision on the Prosecutor's Application for a warrant of arrest, article 58, ICC-01/04-01/06-8-US-Corr Anx I ("Decision on Arrest Warrant").
[2] See Prosecution's Response to Application for Release, ICC-01/04-01/06-149-Conf, 13 June 2006, paras. 19(iii), 20 and 22, and authorities cited therein.
[3] ICC-01/04-01/06-T-3-EN, 20 March 2006, p. 7, lines 10-22. See para.12, below.
[4] Appeal by Duty Counsel for the Defence against Pre-Trial Chamber I's Decision of 10 February 2006 on the Prosecutor's Application for a Warrant of Arrest, ICC-01/04-01/06-57-Corr-tEN, 27 March 2006.
[5] Decision on Thomas Lubanga Dyilo's Application for Referral to the Pre-Trial Chamber / in the alternative, Discontinuance of the Appeal, ICC-01/04-01/06-393.
[6] ICC-01/04-01/06-121-tEN. In response to an order of the Pre-Trial Chamber, on 29 May 2006 the Appellant stated that "interim release is not at issue" in that application (Submissions relative to the Order of 29.05.2006, ICC-01/04-01/06-131-tEN, p. 2). On 17 July 2006, in response to a further order from the Pre-Trial Chamber, the Appellant "recharacterise[d] the scope of its application as a challenge to jurisdiction" (Submissions Further to the Order of 13 July 2006, ICC-01/04-01/06-197-tEN, p. 3, para. 8). The Pre-Trial Chamber dismissed this challenge to jurisdiction on 3 October 2006 (Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute, ICC-01/04-01/06-512), which the Appellant is appealing in parallel proceedings (see documents ICC-01/04-01/06-532 and ICC-01/04-01/06-619-Conf).
[7] Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3), ICC-01/04-01/06-356 and annexes, 28 August 2006.
[8] ICC-01/04-01/06-452, 20 September 2006 ("Defence Request"), paras. 33-49 and relief sought, para. (vii).
[9] ICC-01/04-01/06-531 ("Prosecution Response"). Representatives of victims also filed a response on 9 October 2006 – see document ICC-01/04-01/06-530.

Decision on 20 October 2006,[11] and filed its substantive "Defence Appeal Against the 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo" on 26 October 2006.[12] The Prosecution hereby files its response to the Appeal Brief.

The First Issue – the Pre-Trial Chamber committed no procedural error under Article 60(3) or Rule 118(2)

9. The Appellant asserts that the Pre-Trial Chamber failed to comply with Rule 118(2), and that this failure alone "must result in his immediate provisional release". The Prosecution submits that the Pre-Trial Chamber committed no procedural error under the Statute and the Rules, as alleged by the Appellant, merely by failing to review a non-existent prior decision on interim release within the 120 day time-frame established by Rule 118(2). Furthermore, if the Appeals Chamber disagrees and finds that the Pre-Trial Chamber did err in failing to conduct a *proprio motu* review of detention prior to the Decision on 18 October 2006, the Prosecution submits that the immediate provisional release of the Appellant is wholly disproportionate to any violation of his procedural rights in these circumstances.

The Pre-Trial Chamber committed no error in interpreting Article 60(3) and Rule 118(2)

10. Both Article 60(3) and Rule 118(2) are predicated on a prior "ruling on the release or detention". There must, in short, be something to review. As noted in the Decision, these two provisions each come immediately after provisions dealing with applications for interim release. The Prosecution therefore submits that the approach taken by the Pre-Trial Chamber, holding that the obligation to review "its ruling on the release or detention of the person ... at least every 120 days" would only be triggered by a prior decision on an application for interim release,[13] was reasonable and was not inconsistent with the Statute and the Rules.

11. The Appellant argues that the issuance of the arrest warrant should count as a "ruling" for the purposes of Article 60(3), and bases this argument on the fact that Article 60(3) and Rule 118(2) refer to a "ruling", which should be construed more broadly than a "decision".[14] The Prosecution notes that no such distinction is drawn in the French and Spanish versions of the Statute, which are both equally authentic.[15]

---

[10] ICC-01/04-01/06-586-tEN ("Decision" or "impugned Decision").
[11] ICC-01/04-01/06-594.
[12] ICC-01/04-01/06-618 ("Appeal Brief").
[13] Decision, pp. 4-5. See also "the periodic review under paragraph 3 relates to review of the decision arrived at pursuant to article 60, para. 2." – Khan, "Article 60: Initial proceedings before the Court" in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers notes, article by article*, p. 779.
[14] Appeal Brief, paras. 10-12.
[15] Article 128. The French version of Article 60(3) refers to "sa décision de mise en liberté ou de maintien en détention", and the Spanish version refers to "su decisión en cuanto a la puesta en libertad o la detención".

12. The Prosecution further notes that at the initial appearance, the Appellant was explicitly informed by the Presiding Judge that he "may, during this hearing or after this hearing, request interim release pending trial. Of course, the Chamber will not give an answer, a ruling, immediately, but you may make such a request. ... Would you like to make use of this right at this point in time?"[16] The Appellant declined to make any such request.[17]

13. It is also inappropriate for the Appellant to seek to rely on his Application for Release of 23 May 2006[18] in any way. As the Appellant recognizes,[19] he explicitly denied that this was a request for interim release,[20] and later expressly characterized it instead as a challenge to the jurisdiction of the Court under Article 19.[21] The Prosecution thus submits that these other documents filed by the Appellant are of no relevance to the instant appeal.[22] Further, and also as recognized by the Appellant, a ruling on this request was made on 3 October 2006:[23] as at the date of this Response, less than one month has passed. Thus insofar as the intent of the Statute and Rules is that detention should be reviewed at least every 120 days, the Appellant affirmatively declined to seek release at the first appearance and first requested interim release in September. No period of 120 days has passed without the Appellant having been enabled to seek precisely the review which he now complains was denied.

14. In addition to being consistent with the language and context of the relevant provisions, the Prosecution submits that the approach adopted by the Pre-Trial Chamber also appears to be consistent with the purpose of Article 60(3). The legality of the initial detention of the Appellant is not contingent on the formal regularity of review by the Pre-Trial Chamber; rather, Article 60(3) serves to ensure that a person will not remain in pre-trial detention if the circumstances underlying that detention have materially changed.[24] There has been no such change in this case, and the circumstances which warrant the ongoing pre-trial detention of the Appellant continue to apply.[25] The legality of ongoing detention at this stage is therefore

---

[16] Transcript of 20 March 2006, ICC-01/04-01/06-T-3-EN, p. 7, lines 10-15.
[17] At all times it was open to the Appellant to make a request for interim release, however he chose not to until the Defence Request on 20 September 2006.
[18] ICC-01/04-01/06-121-tEN.
[19] Appeal Brief, para. 14.
[20] Submission relative to the Order of 29.5.2006, ICC-01/04-01/06-131-tEN, p. 2 (section 1).
[21] Submissions Further to the Order of 13 July 2006, ICC-01/04-01/06-197-tEN, p. 3 (para. 8).
[22] The Prosecution notes that the decision of the Pre-Trial Chamber on the challenge to the jurisdiction of the Court under Article 19 is under appeal in parallel proceedings – see Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006, ICC-01/04-01/06-620, 26 October 2006.
[23] Appeal Brief, para. 15. Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute, ICC-01/04-01/06-512, 3 October 2006.
[24] Khan, "Article 60: Initial proceedings before the Court" in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*, 778 [2].
[25] See Prosecution Response, paras. 9-13

based on the continued applicability of the criteria in Article 58(1),[26] and the non-applicability of the criteria in Article 60(4).[27] Both of these conditions have been affirmed in the Decision under appeal,[28] and the Prosecution submits that the Decision should be upheld by the Appeals Chamber on these points for the reasons submitted below.

The relief sought by the Appellant is disproportionate in the circumstances

15. Even if the Appeals Chamber does find that the Pre-Trial Chamber committed an error by failing to rule on the release of the Appellant *proprio motu* prior to its Decision on 18 October 2006, the Prosecution submits that the relief sought by the Appellant is wholly disproportionate to any such procedural violation. In no way is the impact of any failure to exercise the *proprio motu* power of review in these circumstances such that it "must result in his immediate provisional release".[29] Any remedy sought for an alleged violation of a right must be proportionate to that alleged violation.[30] In drafting the Rules of Procedure and Evidence, States explicitly rejected the idea of "release by default" if the Chamber failed to comply with the formal requirements of what later became Rule 118.[31] The Prosecution submits that this underscores the need to carefully consider the proper and proportionate remedy in the case of a procedural error relating to interim release, rather than automatically releasing the person.

16. The Prosecution submits that even if the Appeals Chamber holds that the Pre-Trial Chamber did err in failing to make a ruling under Rule 118(2) earlier, that does not undermine

---

[26] The continued applicability of these conditions is reviewed through Article 60(2).

[27] If the conditions in Article 60(4) are met, then the Chamber has a discretion, not an obligation, to order the interim release of the person – "the Court shall consider releasing the person" (emphasis added)

[28] Indeed, at this point in the proceedings the Appellant has lodged two separate challenges to his detention, and the legality of the detention of the Appellant have been affirmed under three different legal authorities – Articles 19(2), 60(2) and 60(4). In each case the Pre-Trial Chamber has examined the substantive issues and found that the continued detention of the Appellant is legal and necessary

[29] Appeal Brief, para. 17.

[30] *Prosecutor v Kajelijeli*, ICTR-98-44A-A, Judgment, 23 May 2005, paras. 206, 255; *Semanza v The Prosecutor*, ICTR-97-20-A, Judgment, 20 May 2005, para. 325. See also *Semanza v The Prosecutor*, ICTR-97-20-A, Decision, 31 May 2000, paras. 125, 129. While a violation of rights does require some remedy, the ICTY Appeals Chamber has noted that when considering the appropriate remedy for an alleged violation of the rights of the accused, "balance must therefore be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law." - *Prosecutor v Nikolic*, IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, para. 30. *Prosecutor v Brdjanin*, IT-99-36-T, Decision on the Defence Objection to Intercept Evidence, 3 October 2003, para. 61 applies the same principles to other alleged violations of rights.

[31] Friman, "Investigation and Prosecution" in Lee (ed) The *International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), 518. Contrast "Revised discussion paper proposed by the Coordinator Rules of Procedure and Evidence related to Part 5 of the Statute", PCNICC/1999/WGRPE/RT.6, 5 August 1999, Rule 5.16, with earlier versions such as "Proposal by France concerning the Rules of Procedure and Evidence", PCNICC/1999/DP.7/Add.1/Rev.1, 29 June 1999, Rule 60.3; and "Proposal by France concerning the Rules of Procedure and Evidence, Part 3, section 3, subsection 2, Addendum", PCNICC/1999/DP.7/Add.1, 22 February 1999, Rule 60.3.

the legality nor the propriety of the continued detention of the Appellant in these circumstances, and that the release of the Appellant would be highly disproportionate to any technical violation of his rights. Granting interim release in response to such an error, the Prosecution respectfully submits, would be all the more inappropriate when there has been an intervening substantive ruling that the criteria for the Appellant's ongoing detention under the Statute continue to be met.

The Second Issue – the Pre-Trial Chamber committed no error in holding that the Appellant was not entitled to interim release under Article 60(4)

The alleged subordination of Article 60 (4) to Article 60 (2)

17. The Appellant firstly claims that the Pre-Trial Chamber erred in law by subordinating the application of Article 60 (4) to Article 60 (2) and the conditions therein.[32] The Appellant however subsequently concedes that "[i]t is not entirely clear from the Decision whether the examination of Article 60 (4) was subordinate to Article 60 (2)".[33]

18. The Prosecution respectfully submits that the Appellant's arguments are misconceived. In particular, the Prosecution notes that the Appellant has failed to provide any plausible argument demonstrating his claim that the Chamber somehow subordinated the applicability of Article 60 (4) to the terms and conditions of Article 60 (2). Contrary to the Appellant's speculative assertions, nothing in the Decision supports the Appellant's conclusion. Rather, the Decision includes two discrete and *independent* determinations: one pertaining to the conditions justifying continued detention under Article 60 (2)[34], and one related to the applicability of Article 60 (4) to the facts of the instant case.[35]

19. Far from indicating any relationship of "subordination" between different limbs of Article 60, the Decision merely reflects the analytical process followed by the Chamber, being seized of what it considered to be the *first* request for provisional release made by the Appellant, consequently leading to the Chamber's first ruling on the release or detention of the Appellant.[36] In this particular context, it is only natural that before analysing the applicability of Article 60 (4) the Chamber decided to, as required by Article 60 (2), satisfy itself as to whether the conditions for detention in Article 58 continued to apply.[37] If they did not, then the Appellant would have been entitled to release, independently of any determination under

[32] Appeal Brief, para. 18.
[33] Ibid., para. 22.
[34] Decision, pp. 5-6.
[35] Ibid., pp. 6-7.
[36] Ibid., pp. 4-5.
[37] This process transpires with clarity from the terms of the Decision: at p. 5 the Chamber concludes that the conditions set forth in Article 58 (1) if the Statute "*continue* to be fulfilled".

Article 60 (4), which would have actually become unnecessary.[38] Once the Chamber satisfied itself that the conditions for detention continued to apply, it proceeded to discuss whether the requirements for release under Article 60 (4) had been met in the present case.[39]

20. It is accordingly clear that the proposition that the Decision entails an erroneous interpretation of the terms of Article 60, whereby release under Article 60 (4) is subordinated to the terms of Article 60 (2), is wholly without foundation. The Chamber's approach to the relevant provisions is a serious and responsible one, consistent with the Chamber's duties under Article 60, and involves no appeallable error. This aspect of the appeal must thus be rejected.

The claim that time spent in custody has been unreasonable

21. The Appellant argues that the length of time elapsed after his surrender to the Court (seven and a half months at the time of the appeal) is "far in excess of that which is considered a reasonable length of time for a suspect to remain in detention even before charges are confirmed against him".[40] The Appellant offers four clusters of arguments in support of this position;[41] each of which the Prosecution will deal with separately.

22. The Appellant's reliance on the negotiating history of the Statute is misplaced. The Appellant cites provisions from old drafts of the Statute which bear little resemblance with its final version. The provisional arrest of a suspect, as contemplated in Article 28 (2) of the ILC Draft constituted an exception to the general principle that an arrest warrant ought to be issued "*once the indictment has been affirmed*",[42] in accordance with draft Article 28 (3). In this particular context, a temporal limit to pre-indictment detention is only natural. The final version of the Statute, as it is well known, abandoned the notion of an indictment as a single document performing both the functions of constituting the basis for an arrest warrant and the

[38] The language of Article 60 (2) is mandatory: if the Chamber is not satisfied that the conditions set forth in Article 58 are met, it "shall release the person, with or without conditions".
[39] See Decision, pp. 6-7. The discussion on reasonableness of the time of detention starts at page 6 *in fine* ("CONSIDERING, moreover, that, in accordance with internationally recognised human rights, everyone arrested or detained is entitled to trial within a reasonable time or to release pending trial"). The Prosecution further notes that in its response to the Appellant's application for provisional release, the Prosecution, prior to discussing the applicability of Article 60 (4), also dealt with the conditions for detention, as set forth in Articles 60 (2) and 58, a factor that may have also led to the Chamber's sequential analysis of the relevant provisions and their application to the instant facts. See Prosecution's Response, paras. 9-13.
[40] Appeal Brief, para. 24.
[41] These are: (a) Prior drafts of the Statute included fixed terms of permissible detention, ranging from 60 to a maximum of 90 days (paras. 26-27); (b) the Rules of Procedure of both ad hoc Tribunals allegedly establish a 90 days "absolute maximum" for the length of detention of a suspect (paras. 28-29); (c) human rights jurisprudence interpreting Article 9 (2) of the ICCPR has chastised periods of pre-trial detention of similar length to that of the Appellant's (para. 30); and (d) domestic practice also imposes strict limitations on detention prior to confirmation of charges (para. 31).
[42] See Report of the International Law Commission on Its Forty-Sixth Session, Draft Statute for an International Criminal Court, 2 May-22 July 1994, A/49/10 (hereinafter, "ILC Report"), commentary to Article 27.

charging instrument, and established two discrete procedural phases involving different applications: the issuance of an arrest warrant under Article 58; and the confirmation of charges, as included in a separate document,[43] under Article 61.[44]

23. The Prosecution further notes that the Appellant's reference to Article 28 (2) of the ILC Draft Statute is incomplete: the provision does not establish that 90 days is a "reasonable amount of time" for a person to be held in custody prior to confirmation of the indictment, as the Appellant contends; rather, the provision reads as follows: "A suspect who has been provisionally arrested is entitled to release from arrest if the indictment has not been confirmed within 90 days of the arrest, *or such longer time as the Presidency may allow*".[45] Hence, even in the context of what constituted an exceptional procedure, namely the provisional arrest of a person pending the confirmation of an indictment, the ILC Draft Statute provided for a significant degree of flexibility pertaining to the length of detention.

24. Finally, the Prosecution submits that the Appellant's position cannot explain why, despite the existence of earlier drafts including time-limits for the length of detention, neither the Statute nor the Rules, as adopted, include a fixed time-limit for the length of detention, leaving it to the Court to determine what constitutes a reasonable period of time.[46] In this context, the Appellant's statement that the Preparatory Commission considered that the appropriate limit for determination before the confirmation of the charges was 60 days with the possibility of an extension up to 90 days[47] is a misrepresentation of the relevant events. The report cited by the Appellant contained a draft provision (Article 59 at that point in time) including a number of options which ranged from 30 to 90 days.[48] A subsequent proposal, not referred to by the Appellant, contained a text very similar to the final version of Article 60, not including any specific time-limits for the purposes of detention.[49] The reference to

---

[43] The "document containing the charges", as referred to in Article 61 (3) and Regulation 52.
[44] The Appellant's arguments completely overlook these and other striking differences between the ILC Draft and the basic documents governing the Court's activities. Critically, the ILC Draft, did not provide for an adversarial confirmation hearing and did not vest the suspect with any relevant procedural rights at the confirmation stage. See ILC Report, commentary to Article 27: "the confirmation occurs in the absence of and without notice to the accused, and without any assessment of the defence as it will be presented at trial". See also draft Article 30 (notification of indictment).
[45] Emphasis added.
[46] See Khan, "Article 60: Initial proceedings before the Court" in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers notes, article by article*, p. 779, footnote 42.
[47] Appeal Brief, para. 26.
[48] See Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum, A/Conf. 183/2/Add.1, 14 April 1998, p. 87.
[49] Ibid. pp. 95-96.

drafting options that were ultimately rejected during the process of adoption of the Statute cannot assist the Appellant in his efforts to identify appellable errors in the Decision.[50]

25. Equally misguided is the Appellant's reliance on the provisions of the *ad hoc* Tribunals related to transfer and provisional detention of suspects. Once more, the Appellant wrongly equates an exceptional provision allowing for pre-indictment/arrest warrant detention with the regime governing detention stemming from an arrest warrant properly issued pursuant to Article 58 of the ICC Statute. Rule 40*bis* of the ICTY Rules of Procedure and Evidence deals, in a manner similar to Article 28 (2) of the ILC Draft Statute discussed above, with an exceptional situation: the arrest and transfer of a person *prior* to an indictment being confirmed and an arrest warrant being issued. Rule 40*bis* must be read in conjunction with Rule 40, which shows the exceptional nature of the measure: "*In case of urgency*, the Prosecutor may request any State: (i) to arrest a suspect or an accused provisionally".[51] In turn, Rule 40*bis* vests a Judge to order the transfer and provisional detention of a suspect if, *inter alia*, the Prosecutor has made a request for provisional arrest to a State in accordance with Rule 40, or the suspect is otherwise detained by State authorities. The system is thus one allowing for an exceptional and provisional in nature arrest and transfer of a suspect in the absence of an indictment *and* of an arrest warrant issued pursuant to Rule 55. As in the case of Article 28 (2) of the ILC Draft Statute, the temporal limits imposed on the duration of the detention must be read in the light of this provisional and exceptional character.[52]

26. The Prosecution further stresses that the ICTY Statue and Rules – as well as the ICTR basic documents – provide for a single sequence of presentation and confirmation of charges and issuance of an arrest warrant, without any involvement of the person against whom charges are being brought; this is a striking difference with the ICC regime, which, as already noted, provides for a two-stage procedure,[53] including an adversarial confirmation hearing. In the ICC system, the defence can challenge the Prosecution's evidence and present its own evidence, and is given the benefit of timely access to the evidence to be relied upon by the Prosecution at the confirmation hearing, as well as exculpatory evidence in the Prosecution's possession. A system providing for adversarial confirmation of charges before a full Chamber,

[50] The Prosecution also notes that, as it submitted before the Pre-Trial Chamber, the negotiating history of the Statue also provides examples of provisions allowing for pre-trial detention for a maximum of one year which could be extended up to an additional year. See Prosecution's response, para. 18.
[51] Emphasis added.
[52] The Prosecution notes that the ICTY model contained by Rules 40 and 40 bis cannot even be completely equated to the provisional arrest provided for in Article 92 of the ICC Statute, which still requires "the existence of a warrant of arrest" (see Article 92 (2) (c)).
[53] As described in Archbold, *International Criminal Courts* (2nd ed) (2006), p. 192.

including detailed notice of the charges and disclosure of evidence, which in the instant case has been very voluminous, must necessarily take more time than one whereby charges are confirmed ex parte before a confirming Judge.[54]

27. The Prosecution finally submits that under the relevant jurisprudence stemming from the ICTY and the ICTR, which takes into consideration the length of detention, but also the particular features of international criminal tribunals, the complexity of the crimes they are called to deal with and the limitations under which they operate, a period of pre-trial detention exceeding one year has been deemed not to be *per se* unreasonable.[55]

28. In turn, the human rights cases and national legislation cited by the Appellant[56] do not disclose any error on the part of the Single Judge, nor any violation of the rights of the Appellant by the ICC in these circumstances. Each of the cases cited by the Appellant materially differs from the circumstances in the case at hand.[57] In contrast with those cases, in the present case the Appellant was promptly informed of the charges against him, presented with the warrant detailing those charges, and was brought before the competent judicial

---

[54] The Appellant appears to claim that the cited principles governing provisional arrest and detention apply to his case since he is a "suspect", not an "accused", and conversely, that the principles pertaining to the permissible length of procedures applicable to someone that has been formally indicted should not be considered for the purposes of assessing the length of his detention (Appeal Brief, para. 23). This wholly unsubstantiated position overlooks, on the one hand, the basic fact that the ICC Statue does not make sharp divisions between "suspects" and "accused", but rather provides for "certain rights at specific stages of the procedure" (see Friman, "Rights of Persons Suspected or Accused of a Crime" in Lee (ed.), *The International Criminal Court. The Making of the Rome Statute* (1999), p. 254), and, on the other, the important panoply of procedural rights and the degree of involvement in proceedings that arrested persons enjoy at the pre-trial/confirmation stages.

[55] See *Prosecutor v Seselj*, IT-03-67-PT, Decision on Defence Motion for Provisional Release, 23 July 2004, at para. 11: "The Trial Chamber notes that the duration of pre-trial detention is a factor relevant to its decision whether to continue detention. While the Accused has already spent 15 months in pre-trial detention, in light of the legal and factual complexity of the case, and in particular the number of witness statements that has to be disclosed to the Accused and the relevant procedural actions, this period is not unreasonable and does not *per se* constitute a ground for allowing the Motion. In any event this fact must be considered in light of all relevant factors." See also, *The Prosecutor v Kanyabashi*, ICTR-96-15-T, Decision on Defence Motion for the Provisional Release of the Accused, 21 February 2001, where a request for provisional release was denied despite a five-year long remand; and *Prosecutor v Mrdja*, IT-02-59-PT, Decision on Darko Mrdja's Request for Provisional Release, 15 April 2002, where detention on remand of over ten months was found not to exceed those periods which the ECtHR or Human Rights Committee have found to be reasonable for comparable cases.

[56] Appeal Brief, paras. 30-31.

[57] In *Jaona v Madagascar*, the applicant "was not informed of the grounds for his arrest and there is no indication that charges were ever brought against him or investigated" (01/04/85, Comm No. 132/1982, para. 12.2), whereas the Appellant was informed of the charges against him on 16 March 2006, the day that he was surrendered to the Court (initially through the service of a copy of the warrant of arrest, and since supplemented by access to the Decision on Arrest Warrant); the violations of the right to be promptly informed of the charges against two of the victims in *Valentini de Bazzano v Uruguay* was in circumstances where there was no indication that they had been provided with any information whatsoever about the charges against them in approximately 8 months, in conjunction with denial of applications for habeas corpus, severe mistreatment, incommunicado detention and detention in unknown facilities (15/08/79, Comm No. 5/1977); in *Glendford Campbell v Jamaica*, one and a half months passed in detention before the applicant was ever served with a warrant for any offence (in that instance, stealing one cow, two ropes and a chain) or brought before any judicial authority, and a full three months passed before even a warrant was issued in respect of the crime for which he was ultimately indicted (07/04/92, Comm No. 248/1987, paras. 2.1-2.2, 3.1, 6.4).

authority within four days of his surrender to the Court where he was given an explicit opportunity to apply for interim release.[58]

29. More importantly, none of the cases cited adopt a mechanical approach to the right to be promptly informed or set out an arbitrary or general limit that can be applied to all cases: rather, each considers the facts of the case on their merits. This is entirely consistent with the approach of the ECHR, which has also eschewed fixed limits and approached cases concerning detention on remand by considering a range of factors in the circumstances of the particular case.[59] Therefore the fact that the Human Rights Committee has found a certain period of detention to be unreasonable under one set of circumstances does not mean that detention for a similar period in other circumstances would *ipso facto* be unreasonable.

30. The Prosecution submits that the analogies that the Appellant seeks to draw with national legislation are even less apposite to the case at hand. The challenges faced by an international court, without coercive powers and necessarily conducting investigations in distant territories and often under difficult conditions, means that specific time-limits established in national legislation, even for serious crimes, are of little guidance. The Prosecution submits that two pieces of national legislation, especially without consideration of the differences between the ICC and national criminal courts, cannot establish a standard to be imposed on the ICC.[60] The Prosecution further notes that, in respect of the German provision cited by the Appellant, the Pre-Trial Chamber has conducted "a re-examination of the reasons justifying pre-trial detention",[61] in the form of the Decision, and has found that such detention is still warranted.

The claim that the Chamber should have included time spent in detention and house arrest in the DRC in assessing whether the detention was unreasonable

31. The Appellant argues that the Pre-Trial Chamber should have taken into account the time that he spent in detention and house arrest in the DRC, pursuant to domestic proceedings.[62] At the outset, the Prosecution submits that this position was stated without any elaboration by the Appellant in his submission before the Pre-Trial Chamber, merely incorporating by reference

[58] See further the "Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3)" (ICC-01/04-01/06-356 and annexes, 28 August 2006.

[59] Such factors include, *inter alia*, the complexity of the case, the severity of the offence and the penalty to be expected in the case of a conviction, the range of evidence and difficulties in the investigation, and the conduct of the judicial authorities.See further Prosecution's Response to Defence Request for Interim Release, paras. 16-22, in particular para. 20, and authorities cited therein.

[60] In particular, the Prosecution notes that the Appellant has not attempted to demonstrate any consistency of practice across the "national laws of legal systems of the world", pursuant to Article 21(1)(c).

[61] Appeal Brief, para. 31, citing StPO s. 121.

[62] Throughout the proceedings the Prosecution has consistently maintained that the Appellant's effective detention in the DRC started in March 2005, and prior to that time he was able to move freely and communicate without restriction with whomever he wanted.

the arguments advanced in unreferenced "earlier filings in the context of its challenge to personal jurisdiction".[63] No effort was made by the Appellant to assist the Pre-Trial Chamber by indicating which prior arguments it referred to and how they impacted on the specific application for release under Articles 60 (3) and (4) of the Statute that he had made. The Appellant now refers, for the first time, to specific paragraphs of its Response to the Observations of the DRC and the Observations of the Victims in Relation to Article 19 of the Statute,[64] which only relate to the alleged illegality of the administrative arrest imposed on the Appellant by the DRC authorities.

32. The crux of the Appellant's current position appears to be that the Chamber should have applied principles similar to those governing the calculation of the applicable sentence, and accordingly include the time spent on detention imputable solely to the DRC authorities in the calculation of the overall period of detention. The Appellant relies on Article 78 (2) of the Statute and on specific jurisprudence of the ICTY.[65] These arguments are being raised for the first time before the Appeals Chamber.

33. The Prosecution firstly submits that the Appellant's approach, as described above, should not be favoured by the Appeals Chamber. The Appellant had ample opportunity to address all relevant issues pertaining to his detention in a clear and comprehensive manner, and instead he opted to advance incomplete pieces of argumentation, scattered across different filings.[66] It is only now that in relation to this specific issue the Appellant is advancing a comprehensible argument as to why the time spent in house arrest pursuant to independent domestic proceedings in the DRC should be considered for the purposes of assessing the length of detention before this Court. Leaving this matter aside, and more importantly, the Appellant's arguments *bear no connection whatsoever with any conduct of the Prosecution*, and accordingly do not, and cannot relate to any instance of alleged "inexcusable delay" by the Prosecution, warranting release under Article 60 (4). This provision "does not protect a person from unreasonable lengths of detention, but only unreasonable lengths of detention occasioned by inexcusable delay by the Prosecutor".[67] Even assuming that the Appellant's

---

[63] Defence Request, para. 48.
[64] ICC-01/04-01/06-406-Conf, 8 September 2006.
[65] See Appeal Brief, paras. 38-39.
[66] The Prosecution has already objected to the Appellant's recurring practice of incorporating by reference submission *en masse* - Prosecution's Response to Defence Appeal Brief in Relation to Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, ICC-01/04-01/06-625, 27 October 2006,
[67] Khan, "Article 60: Initial proceedings before the Court" in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers notes, article by article*, p. 780, after noting that the "unreasonable period" and "inexcusable delay" requirements are conjunctive in nature (p. 779).

position was correct, a proposition which the Prosecution, as it will explain below, strongly disputes, the remedies available to the Appellant should be sought in the ambit of sentencing (Article 78) or, eventually, compensation (Article 85), but not release. On this basis alone, the Appellant's arguments should be dismissed.

34. The Prosecution also submits that the Appellant's position, equating credit for time in detention for sentencing purposes under Article 78 (2) with calculation of the overall period of detention for the purposes of determining release under Article 60 is wholly without merit. Firstly, Article 78 (2) vests a Trial Chamber with discretion to deduct any time spent in detention not under an order of the Court but nonetheless "in connection with conduct underlying the crime".[68] In the instant case, the Pre-Trial Chamber has already determined that the national proceedings pursuant to which the Appellant was held in detention related to conduct *different* to that for which the Appellant is currently being prosecuted at the ICC.[69] This conclusion has never been challenged by the Appellant. It is consequently difficult to understand how the Chamber could have followed the course of action advocated by the Appellant.

The alleged abuse of discretion in weighing relevant factors for the purposes of determining whether a period of detention is "unreasonable"

35. The Appellant argues that the Chamber erred in considering the complexity of the case and the fact that the evidence is located abroad, as these are common to all cases in international criminal tribunals.[70] The Prosecution submits that this cannot be the case. To accept the proposition of the Appellant would be to deem it unreasonable to consider the reality in which international criminal courts and tribunals operate when assessing whether an aspect of that operation is reasonable.[71]

---

[68] The first sentence of Article 78(2) is of no relevance to this argument, and does not even appear to be relied upon by the Appellant – see Appeal Brief, paras. 39-40.

[69] See Decision on Arrest Warrant, paras. 37 et seq. The ICTY decision cited by the Appellant goes in the same direction: "[...] the Appeals Chamber recognizes that the criminal proceedings against the Appellant in the Federal Republic of Germany emanated from *substantially the same criminal conduct* as that for which he now stands convicted at the International Tribunal. Hence, fairness requires that account be taken of the period the Appellant spend in custody in the federal Republic of Germany prior to the issuance of the Tribunal's formal request for deferral." *Prosecutor v Tadic*, IT-94-1-A, Judgment on in Sentencing Appeal, 26 January 2000, paras. 37-40. The Prosecution need not enter into a discussion as to the legal correctness of importing sentencing principles and considerations into the ambit of detention and release.

[70] Appeal Brief, para. 44. The Appellant also appears to confuse the role that these factors play: they do not justify a particular period of detention; they are merely elements considered in determining whether the length of detention is reasonable. Indeed, contrary to the implication of the Appellant, they do not serve as "a justification for having an inordinately long pre-trial detention" at all – they are amongst the factors considered, and properly so, in determining whether pre-trial detention has been inordinately long.

[71] The complexity of the proceedings, of which the location and accessibility of evidence is one component, has often been considered in determining the reasonableness of delay or ongoing detention in the ICTY and ICTR –

36. The propriety of the Chamber taking these factors into consideration, jointly with others, when determining whether the period of detention was unreasonable in this case is further highlighted by the fact that the Appellant attempts to draw analogies to national cases and legislation in the Appeal Brief.[72] In light of this, any suggestion that the Chamber acted unreasonably in recognizing, and taking into consideration, the characteristics of investigations and prosecutions of international crimes cannot be sustained.

The alleged inexcusable delay attributable to the Prosecution

37. At paras. 45-46 of his Appeal Brief, the Appellant claims that the Chamber's conclusion that the organs of the Court had acted with celerity and that the procedure had been continuously active failed to properly address the issue of inexcusable delay. The Appellant submission appears to be threefold,[73] and the Prosecution submits that none of the allegations demonstrates an appeallable error by the Chamber.

38. The Prosecution must reiterate that the burden is on the Appellant to demonstrate either an error of law, an error of fact or a procedural error incurred by the Chamber. The Appellant should not be allowed to re-litigate issues that were fully litigated before the Pre-Trial Chamber, absent a clear demonstration of an error justifying appellate review, or to litigate for the first time on appeal matters that ought to have been raised before that Chamber. Much less should the Appellant be allowed to disguise as grounds of appeal mere disagreements with the manner in which the Pre-Trial Chamber exercised its discretion.

39. The first set of arguments raised by the Appellant completely fails to demonstrate any error by the Pre-Trial Chamber warranting appellate review. The same allegations that the Appellant raises in his brief were advanced before the Pre-Trial Chamber, and were fully addressed by the Prosecution in response. The Prosecution submitted that the allegations

---

see e.g. "The Tribunal's jurisprudence has consistently affirmed that contrary to Defendant Ngirumpatse's contention, there is no specific period of time which will automatically amount to an excessive delay in the proceedings. The question must be addressed on a case by case basis considering the complexity of the proceedings and the case, including the scale of the offences charged, the number of motions filed by the parties" – *Prosecutor v Karamera et al*, ICTR- 98-44-R72, Decision on Defects in the Form of the Indictment, 5 August 2005, para. 6; see also *Prosecutor v Rwamakuba*, ICTR-98-44C-PT, Decision on Defence Motion for Stay of Proceedings, 3 June 2005, paras. 19, 26, 29; *Prosecutor v Ndayambaje*, ICTR-98-42-T, Decision on the Defence motion for the provisional release of the Accused, 21 October 2002; Prosecutor v Seselj, IT-03-67-PT, Decision on Defence Motion for Provisional Release, 23 July 2004, para. 11; *Prosecutor v Jokic*, IT-01-42-T, Order on Miodrag Jokic's Motion for Provisional Release, 20 February 2002, para. 25; *Prosecutor v Blaskic*, IT-95-14, Order Denying a Motion for Provisional Release, 20 December 1996.

[72] Appeal Brief, paras. 30-31.

[73] Namely (a) the "inexcusable delay" may also be caused by the Prosecution "changing tactics, failing to disclose materials in a form which the Defence can review or failing to comply with the eCourt protocol" (para. 46); (b) the Prosecution allegedly was aware of the Appellant's detention in the DRC and benefited from it (para. 48); and (c) the Prosecution prematurely requested an arrest warrant against the Appellant to deprive him of his right to challenge his arbitrary detention by the DRC authorities (para. 49).

made by the Appellant were without merit and indicated various instances where the Appellant was completely misstating the facts,[74] including numerous citations of the record of the proceedings in support of its position. After this full discussion on the conduct of the Prosecution during the proceedings, the Chamber entered its Decision, rejecting the Appellant's position and stating that all organs of the Court had acted "swiftly".[75] In this particular context, it is clear that the Appellant's submissions pertaining to alleged instances of misconduct by the Prosecution were not accepted by the Chamber. The same rejected position is being advanced again, this time before the Appeals Chamber, without any reference to the prior discussion before the Pre-Trial Chamber and without any identifiable error being articulated in the Appellant's brief.

40. The Prosecution respectfully submits that the Appellant's second set of arguments should be dismissed *in limine*. First, the Appellant is raising for the first time the alleged "concerted action" between the Prosecution and the DRC authorities, an argument that has previously only been raised in relation to the Appellant's challenge to jurisdiction, for the purposes of demonstrating "inexcusable delay" in terms of Article 60 (4). The arguments on "inexcusable delay" advanced by the Appellant before the Pre-Trial Chamber focused solely on the conduct of the Prosecution during ICC proceedings, as discussed in the preceding paragraph, and at no point even hinted at any alleged concerted action between the Prosecution and the DRC authorities. The Prosecution submits that the Appellant cannot raise these new arguments for the first time before the Appeals Chamber when he had ample opportunity to raise them before the Pre-Trial Chamber but failed to do so.[76] The purpose of an appeal is not to remedy an oversight or tactical failing of a party before the first instance chamber.[77]

41. Second, the Prosecution notes that the Appellant's factual theory of "concerted action", included in the challenge to jurisdiction, was rejected as unfounded.[78] The Appellant is now relying entirely on arguments included in a separate appeal brief currently before the Appeals Chamber, to which the Prosecution has not yet responded, again abusing the practice of

[74] Prosecution's Response, paras. 21-35.
[75] Decision, p. 7.
[76] *The Prosecutor v. Kambanda*, ICTR 97-23-A, Appeal Judgement, 19 October 2000, paras. 25-27; *The Prosecutor v Akayesu*, ICTR-96-4-A, Appeal Judgement, 1 June 2001, para. 361; *Prosecutor v. Blaskic*, IT-95-14-A, Appeal Judgment, para. 222; *Prosecutor v. Blagojevic*, IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team, 7 November 2003, para. 10. See further Prosecution's Response to Thomas Lubanga Dyilo's 27 september 2006 Request for Leave to Appeal the Second Decision on Prosecution Requests for Redactions, ICC-01/04-01/06-497, 3 October 2006, paras. 25-29.
[77] See e.g. *Prosecutor v Kupreskic*, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 408; *Prosecutor v Delalic et al*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 724; *The Prosecutor v Akayesu*, ICTR-96-4-A, Appeal Judgement, 1 June 2001, para. 408.
[78] Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute, ICC-01/04-01/06-512, 3 October 2006, p. 10.

"incorporating by reference".[79] The Prosecution submits that an appellant should not be allowed to litigate in parallel issues that are before the same court, but in separate proceedings. The proposition that the Prosecution acted in concert with the DRC authorities and benefited from the Appellant's detention in the DRC is a hotly contested one, at the heart of separate appellate proceedings on the Appellant's unsuccessful challenge to jurisdiction.[80] A full discussion on this allegation should be reserved for that appeal, not this one.

42. Third, the burden on the Appellant is to show that the Pre-Trial Chamber *erred* by failing to properly assess the factors and information allegedly establishing "inexcusable delay" by the Prosecution, and thus warranting release under Article 60 (4). The mere incorporation by reference of allegations of concerted action made elsewhere, in no clear and identifiable manner related to the Chamber's findings in the Decision, can only fail to meet that burden.

43. The Appellant further agues that the Prosecution prematurely applied for an arrest warrant, not being ready for the confirmation hearing, and with the sole purpose of depriving the Appellant of an opportunity to seek review of his detention.[81] The Prosecution can be very brief in response: first, the claim that the Prosecution was not ready for the confirmation hearing, as allegedly evidenced by its request to postpone it, was raised before the Pre-Trial Chamber[82], rebutted by the Prosecution[83] and ultimately not accepted by the Chamber. The Appellant merely repeats the same position without even attempting to demonstrate that its prior rejection by the Pre-Trial Chamber was in error. Second, the added "twist" of an alleged malicious intent by the Prosecution aimed at preventing the Appellant from challenging his detention by the DRC authorities is not only completely unsupported by any factual material, but was further never raised before the Pre-Trial Chamber when requesting provisional release. An appeal is not a vehicle to bring offensive and unsubstantiated accusations, with no bearing at all on the findings being impugned.[84]

The Third Issue – the Pre-Trial Chamber committed no error in the exercise of its discretion under Article 60(2)

44. The Prosecution submits that there is no abuse of discretion by the Single Judge in its Decision denying the application for release and its interpretation and application of Article

[79] See Appeal Brief, para. 48.
[80] Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2003, ICC-01/04-01/06-620, 26 October 2006.
[81] Appeal Brief, para. 49.
[82] Defence Request, para. 48.
[83] Prosecution Response, paras. 24-27.
[84] Since the Appellant has completely failed to demonstrate the existence of any appeallable error requiring corrective action by the Appeals Chamber, the Prosecution need not address the Appellant's submissions on the appropriate remedy (Appeal Brief, paras. 51-53).

60 (2). The issue for the determination of the Appeals Chamber is whether the Pre-Trial Chamber considered the relevant factors and accorded them appropriate weight in its determination that the conditions in Article 58(1), which form the basis of the determination under Article 60(2), continue to be met.[85]

45. The Appellant recognises the discretionary nature of the decision, and the appropriate standard of review, with regard to whether the conditions in Article 58(1) were met.[86] The Prosecution submits that in the review of discretionary decisions of a Pre-Trial Chamber or any other Chamber of first instance, appellate bodies generally show a level of deference to the exercise of the discretion of the original Chamber especially where it involves factual considerations: they do not find an error merely because the appellate Chamber would have come to a different conclusion.[87] In light of this, the Prosecution submits that the Single Judge considered the relevant factors, and that the Appellant has demonstrated no error in the exercise of the Single Judge's discretion.

46. In relation to the first factor discussed in the Appeal Brief, the Appellant rightly acknowledges that the Pre-Trial Chamber was entitled to take into account the gravity of the crimes with which the Appellant is charged, insofar as they relate to the likelihood that the Appellant will appear at trial.[88] The Prosecution submits that, contrary to the implication of the Appellant, this is precisely the manner in which the Single Judge considered the gravity of the crimes. There is no evidence in the Decision to suggest that the Single Judge considered gravity "in isolation". To the contrary, the Single Judge referred gravity as a factor which creates "a substantial risk that [the Appellant] may wish to abscond from the jurisdiction of the Court".[89]

---

[85] Article 60 (2) of the Statute mandates the Pre-Trial Chamber to order the continued detention of a person if it is satisfied that the conditions in Article 58 (1) are met.

[86] Appeal Brief, para. 55. This is reinforced by the case cited in the Appeal Brief, para. 57: *Prosecutor v. Brdjanin and Talic*, IT-99-36-T, Decision on the motion for provisional release of the Accused Momir Tadic, 20 September 2002, p. 5 – "The Trial Chamber is of the view that Rule 65 (B) is silent on circumstances justifying provisional release specifically to enable individual cases to be determined on their merits and by application of discretion in the interests of justice".

[87] In the context of the ICTY and ICTR Appeals Chamber, see e.g. *Prosecutor v Milosevic*, IT-99-37-AR73 and IT-01-50-AR73 and IT-01-51-AR73, Reasons For Decision on Prosecution Interlocutory Appeal From Refusal To Order Joinder, 18 April 2002 at para 4; *Milosevic v Prosecutor*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004 at para 9-10; *Prosecutor v Sainovic and Ojdanic*, IT 99-37-AR65, Dissenting Opinion of Judge David Hunt on Provisional Release, 30 October 2002, para 22; *Prosecutor v. Haradinaj et al.*, IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006, para. 5; *The Prosecutor v Karemera et al*, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003 at para 9.

[88] Appeal Brief, para. 56.

[89] Decision, pp. 5-6.

47. Any suggestion that the Pre-Trial Chamber considered the gravity of the charges in isolation is further disproved by the manner in which the Single Judge considered it in the Decision in conjunction with other relevant factors that may enable the Appellant evade the jurisdiction of the Court, including the Appellant's ties to the DRC; his position as President of the UPC, which still exists and is active in the DRC and his position as commander-in-chief of the FPLC; as well as his national and international contacts.[90]

48. The Prosecution submits that in the second factor, the Appellant also has demonstrated no error on the part of the Single Judge.[91] It was not unreasonable for the Pre-Trial Chamber to consider that the main ties of the Appellant are to a country other than those to which he seeks interim release. The fact that the Appellant wishes to go to Belgium or Great Britain does not necessarily undermine the fact that he may flee or interfere with witnesses. Furthermore, the Appellant fundamentally misrepresents the ICTY case cited – the location to which Talic sought provisional release was not "the determining factor" in granting provisional release; rather the decision was made expressly due to his grave medical condition.[92]

49. In relation to the Appellant's argument that maintaining national and international links does not imply that a suspect would use them to escape, there is no abuse of discretion by the Pre-Trial Chamber. The Prosecution submits that the fact that the Appellant had the means and contacts by which to readily escape the jurisdiction of the Court was one relevant factor which the Chamber properly considered in determining that the Appellant was a flight-risk. The Chamber did not find that this factor proved the risk of flight in itself, nor did it need to. The various relevant factors considered together by the Chamber lead it to reasonably conclude that the continued detention of the Appellant "appears necessary (i) [t]o ensure the person's appearance at trial".[93] The Appellant has demonstrated no error which would justify the Appeals Chamber's interference in this discretionary determination. In particular, repeated attempts to show that any one factor alone may not justify this conclusion do not demonstrate that those factors together rendered the conclusion unreasonable.

50. In relation to the factors considered by the Pre-Trial Chamber in holding that the conditions in Article 58(1)(b) were also met, the Appellant has misrepresented the Chamber's

[90] Decision, p. 6.
[91] Appeal Brief, para. 57.
[92] *Prosecutor v. Brdjanin and Talic*, IT-99-36-T, Decision on the motion for provisional release of the Accused Momir Tadic, 20 September 2002. The Trial Chamber distinguished the Talic application from others because it involved a critical state of health. The Chamber later remarked on page 6 that "The Trial Chamber believes that, given the medical condition of Talic, it would be unjust and inhumane to prolong his detention on remand until he is half dead before releasing him". The fact that the location was different to that where the crimes were alleged to have occurred was a subsidiary consideration, in order to mitigate any risk of interference.
[93] Article 58(1)(a).

decision.[94] The Pre-Trial Chamber did not rely solely on the fact that the Appellant knows the identities of certain witnesses: it also expressly considered other relevant factors including the fact that if the Appellant were to be released, he would be in a position to have unmonitored and unrestricted access to communication with people; the consequential risk of exerting pressure on witnesses; and the history of threats and other interference.[95] The Appellant has not addressed or challenged any of these additional factors.

51. In relation to this condition, the key issue is not the actual return of the Appellant to the DRC, but the influence he still wields in the region regardless of his physical location or distance from the DRC. The Prosecution submits that it was perfectly within the discretion of the Chamber to determine that interim release would create an unacceptable risk of threats to victims and witnesses in the region. In the case of *Prosecutor v. Fofana and others*, the SCSL Appeals Chamber stated that "Given the practical difficulties facing international criminal justice at this time, courts must demonstrate a resolve to ensure that those suspects who have been arrested do in due course face trial, and are not given bail in circumstances where there is a real risk that they would flee or intimidate prosecution witnesses or resume the conduct for which they have been indicted".[96]

52. The Prosecution submits that the final argument raised by the Appellant in an attempt to impugn the Decision, that the Pre-Trial Chamber failed to take account whether the Appellant would have voluntarily surrendered to the court,[97] is irrelevant and misconceived. The Appellant, as noted in the Brief, was not able to surrender voluntarily. Therefore the Chamber quite properly did not consider a factor which did not exist. The Appellant appears to be suggesting that the Pre-Trial Chamber should have considered extraneous, irrelevant and hypothetical factors in coming to a determination of what the Appellant would have done if given the opportunity to surrender himself voluntarily.

53. In relation to the submission that the compulsory transfer of the Appellant "must not be used against him",[98] there is absolutely no indication on the record that the Pre-Trial Chamber did consider the fact that the Appellant did not surrender voluntarily against the Appellant. It is erroneous and misleading for the Appellant to attempt to impute factual reasoning that was

---

[94] Appeal Brief, para. 59.
[95] Decision, p. 6. The Pre-Trial Chamber to the Decision on Arrest Warrant, para. 101, where it was observed that some witnesses who appeared at trials of some UPC members had been killed or threatened.
[96] *Prosecutor v. Fofana*, SCSL-04-14-AR65, Appeal against Decision refusing bail, 11 March 2005, para. 31
[97] Appeal Brief, para. 60.
[98] Appeal Brief, para. 60.

not made by the Pre-Trial Chamber in support of his appeal. Failure to consider an irrelevant factor that has in no way been raised or used in the Decision cannot be an abuse of discretion.

54. Finally, the Appellant argues that the Chamber failed to apply the principles of necessity and proportionality, and that it should have considered less restrictive measures as it could order interim release with or without conditions.[99] The Prosecution notes that the Appellant has not specifically addressed the issue of what conditions might have been appropriate.

55. The Prosecution submits that the Appellant has failed to demonstrate any discernible error in relation to necessity or proportionality. The fundamental issue addressed in the Decision is whether the ongoing detention of the Appellant is necessary to ensure that he appears at trial, and that he does not obstruct or endanger the proceedings. Once one of these conditions is satisfied, Article 60(2) states that "the person shall continue to be detained". The Appellant has made no showing that the Chamber's determination of the necessity of continued detention discloses any error or abuse of discretion of the kind which would justify appellate intervention.[100] Therefore the Prosecution submits that the appeal on this ground must fail.

Conclusion

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

Luis Moreno-Ocampo
Prosecutor

Dated this 1st day of November 2006
At The Hague, The Netherlands

[99] Appeal Brief, paras. 61-62.
[100] The Prosecution refers to its submissions, above, and Prosecution's Response (paras. 11 to 13) that the detention of the Appellant continues to be necessary to ensure his appearance at trial and to ensure that he does not obstruct or endanger the investigation and prosecution of the charges against him.