Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No.: **ICC-01/04-01/06 (OA4)**
Date: **14 December 2006**

THE APPEALS CHAMBER

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

Registrar: **Mr Bruno Cathala**

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

Public Document

Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006

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The Appeals Chamber of the International Criminal Court (hereinafter "the Court"),

In the appeal of Mr. Thomas Lubanga Dyilo of 9 October 2006 entitled "Requête d'appel du Conseil de la Défense de la 'Decision on the Defence Challenge to the jurisdiction of the court pursuant to art.19.2. (a) of the Statute' du 3 octobre 2006" (ICC-01/04-01/06-532),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The decision of Pre-Trial Chamber I entitled "Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute" is confirmed. The appeal is dismissed.

REASONS

I. THE BACKGROUND TO THE PROCEEDINGS

1. On 10 February 2006 Pre-Trial Chamber I (hereinafter "the Pre-Trial Chamber") issued a warrant for the arrest[1] of Mr. Thomas Lubanga Dyilo[2]. Thereafter, it requested[3] the Democratic Republic of the Congo (hereinafter "the DRC") to arrest the named person and surrender him to the Court authorities (articles 58 (5) and 89 of the Statute). This was accomplished on 16 March 2006 following a decision of the judicial authority

[1] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* «Mandat d'arrêt » 10 February 2006 (ICC-01/04-01/06-2).
[2] Mr. Thomas Lubanga Dyilo is interchangeably referred to as "the appellant" or "Mr. Lubanga Dyilo".
[3] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* «Demande d'arrestation et de remise de M. Thomas Lubanga Dyilo adressée à la République démocratique du Congo» 24 February 2006 (ICC-01/04-01/06-9).

of the DRC (Auditeur General) to whom the request was passed on.[4] The day following, Mr. Lubanga Dyilo was transported to The Hague,[5] and on 20 March 2006, he appeared before the Pre-Trial Chamber (represented by duty counsel[6] appointed by the Court) pursuant to the provisions of article 60 (1) of the Statute. The Chamber satisfied itself that the arrestee had been informed of the crimes attributed to him and his rights under the Statute including the right to apply for interim release.[7]

2. In accordance with the provisions of the Statute, an arrested person remains in custody during the pendency of the proceedings unless his/her interim release is sanctioned by the Court under the provisions of article 60 of the Statute.

3. Prior to determining the application for the arrest of Mr. Lubanga Dyilo, the Pre-Trial Chamber examined on its own motion whether the case against him fell within the jurisdiction of the Court and sequentially the admissibility of the case under the Statute.[8] Power lies with the Court to inquire *proprio motu* into its jurisdiction to take cognisance of a case and its admissibility as a proper subject for the exercise of its jurisdiction by virtue of the provisions of article 19 (1) of the Statute. The Pre-Trial Chamber decided it had jurisdiction to deal with the case.[9] Further it held the case to be admissible before it.[10] Thereafter, the Chamber inquired into the merits of the application for the issue of a warrant of arrest upholding it as well-founded. On being informed of the aforesaid decision, the appellant challenged its correctness by way of appeal[11]. Meanwhile, he

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[4] See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* "Report from the Registrar on the Execution of the Request for Arrest and Surrender" 23 March 2006 (ICC-01/04-01/06-Conf).

[5] See *ibid.*

[6] Subsequently the duty counsel was appointed on 12 April 2006 to represent him in proceedings before the Court.

[7] See transcript of the hearing of 20 March 2006 (01-04-01-06-T-3-EN).

[8] See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* "Decision on the Prosecutor's Application for a warrant of arrest, Article 58" 10 February 2006, Annex I to "Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo" 24 February 2006 (ICC-01/06-01/04-8-Corr, reclassified as public pursuant to the Decision ICC-01/04-01/06-37). Reclassified as public on 17 March 2006 pursuant to decision ICC-01/04-01/06-37.

[9] *Ibid* paragraph 28.

[10] *Ibid* paragraph 75.

[11] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* « Requête d'appel du conseil de permanence de la décision du 10 février 2006 de la Chambre Préliminaire I, relative à la requête du Procureur aux fins de délivrance d'un mandat d'arrêt en vertu de l'Article 58 du statut » 24 March 2006 (ICC-01/04-01/06-57-Corr).

applied to the Pre-Trial Chamber for his release.[12] He did not pursue his appeal, ultimately dismissed as abandoned.[13]

4. The legal foundation of the application[14] of Mr. Lubanga Dyilo for his release was obscure, subsequently referred to by himself as a request for compensation "which must necessarily consist of release"[15]. The remedy sought was not pegged to any provision of the Statute nor was it articulated by reference to any provision of the Rules of Procedure and Evidence. The subject-matter of a claim to compensation under article 85 (1) of the Statute is not the release of the claimant but the award of compensation following a decision of the Court declaring his arrest or detention unlawful (see rule 173 of the Rules of Procedure and Evidence). The Pre-Trial Chamber inquired into the procedural foundation of the application, requesting that it be clarified.[16] Moved by the need to identify or specify the object of his motion, Mr. Lubanga Dyilo reformulated or refashioned his application as a challenge to the jurisdiction of the Court under article 19 (2) of the Statute.[17]

5. The jurisdiction of the Court is disputed by reference to the "doctrine of abuse of process". The facts supporting the new application are not set forth in its text. The failure was not treated as fatal to the pursuit of the application, seemingly because the facts put forward in his original application were by necessary implication deemed to be adopted as the foundation of the reformulated motion. In the original application, allegations were made that prior to his arrest under the warrant of the Court he was unlawfully detained and ill-treated by the Congolese authorities. Such violations of his rights by the DRC

[12] See *Situation en République Démocratique du Congo Affaire le Procureur c/Thomas Lubanga Dyilo* «Requête de mise en liberté » 23 May 2006 (ICC-01/04-01/06-121).
[13] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* "Decision on Thomas Lubanga Dyilo's Application for Referral to the Pre-Trial Chamber / In the Alternative, Discontinuance of Appeal" 6 September 2006 (ICC-01/04-01/06-393).
[14] See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* « Requête de mise en liberté » 23 May 2006 (ICC-01/04-01/06-121) and « Conclusions en réplique à la réponse du Procureur à la demande de mise en liberté » 10 July 2006 (ICC-01/04-01/06-188-Conf).
[15] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* « Conclusions suite à l'ordonnance du 13 juillet 2006 » 17 July 2006 (ICC-01/04-01/06-197), paragraph 5.
[16] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* "Order relating to the Application for Release" 13 July 2006 (ICC-01/04-01/06-191).
[17] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* « Conclusions suite à l'ordonnance du 13 juillet 2006 » 17 July 2006 (ICC-01/04-01/06-197), paragraph 8.

burden, as he submitted, the prosecuting authority of the Court who must, in the circumstances of the case, shoulder responsibility for the actions of the authorities of the DRC. Moreover, the process of his arrest under the warrant of the Court is claimed to be flawed inasmuch as the warrant was endorsed by a military and not by an ordinary court. Prior to his arrest on the authority of the warrant of the Court, Mr. Lubanga Dyilo was held in custody by the Congolese authorities for crimes other than those that were found to justify the issue of a warrant for his arrest by the Court.

6. The DRC in its observations[18] submitted and received under article 19 (3) of the Statute maintained that Mr. Lubanga Dyilo was brought before the judicial authorities having competence in the matter of enforcement of the warrant of the Court and that the process followed was the one ordained by law. In his response[19] thereto Mr. Lubanga Dyilo submitted that the Prosecutor was privy to his prior illegal detention by the Congolese authorities with a view to facilitating his unimpeded arrest under the warrant of the Court. There was, in his submission, complicity on the part of the Prosecutor in the action of the Congolese authorities to secure his arrest by devious means; shifting thereby the weight of his submission from responsibility of the Prosecutor for acts of the DRC to responsibility attributed to him on account of underhanded dealings with the authorities of that state.

7. The Prosecutor refuted the allegation that he was party to any surreptitious dealings or arrangements with a view to bypassing the legal process or infringing the rights of the suspect or that he connived in any act of ill-treatment of the suspect.[20] He submitted that the process for the enforcement of the warrant before the Congolese authorities followed the path envisaged by law, which is also the stance taken by the

[18] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* «Observations des victimes a/0001/06, a/0002/06 et a/0003/06 quant à l'exception d'incompétence soulevée par la défense dans la requête du 23 mai 2006 » 24 August 2006 (ICC-01/04-01/06-349) ; « Observations de la République Démocratique du Congo » registered on 24 August 2006 (ICC-01/04-01/06-348-Conf).

[19] See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* "Defence Response to the Observations of the DRC and the Observations of the Victims in the Application of Article 19 of the Statute" 8 September 2006 (ICC-01/04-01/06-406-Conf).

[20] See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* "Prosecution's Response to the Application for Release" 13 June 2006 (ICC-01/04-01/06-149-Conf) and "Prosecution's Response to the Observations of the DRC and the Observations of the Victims in Application of Article 19 of the Statute" 7 September 2006 (ICC-01/04-01/06-401-Conf).

victims a/0001/06, a/0002/06 and a/0003/06 (hereinafter "the victims")[21]. Both, the DRC and the victims, disputed the efficacy of the application as a challenge to the jurisdiction of the Court under article 19 (2) of the Statute.[22]

II. THE DECISION[23] OF THE PRE-TRIAL CHAMBER

8. Notwithstanding the absence of any suggestion that the Court lacked jurisdiction to inquire into the crimes and sequential charges levelled against the suspect and, if confirmed, authority to try him, the Pre-Trial Chamber treated the application as going to jurisdiction and went into its substance with a view to determining whether there were valid reasons to refrain from assuming jurisdiction in the matter. Ground for such a course was found to be provided by article 21 (3) of the Statute and the principle or doctrine of English law of abuse of process. It treated the application as a motion to relinquish jurisdiction on grounds of abuse of process and violation of the fundamental rights of the accused, safeguarded by article 21 (3) of the Statute.[24] In so doing, they derived support from decisions of the International Criminal Tribunal for Rwanda (hereinafter "ICTR")[25] and the International Criminal Tribunal for the Former Yugoslavia (hereinafter "ICTY")[26].

9. The Pre-Trial Chamber noticed the absence of any evidence to support allegations of "concerted action", as it calls it,[27] between the Prosecutor and the DRC to secure the

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[21] See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* « Observations des victimes a/0001/06, a/0002/06 et a/0003/06 quant à l'exception d'incompétence soulevée par la défense dans la requête du 23 mai 2006 » 24 August 2006 (ICC-01/04-01/06-349).

[22] See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* « Observations des victimes a/0001/06, a/0002/06 et a/0003/06 quant à l'exception d'incompétence soulevée par la défense dans la requête du 23 mai 2006 » 24 August 2006 (ICC-01/04-01/06-349) ; « Observations de la République Démocratique du Congo » registered on 24 August 2006 (ICC-01/04-01/06-348-Conf).

[23] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* "Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute" 3 October 2006 (ICC-01/04-01/06-512) (hereinafter: "impugned decision").

[24] Impugned decision, page 10.

[25] ICTR Appeals Chamber, *Jean Bosco Barayagwiza v. The Prosecutor* "Decision" 3 November 1999, *available at*: http://69.94.11.53./ENGLISH/cases/Barayagwiza/decisions/dcs991103.htm.

[26] ICTY Appeals Chamber, *Prosecutor v Dragan Nikolić*, "Decision on Interlocutory Appeal Concerning Legality of Arrest", 5 June 2003, Case No. IT-94-2-AR73, *available at* http://www.un.org/icty/nikolic/appeal/decision-e/030605.pdf; see further impugned decision, footnotes 31, 32 and 33.

[27] Impugned decision, pages 9 and 11.

detention of Mr. Lubanga Dyilo in order to pave the way for his subsequent unhindered arrest in execution of the warrant of the Court that might be issued in due course. All the indications point in the opposite direction, as the Pre-Trial Chamber noted, finding that the procedure for the arrest and surrender of Mr. Lubanga Dyilo was legally and factually unblemished.[28]

10. The Pre-Trial Chamber acknowledged that torture or serious mistreatment of the suspect in the process of bringing him to justice may justify the non-assumption of jurisdiction in any given case,[29] treading along the lines earmarked by the decisions of the ICTY in *Prosecutor v. Dragan Nicolić*[30] and the ICTR in *Jean Bosco Barayagwiza v. The Prosecutor*[31], where the doctrine of abuse of process as fashioned by English case law was held to apply in proceedings before the ICTY and ICTR respectively. Prior detention by the Congolese authorities could have no bearing on the issue of abuse of process in the absence of evidence tending to establish torture or serious mistreatment in connection with the arrest and surrender of Mr. Thomas Lubanga Dyilo. The Pre-Trial Chamber noticed the total absence of evidence to support the allegations of Mr. Thomas Lubanga Dyilo that he was either tortured or seriously mistreated.[32]

III. THE APPEAL

11. Mr. Lubanga Dyilo mounted an appeal[33] against the decision of the Pre-Trial Chamber pursuant to the provisions of article 82 (1) (a) of the Statute that confers a right to appeal decisions "with respect to jurisdiction or admissibility".

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[28] Impugned decision, pages 6 to 9.
[29] See impugned decision, page 10.
[30] ICTY Appeals Chamber, "Decision on Interlocutory Appeal Concerning Legality of Arrest", 5 June 2003, Case No. IT-94-2-AR73, *available at*: http://www.un.org/icty/nikolic/appeal/decision-e/030605.pdf .
[31] ICTR Appeals Chamber, *Jean Bosco Barayagwiza v The Prosecutor* "Decision" 3 November 1999, *available at*: http://69.94.11.53./ENGLISH/cases/Barayagwiza/decisions/dcs991103.htm .
[32] See impugned decision, page 10.
[33] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* « Requête d'appel du Conseil de la Défense de la 'Decision on the Defence Challenge to the jurisdiction of the court pursuant to art.19.2 (a) of the Statute' du 3 octobre 2006 » 9 October 2006 (ICC-01/04-01/06-532), "Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006" 26 October 2006 (ICC-01/04-01/06-619-Conf) (hereinafter "Defence document").

12. Neither the Prosecutor in his response[34] to the appeal, nor the DRC[35] or the victims[36] in their observations entered a demurral to the admissibility of the appeal. And insofar as the *sub judice* decision dismisses the application of Mr. Lubanga Dyilo raised under article 19 (2) (a) of the Statute, the semblance of a decision subject to appeal is visible; reinforced by the fact that the Pre-Trial Chamber, as may be gathered from their decision, treated the application for stay or discontinuance of the proceedings on grounds of abuse of process as a challenge to jurisdiction.

13. The appellant advanced five grounds of appeal, all connected with the refusal of the Pre-Trial Chamber to stay or stop the proceedings on account of his gross mistreatment, involving serious violations of his human rights, concluding that the process was abused to such an extent that the proceedings should be stayed. He disputed the soundness of the findings of the Pre-Trial Chamber respecting the absence of torture or serious mistreatment of himself and the rejection of his claim that the Prosecutor was privy to ill-doing in securing his arrest. The following grounds of appeal are listed in paragraph 5 of the document in support of the appeal.

1st ground: Adoption by the Pre-Trial Chamber "of an incorrect legal test for the determination as to whether to stay the exercise of jurisdiction over Thomas Lubanga Dyilo"[37]

2nd ground: Failure of the Chamber "to consider relevant and significant indicia concerning the relationship between the DRC and the ICC prosecution"[38]

3rd ground: Application by the Chamber of "an incorrect legal standard for assessing the relevant law of the DRC in the context of article 59 (2) of the Statute"[39]

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[34] See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* "Prosecution's Response to Defence appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006" 16 November 2006 (ICC-01/04-01/06-709-Conf) (hereinafter "Prosecutor's document").

[35] See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* « Observations de la République Démocratique du Congo » registered on 21 November 2006,(ICC-01/04-01/06- 720).

[36] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* « Observations des victimes a/0001/06, a/0002/06 et a/0003/06 à l'appel de la Défense concernant la Décision relative à l'exception d'incompétence de la Cour en vertu de l'article 19-2 du Statut » 22 November 2006 (ICC-01/04-01/06-725).

[37] See on this ground of appeal· Defence document, paragraphs 6 to 21, Prosecutor's document, paragraphs 10 to 25.

[38] See on this ground of appeal: Defence document, paragraphs 22 to 35, Prosecutor's document, paragraphs 26 to 43.

4th ground: Failure of the Chamber "to consider the cumulative effect of the violations of Thomas Lubanga Dyilo's rights"[40]

5th ground: Failure of the Chamber "to consider whether a lesser remedy would be appropriate"[41]

14. In the submission of the appellant, the Pre-Trial Chamber made a series of errors, legal and factual. He argued that the test applied by the Chamber to determine the requisites of breaches of his rights and the law such as would justify stay was unduly restrictive.[42] The appellant drew attention to the fact that the case law of the European Court of Human Rights relied upon[43] relates to cases of extradition; therefore the principles adopted therein cannot be extricated from the facts defining the issue before the European Court of Human Rights.[44] Moreover, the concept of human rights and the implications of their violations, as the relevant arguments may be summarized, should not be viewed statically but from an ever-evolving perspective of the impact of human rights violations on judicial proceedings.[45] Reference was made to *inter alia* the jurisprudence of the Inter-American Court of Human Rights[46] and the test of "due diligence" adopted as the measure of testing the propriety of action of the prosecuting authorities as well as the conduct of private actors.[47] Torture or serious mistreatment, on the other hand, the appellant submitted, should not be confined to isolated acts but may be configured by the cumulative effect of a series of acts involving violations of the rights of a person.[48] The appellant depicted *inter alia* his stay while in custody and the conditions of his detention

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[39] See on this ground of appeal: Defence document, paragraphs 36 to 44, Prosecutor's document, paragraphs 44 to 56.
[40] See on this ground of appeal: Defence document, paragraphs 45 to 52, Prosecutor's document, paragraphs 57 to 61
[41] See on this ground of appeal: Defence document, paragraphs 53 to 58, Prosecutor's document, paragraphs 62 and 63.
[42] See Defence document, paragraphs 6 to 21.
[43] *Case of Stocké v Germany*, Judgment, 18 February 1991, Application number 11755/85 available in: HUDOC database at: http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en; *Klaus Altmann (Barbie) v France*, Decision, 4 July 1984, Application number 10689, available in: HUDOC database at: http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en.
[44] See Defence document, paragraphs 8, 9 and 10.
[45] See Defence document, paragraphs 11 and 12.
[46] Defence document, footnote 35.
[47] Defence document, paragraph 11.
[48] See Defence document, paragraphs 45 to 52.

as an act of torture.[49] The deference shown by the Pre-Trial Chamber to national law and the process followed by the Congolese authorities in enforcing the arrest warrant was unjustified.

15. The Prosecutor in his response supported the decision of the Pre-Trial Chamber in every respect: He agreed there is power to stop proceedings for abuse of process.[50] The finding of the pre-trial court that he was not party to any misdoing is correct and accords with the truth.[51] Deference to the law and procedures of the country requested to effect the arrest of and surrender the suspect to the Court authorities is implicit from the provisions of article 59 (2) of the Statute, reinforced by those of article 99 (1) providing that "[r]equests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process."

16. The Pre-Trial Chamber does not, the Prosecutor argued, sit on appeal from any decision of the national judicial authorities respecting the authorisation of the enforcement of the warrant nor is power vested in the Court to assume jurisdiction in the matter.[52] With regard to interim release, he brought to the notice of the Appeals Chamber that a separate application had been made to that end before the Pre-Trial Chamber under rule 118 of the Rules of Procedure and Evidence that was addressed by the Pre-Trial Chamber whose decision is presently the subject of another appeal of Mr. Lubanga Dyilo.[53] Neither the Prosecutor nor the Court bear responsibility or can be held accountable for the detention of the appellant by the Congolese authorities or his treatment while in custody, albeit, agreeing with the Pre-Trial Chamber, that there is no evidence supporting the appellant's allegations of torture and serious mistreatment.[54]

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[49] See paragraphs 46 and 47.
[50] Prosecutor's document, paragraphs 11 and 21 to 25.
[51] Prosecutor's document, paragraphs 27 to 42.
[52] See Prosecutor's document, paragraphs 45 and 46; noteworthy is footnote 104 of the Prosecutor's document: *Schlunck*, Article 59 – Arrest proceedings in the custodial State, in *Triffterer O.* (Editor), Commentary on the Rome Statute of the International Criminal Court (1999), page 767.
[53] See Prosecutor's document, paragraph 60.
[54] See Prosecutor's document, paragraph 61.

17. The DRC observed that none of the grounds put forward by the appellant justify interference with the findings and the decision of the Pre-Trial Chamber refuting the existence of any errors in the decision of the Pre-Trial Chamber.[55] The victims followed a similar line, subject to the proviso, that the proceedings do not, in their view, raise a question of jurisdiction and for that reason they should be outrightly dismissed.[56]

18. In his responses[57] to the observations of the DRC and the victims, the appellant denied their validity reasserting the position put forward in the document in support of the Appeal.

IV. THE DECISION OF THE APPEALS CHAMBER

19. The issues raised for consideration in this appeal may be summed up as follows:

A. The parameters of the jurisdiction of the Court

B. The doctrine or principle of abuse of process, its ambit and applicability in proceedings before the ICC

C. Article 21 (3) of the Statute, and its relevance to the assumption of jurisdiction by the Court in any given case

D. The validity of the findings of the Pre-Trial Chamber respecting

a. the absence of wrongdoing on the part of the Prosecutor in the detention and sequential treatment of the appellant by the Congolese authorities;

b. the absence of evidence of mistreatment, grave or otherwise, of the appellant; and

c. the application of article 59 (2) of the Statute.

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[55] See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* « Observations de la République Démocratique du Congo» (ICC-01/04-01/06- 720), registered on 21 November 2006.

[56] See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* « Observations des victimes a/0001/06, a/0002/06 et a/0003/06 à l'appel de la Défense concernant la Décision relative à l'exception d'incompétence de la Cour en vertu de l'article 19-2 du Statut » 22 November 2006 (ICC-01/04-01/06-725).

[57] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* "Defence Reply to the Observations of the Government of the Democratic Republic of Congo" 27 November 2006 (ICC-01/04-01/06-730); "Defence Reply to the Observations of the Victims' Representatives" 28 November 2006 (ICC-01/04-01/06-733).

A. The parameters of the jurisdiction of the Court

20. Save for the prayer itemizing the relief sought – challenge to the jurisdiction of the Court – nothing was produced, said or done to contest the jurisdiction of the Court to take cognisance of the crimes involved in the accusations levelled against Mr. Lubanga Dyilo, nor was the decision[58] of the Pre-Trial Chamber of 10 February 2006 to the effect that the Court is vested with jurisdiction to deal with the case against him doubted or disputed in any way. On the contrary, the application is founded on the premise that the Court has jurisdiction to address the case but should desist from assuming jurisdiction in the matter for the reason that so to do would be an abuse of the proceedings before the Court owing to the grave violations of the rights of the appellant entrenched in the Statute. The Pre-Trial Chamber treated the application of Mr. Lubanga Dyilo as going to jurisdiction without specifically saying so and without heeding the observations of the DRC and the victims to the contrary. In essence, what the Pre-Trial Chamber did was to treat the submission of the appellant that the Court should refrain from addressing his case as a challenge to the jurisdiction of the Court under article 19 (2) of the Statute.

21. The jurisdiction of the Court is defined by the Statute. The notion of jurisdiction has four different facets: subject-matter jurisdiction also identified by the Latin maxim jurisdiction *ratione materiae*, jurisdiction over persons, symbolized by the Latin maxim jurisdiction *ratione personae*, territorial jurisdiction – jurisdiction *ratione loci* – and lastly jurisdiction *ratione temporis*. These facets find expression in the Statute.

22. The jurisdiction of the Court is laid down in the Statute: Article 5 specifies the subject-matter of the jurisdiction of the Court, namely the crimes over which the Court has jurisdiction, sequentially defined in articles 6, 7, and 8. Jurisdiction over persons is dealt with in articles 12 and 26, while territorial jurisdiction is specified by articles 12 and

[58] See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* "Decision on the Prosecutor's Application for a warrant of arrest, Article 58" 10 February 2006, Annex I to "Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo" 24 February 2006 (ICC-01/06-01/04-8-Corr, reclassified as public pursuant to the Decision ICC-01/04-01/06-37). Reclassified as public on 17 March 2006 pursuant to decision ICC-01/04-01/06-37.

13 (b), depending on the origin of the proceedings. Lastly, jurisdiction *ratione temporis* is defined by article 11.

23. The Statute itself erects certain barriers to the exercise of the jurisdiction of the Court, those set up by article 17, referable in the first place to complementarity (article 17 (1) (a) to (b)) in the second to *ne bis in idem* (articles 17 (1) (c), 20) and thirdly to the gravity of the offence (article 17 (1) (d)). The presence of anyone of the aforesaid impediments enumerated in article 17 renders the case inadmissible and as such non-justiciable.

24. Abuse of process or gross violations of fundamental rights of the suspect or the accused are not identified as such as grounds for which the Court may refrain from embarking upon the exercise of its jurisdiction. Article 19 of the Statute regulates the context within which challenges to jurisdiction and admissibility may be raised by a party having an interest in the matter, including a person in the position of Mr. Lubanga Dyilo against whom a warrant of arrest had been issued. Jurisdiction under article 19 of the Statute denotes competence to deal with a criminal cause or matter under the Statute. Notwithstanding the label attached to it, the application of Mr. Lubanga Dyilo does not challenge the jurisdiction of the Court. As earlier noted, the conclusion to which the Appeals Chamber is driven is that the application of Mr. Lubanga Dyilo and the proceedings following do not raise a challenge to the jurisdiction of the Court within the compass of article 19 (2) of the Statute. What the appellant sought was that the Court should refrain from exercising its jurisdiction in the matter in hand. Its true characterization may be identified as a *sui generis* application, an atypical motion, seeking the stay of the proceedings, acceptance of which would entail the release of Mr. Lubanga Dyilo. The term "*sui generis*" in this context conveys the notion of a procedural step not envisaged by the Rules of Procedure and Evidence or the Regulations of the Court invoking a power possessed by the Court to remedy breaches of the process in the interest of justice. The application could only survive, if the Court was vested with jurisdiction under the Statute or endowed with inherent power to stop judicial proceedings where it is just to do so.

25. The Pre-Trial Chamber identified two related grounds, as may be summarized, that might provide justification to refuse to exercise jurisdiction in a case brought before it: a) abuse of process and b) serious violations of the rights of the suspect or the accused, resulting from "concerted action" between the Prosecutor and the DRC, derailing the process to an extent making it antagonistic to the ends of justice to put him/her on trial.

B. The doctrine or principle of abuse of process, its ambit and applicability in proceedings before the ICC

26. Abuse of process is a principle associated with the administration of justice, referred to as a doctrine because of wide adherence to the principle involved.[59] It is a principle evolved by English case law constituting a feature of the common law adopted in many countries where this system of law finds application.

27. Authority is acknowledged to a court of law to stop a judicial proceeding, at the outset and less frequently in the process, by declining jurisdiction in a judicial cause, where to do otherwise would be odious to the administration of justice. The term "process" means the judicial process designed to do justice in the cause before the court. The term "abuse" signifies derogation from the judicial process evidenced by facts and circumstances, such as would render the invocation of the jurisdiction of a court a misuse of the purpose for which it is intended or its use for purposes other than those for which it was established.

28. The power to stay proceedings is *par excellence* a power assumed by the guardians of the judicial process, the judges, to see that the stream of justice flows unpolluted. As stressed, in the recent decision of the English[60] Court of Appeal *R. v. S (SP)*[61] it is a discretionary power involving "an exercise of judicial assessment dependent on judgment rather than on any conclusion as to fact based on evidence."

29. Instances of stay of proceedings on grounds of abuse of process are provided by cases involving a) delay in bringing the accused to justice, b) broken promises to the

[59] See definition of the term "doctrine" in *Garner B.A* (Editor in Chief), Blacks Law Dictionary, (2004 West, St. Paul), page 518.
[60] The Judiciary of England and Wales.
[61] 6 March 2006, [2006] 2 Cr App R. (Criminal Appeal Reports) 23, page 341, quotation at paragraph H7,

accused with regard to his prosecution, c) bringing the accused to justice by illegal or devious means.[62] The last example is instantiated by the English decision in *Bennett v. Horseferry Road Magistrates' Court*[63], *R v Horseferry Road Magistrates' Court, ex p Bennett*[64], where the presence of the accused in England and sequentially his arrest and appearance before the Court was the offspring of duplicitous action involving the English and South African authorities marring the judicial process. To quote from the judgment of Lord Bridge in *Bennett v. Horseferry Road Magistrates' Court* (supra), "[w]hen it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court takes cognisance of that circumstance."[65] In the same judgment reference is made to an earlier decision of the House of Lords *Connelly v. DPP*[66], where Lord Devlin speaks of the importance of the court accepting what is described as its "inescapable duty to secure fair treatment for those who come or are brought before them." The principle of abuse of process finds application in New Zealand in much the same way as in England exemplified by the decisions of *R v. Hartley*[67] and *Moevao v. Dept. of Labour*[68]. In the latter decision, the jurisdiction to stay or dismiss a prosecution is said to inhere in the court to prevent abuse of its own process. The focus, as underlined, "is on the misuse of the court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice [...]". The exercise of such jurisdiction it was said "require[s] the Courts to tread with the utmost circumspection." Like principles apply in Canada where abuse of process provides a ground for staying or stopping a prosecution. Interestingly, in *United States v. Shulman*[69] the Supreme Court of Canada referred to the non-assumption of

[62] Cases narrated in *Murphy, P.* (Editor-in-Chief) Blackstone's Criminal Practice 2006 (Oxford University Press, 2005), D10.41.
[63] House of Lords, 24 June 1993, [1993] 3 All ER (All England Law Reports), page 138.
[64] Court of Appeal, 24 June 1993, [1994] 1 AC (Law Reports: Appeal Cases), page 42.
[65] at page 155.
[66] House of Lords, 21 April 1964, [1964] 2 All ER (All England Law Reports), page 401, quotation at page 422.
[67] Court of Appeal , Wellington , 5 August 1977, [1978] 2 NZLR (New Zealand Law Reports), page 199.
[68] Court of Appeal , Wellington, 6 August 1980, [1980] 1 NZLR (New Zealand Law Reports), page 464.
[69] Supreme Court of Canada, Judgment, 24 March 2001,2001 SCC 21 *available in* Westlaw.

jurisdiction on grounds of abuse of process and for violation of the Charter guaranteeing the rights of persons in the same spell; acknowledging thereby similar jurisdiction to a court to stop prosecutions for either reason.[70] The decision of the South African Court of Appeal in *S. v. Ebrahim*[71] indicates that the fairness of the legal process and the abuse thereof justifies the non-exercise of jurisdiction in order to "promote the dignity and integrity of the judicial system". Australian courts also abide by the principle of abuse of process.[72] In Cyprus too power is acknowledged to the court to stop or suspend pending proceedings for abuse of process. In *Director of Prisons v. Djenaro Perella*[73] the Supreme Court adverted to the nature of the inherent powers of the court to stay proceedings involving abuse of process underlining that the judicial process cannot be employed in a manner oppressive to the rights of the counterparty or adversary.

30. Not every infraction of the law or breach of the rights of the accused in the process of bringing him/her to justice will justify stay of proceedings. The illegal conduct must be such as to make it otiose, repugnant to the rule of law to put the accused on trial.

31. The power to stay proceedings should be sparingly exercised, as repeatedly stressed by English courts and lastly noted in *Jones v. Whalley*[74]. Room for its exercise is provided where either the foundation of the prosecution or the bringing of the accused to justice is tainted with illegal action or gross violation of the rights of the individual making it unacceptable for justice to embark on its course.

32. In the United States of America, the doctrine of abuse of process has had a mixed reception, recognising on the one hand its existence but confining its application within very narrow straits.[75]

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[70] See also *Glorian Keyowski v Her Majesty The Queen*, Judgment, 28 April 1988, [1988] 1 SCR 657, at pages. 658-59 also *available at* http://scc.lexum.umontreal.ca/en/1988/1988rcs1-657/1988rcs1-657.html .
[71] 26 February 1991, [1991] (2) SA (South African Law Reports), page 553.
[72] See *Levinge v Director of Custodial Services* 9 NSWR 546 (Ct App 1987) cited in *Wilske S , Schiller T.*, Jurisdiction over persons abducted in violation of international law in the aftermath of the United States v. Alvarez-Machain in: University of Chicago Law School Roundtable 1998, *available in*: Westlaw. (5.U.Chi.L.Sch.Roundtable 205).
[73] [1995] 1 C.L.R. (Cyprus Law Reports), page 217 (in Greek).
[74] House of Lords, 26 July 2006, [2006] 4 All ER (All England Law Reports), page 113.
[75] See United States Court of Appeals, Second Circuit, United States of America v. Francisco Toscanino, No. 746, Docket 73-2732, 15 May 1974, 500 F.2d 267, *available in*: Westlaw.; Supreme Court of the

33. The doctrine of abuse of process as known to English law finds no application in the Romano-Germanic systems of law. The principle encapsulated in the Latin maxim *male captus bene detentus* has received favourable reception in the French case of *re Argoud*[76] but not an enthusiastic one in the old case of *re Jollis*[77]. The German Constitutional Court too appears to have endorsed like principles to those approved in *re Argoud*[78]. But where serious violations of the fundamental rights of the accused or international law are involved, the rule is mitigated.[79]

34. Does the principle or doctrine of abuse of process find application under the Statute as part of the applicable law and in particular under the provisions of article 21 (1) (b) and (c)? In the first place the answer would depend on whether the Statute and Rules of Procedure and Evidence leave room for its application within the framework of the Court's process. Jurisdiction apart, admissibility is the only ground envisaged by the Statute for which the Court may validly refrain from assuming or exercising jurisdiction in any given cause. Abuse of process is not listed as a ground for relinquishing jurisdiction in article 17 of the Statute. The previous decision of the Appeals Chamber in *Situation in the Democratic Republic of the Congo* "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal"[80] is instructive on the interpretation of article 21 (1) of the Statute, particularly whether a matter is exhaustively dealt with by its text or that of the Rules of Procedure and Evidence, because in that case no room is left for recourse to the second or third source of law to determine the presence or absence of a rule governing a given subject. This is said without implying that if the Statute was not exhaustive on the subject, abuse of process would find its place as an applicable principle of law under either sub-paragraphs (b) or (c) of paragraph 1 of article 21 of the Statute.

United States, United States v. Humberto Alvarez-Machain, 15 June 1992, 504 U.S. 655, *available in* Westlaw.

[76] Cour de Cassation, 4 June 1964, 45 ILR (International Law Reports), page 90. .

[77] Tribunal Correctionnel d'Avesnes, 22 July 1933, 7 Ann Dig (Annual Digest and Reports of Public International Law Cases) (1933-1934), page 191.

[78] See Bundesverfassungsgericht, Decision of 17 July 1985, 2 BvR 1190/84 in: EuGRZ (Europäische Grundrechte Zeitschrift) 1986, page 18; Bundesgerichtshof, 30 May 1984, 4 StR 187/85, NStZ (Neue Zeitschrift für Strafsachen) 1985, page 464.

[79] See Bundesverfassungsgericht, 5 November 2003 – 2 BvR 1506/03 and 2 BvR 1506/03 - *at*: http://www.bverfg.de/entscheidungen/rs20031105_2bvr124303.html.

[80] 13 July 2006 (ICC-01/04-168).

35. The next question to be answered is whether power inheres in or resides with the Court to stop proceedings for abuse of process as the doctrine is understood and applied under English common law. The Appeals Chamber shall not examine the implications of article 4 (1) of the Statute for under no circumstances can it be construed as providing power to stay proceedings for abuse of process. The power to stay proceedings for abuse of process, as indicated, is not generally recognised as an indispensable power of a court of law, an inseverable attribute of the judicial power. The conclusion to which the Appeals Chamber is driven is that the Statute does not provide for stay of proceedings for abuse of process as such.

C. Article 21 (3) of the Statute, and its relevance to the assumption of jurisdiction by the Court in any given case

36. The doctrine of abuse of process had *ab initio* a human rights dimension in that the causes for which the power of the Court to stay or discontinue proceedings were largely associated with breaches of the rights of the litigant, the accused in the criminal process, such as delay, illegal or deceitful conduct on the part of the prosecution and violations of the rights of the accused in the process of bringing him/her to justice. The Statute safeguards the rights of the accused as well as those of the individual under interrogation and of the person charged. Such rights are entrenched in articles 55 and 67 of the Statute. More importantly, article 21 (3) of the Statute makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights. It requires the exercise of the jurisdiction of the Court in accordance with internationally recognized human rights norms.

37. Breach of the right to freedom by illegal arrest or detention confers a right to compensation to the victim (see article 85 (1) of the Statute). Does the victim have any other remedy for or protection against breaches of his/her basic rights? The answer depends on the interpretation of article 21 (3) of the Statute, its compass and ambit. Article 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied

in accordance with internationally recognized human rights; first and foremost, in the context of the Statute,[81] the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety.[82] The Statute itself makes evidence obtained in breach of internationally recognized human rights inadmissible in the circumstances specified by article 69 (7) of the Statute. Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.

38. The decision of the European Court of Human Rights in the *Case of Teixeira de Castro v. Portugal*[83], a case of entrapment by undercover agents, provides an example of serious breaches of the rights of the accused by the investigating authorities, rendering the holding of a fair trial impossible. The following passage from the judgment puts the matter in perspective as to the implications that such conduct may have on the holding of a fair trial. Improper conduct by the investigating authorities and the use of evidence resulting therefrom "in the impugned criminal proceedings meant that, right from the outset, the applicant was definitively deprived of a fair trial."[84] In another passage the European Court of Human Rights recorded: "The general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offences, from the most straightforward to the most complex."[85]

39. Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. To borrow an expression from the decision of the English Court of Appeal in *Huang v. Secretary of State*[86], it is the duty of a court: "to see to the protection of individual fundamental rights which is the particular territory

[81] See articles 64 (2), 67 (1), 68 (1) and (5) of the Statute.
[82] See *Nowak M.*, U.N. Covenant on Civil and Political Rights, CCPR Commentary (N.P. England, Airlington, 19993), page 244.
[83] Judgment, 9 June 1998, Application no. 44/1997/828/1034, *available in* HUDOC database *at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en .
[84] At paragraph 39.
[85] At paragraph 36.
[86] [2005] 3 All ER 435 (a civil action).

of the courts [...]" Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.

D. The validity of the findings of the Pre-Trial Chamber

40. Two grounds of appeal are directed against the validity of the decision of the Pre-Trial Chamber in that it adopted an unduly restrictive approach to the relinquishment of jurisdiction for violations of the fundamental rights of the accused.[87] To this, the Appeals Chamber cannot agree. As may be discerned from the principles identified in the decision of the Pre-Trial Chamber as relevant to stay of proceedings, a broader standard was adopted than the one warranted in law in that it failed to require the specific consideration of whether a fair trial remained possible in the particular circumstances of the case. The findings of the Pre-Trial Chamber to the effect that the appellant was not subjected to any ill-treatment in the process of his arrest and conveyance before the Court sidelines the importance of the precise ambit of the test applied as a guide to the resolution of this appeal.

41. The other complaint is that the Pre-Trial Chamber applied the wrong standard in reviewing the efficacy of the process leading to the arrest and surrender of the suspect, allegedly ignoring or paying inadequate attention to the supervisory role of the Pre-Trial Chamber under article 59 (2) of the Statute.[88] The appellant's argument is that the Pre-Trial Chamber is charged under this article to review the correctness of the decision of the Congolese authority to sanction the enforcement of the warrant of arrest. No such role is cast on the Court. The enforcement of a warrant of arrest is designed to ensure, as article 59 (2) of the Statute specifically directs, that there is identity between the person against whom the warrant is directed and the arrested person, secondly, that the process followed is the one envisaged by national law, and thirdly that the person's rights have

[87] See first ground of appeal, Defence document, paragraphs 6 to 21; third ground of appeal, Defence document, paragraphs 36 to 44.
[88] See third ground of appeal, Defence document, paragraphs 36 to 44.

been respected. The Court does not sit in the process, as the Prosecutor rightly observes,[89] on judgment as a court of appeal on the identificatory decision of the Congolese judicial authority. Its task is to see that the process envisaged by Congolese law was duly followed and that the rights of the arrestee were properly respected. Article 99 (1) of the Statute lays down that the enforcement of the warrant must follow the process laid down by the law of the requested state. In this case, the Pre-Trial Chamber determined that the process followed accorded with Congolese law. There is nothing to contradict this statement in light of the fact that the suspect was in custody for crimes coming within the purview of the military authorities. The suspect was afforded an opportunity to voice his views before the judicial authority that examined the request for his surrender. Moreover, there is nothing to indicate that his arrest or appearance before the Congolese authority involved or entailed any violation of his rights.

42. The gravamen of the appellant's complaint, where the essence of the appellant's case lies, is that the Pre-Trial Chamber ignored breaches of his human rights prior to his appearance before the Court and the directions for the enforcement of the warrant of arrest.[90] Such violations should, in his submission, not be extricated from the legitimacy of the processes leading to his arrest and appearance before the Court on account of the part played by the prosecuting authority in their effectuation.[91] The Pre-Trial Chamber concluded in light of the material before it that there was no evidence to lend credence to the allegations of the appellant; a finding denuding his complaints respecting "concerted action" of any substance.[92] Nothing said before the Appeals Chamber reveals an error in this finding which cannot but be sustained. Contrary to the submission of the appellant, the material before the Pre-Trial Chamber did not justify any finding respecting the relationship between the Prosecutor and the DRC other than the one made. The process of bringing the appellant to justice has not been shown to be flawed in any way, nor are the findings of the Pre-Trial Chamber in this connection erroneous. Despite complaints of insufficient information about communications between the Prosecutor and the DRC, no steps were taken before the Pre-Trial Chamber for the elicitation of further information

[89] See Prosecutor's document, paragraph 47.
[90] See Defence document, first and fourth ground of appeal.
[91] See Defence document, first and second ground of appeal.
[92] See impugned decision, pages 10 and 11.

on the subject. The material before the Pre-Trial Chamber respecting communications between the Prosecutor and the DRC did not reveal any impropriety on the part of the former nor did the appellant point to any material casting doubt on the correctness of the Pre-Trial Chamber's appreciation of the matter. Mere knowledge on the part of the Prosecutor of the investigations carried out by the Congolese authorities is no proof of involvement on his part in the way they were conducted or the means including detention used for the purpose. It is worth reminding that the crimes for which Mr. Lubanga Dyilo was detained by the Congolese authority were separate and distinct from those which led to the issuance of the warrant for his arrest.

43. Lastly, the findings of the Pre-Trial Chamber respecting the absence of torture or serious mistreatment have not been shown to be erroneous in any way.

44. At issue is the process of bringing the appellant to justice for the crimes that form the subject-matter of the proceedings before the Court. The Pre-Trial Chamber determined that it is in relation to this process that breaches of the rights of the suspect or the accused may provide ground for halting the process. And none was shown.

45. For the reasons aforegiven, the appeal is dismissed and the decision under appeal confirmed.

Done in both English and French, the English version being authoritative.

Judge Georghios M. Pikis
Presiding Judge

Dated this 14th day of December 2006

At The Hague, The Netherlands