Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **01/04-01/06 (OA 7)**
Date: 13 February 2007

THE APPEALS CHAMBER

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

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 of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"

The Office of the Prosecutor
Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor
Mr. Fabricio Guariglia
Mr. Ekkehard Withopf

Counsel for the Defence
Mr. Jean Flamme

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Counsel for the Victims a/0001/06 to a/0003/06
Mr. Luc Walleyn
Mr. Frank Mulenda

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr. Thomas Lubanga Dyilo of 20 October 2006 entitled "Defence Appeal Against 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'" (ICC-01/04-01/06-594),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The decision of Pre-Trial Chamber I entitled "Decision on the Application for the interim release of Thomas Lubanga Dyilo" of 18 October 2006 is confirmed. The appeal is dismissed.

The Appeals Chamber *decides* furthermore:

(i) The application of the Prosecutor for leave to reply that was made in the "Prosecution Request for Leave to Reply to the Appellant's 20 December 2006 Response to the Observations of Victims a/0001/06, a/0002/06 and a/0003/06" of 22 December 2006 is rejected.

(ii) The Registrar is directed to notify Victims a/0001/06, a/0002/06 and a/0003/06 on 19 February 2007 of the "Defence reply to 'Conclusions des victims a/0001/06, a/0002/06 et a/0003/06 suite à l'ordonance de la chambre d'appel du 12 décembre 2006" (ICC-01/04-01/06-782-Conf), of the "Prosecution Request for Leave to Reply to the Appellant's 20 December 2006 Response to the Observations of Victims a/0001/06, a/0002/06 and a/0003/06" (ICC-01/04-01/06-783-Conf), and of the "Submissions supplementing the Prosecution's 22 December 2006 Request for Leave to Reply to the Appellant's 20 December 2006 Response to the Observations of Victims" (ICC-01/04-01/06-787-Conf). Such notification shall not take place if, by 16:00h on 16 February 2007, the Appellant and/or the Prosecutor have filed an application to the Appeals Chamber, requesting that such notification should not take place.

REASONS

I. KEY FINDINGS

1. For victims to participate in an appeal under article 82 (1) (b) of the Statute, an application seeking leave to participate in the appeal must be filed.

2. An application by victims seeking leave to participate in an appeal pursuant to article 82 (1) (b) of the Statute should include a statement in relation to whether and how their personal interests are affected by the particular appeal, as well as why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented.

3. A periodic review by the Pre-Trial Chamber of its ruling on the detention of a person subject to a warrant of arrest under article 60 (3) of the Statute follows from, and is dependent upon, a ruling on a previous application by the detained person for interim release.

4. Article 60 (4) of the Statute is independent of article 60 (2) in the sense that even if a detainee is appropriately detained pursuant to article 60 (2), the Pre-Trial Chamber shall consider releasing the detainee under article 60 (4) if the detainee is detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor.

II. PROCEDURAL HISTORY

5. On 10 February 2006, Pre-Trial Chamber I issued a warrant of arrest in respect of Mr. Thomas Lubanga Dyilo (hereinafter: "Appellant") for his alleged involvement in conscripting and enlisting children under the age of fifteen years and for using them to participate actively in hostilities (ICC-01/04-01/06-2-US; hereinafter "Warrant of Arrest"). The full reasons for the issuance of the Warrant of Arrest were provided in the "Decision on the Prosecutor's Application for a warrant of arrest, Article 58" of the same date (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" dated 24 February 2006, ICC-01/04-01/06-8-US-Corr; hereinafter: "Decision on the Warrant of Arrest").

6. On 16 March 2006, the Appellant was arrested in Kinshasa (Democratic Republic of the Congo) on the basis of the Warrant of Arrest and on the following day surrendered to the Court. Prior to this arrest, the Appellant had been held in the custody of the Democratic Republic of the Congo in Kinshasa. On 20 March 2006, Pre-Trial Chamber I held a hearing

for the purpose of the initial appearance of the Appellant (hereinafter: "Initial Appearance Hearing"). In the course of the Initial Appearance Hearing, the Pre-Trial Chamber informed the Appellant of his right to apply for interim release pending trial and asked him if he wanted to assert this right.[1]

7. On 20 September 2006, the Appellant filed the "Request for further information regarding the confirmation hearing and for appropriate relief to safeguard the rights of the Defence and Thomas Lubanga Dyilo" (ICC-01/04-01/06-452; hereinafter: "Request for Interim Release"). On page 15 at paragraph vii) of the Request for Interim Release, the Appellant sought that he be "immediately granted provisional release", and in paragraphs 33 to 49 of the Request for Interim Release the Appellant submitted that pursuant to article 60 (3) of the Statute, the Pre-Trial Chamber was under an obligation to review periodically the detention of a suspect; that the Pre-Trial Chamber had failed to do so; that the Appellant had been detained for an unreasonably long period within the meaning of article 60 (4) of the Statute, also taking into account his prior detention and house arrest in the Democratic Republic of the Congo; that the delays in the disclosure process prior to the confirmation hearing were attributable to the Prosecutor; that the Prosecutor should not have applied for the issuance of a warrant of arrest if he was not in a position to comply with his statutory obligations; that pursuant to article 21 (3) of the Statute the provisions of the Statute must be interpreted in a manner consistent with internationally recognised human rights; and that relevant jurisprudence of the European Court of Human Rights (hereinafter: "ECHR") supported the application of the Appellant for interim release.

8. On 9 October 2006 and further to the decision of the Pre-Trial Chamber entitled "Decision Establishing a Deadline in Relation to Defence Request for the Interim Release of Thomas Lubanga Dyilo" of 22 September 2006 (ICC-01/04-01/06-465), Victims a/0001/06, a/0002/06 and a/0003/06 (hereinafter: "Victims") filed the "Observations des victims a/0001/06, a/0002/06 et a/0003/06 sur la demande de mise en liberté introduite par la défense" (ICC-01/04-01/06-530; hereinafter: "Victims' Response to the Request for Interim Release"), and the Prosecutor filed the "Prosecution's Response to the Defence Request for Interim Release" (ICC-01/04-01/06-531; hereinafter: "Prosecutor's Response to the Request for Interim Release"). The Pre-Trial Chamber had authorised the participation of the Victims in the proceedings before that Chamber in its "Decision on the Application for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v.

[1] ICC-01/04-01/06-T3-EN, p. 7, lines 9-15.

Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo" of 28 July 2006 (ICC-01/04-01/06-228-tEN; hereinafter: "Decision on Victims' Participation"). The Victims and the Prosecutor argued *inter alia* that the request for interim release should be rejected because the conditions for continued detention pursuant to article 60 (2) read with article 58 (1) of the Statute persisted. On 13 October 2006, the Appellant filed a "Motion Requesting Authorisation to Respond to the Office of the Prosecutor and the Representatives of Victims a/0001/06 to a/0003/06" (ICC-01/04-01/06-571-tEN; hereinafter: "Appellant's Application for Leave to Reply"), requesting leave to reply to the Victims' Response to the Request for Interim Release and to the Prosecutor's Response to the Request for Interim Release.

9. On 18 October 2006, Pre-Trial Chamber I issued the "Decision on the Application for the interim release of Thomas Lubanga Dyilo" of Pre-Trial Chamber I of 18 October 2006 (ICC-01/04-01/06-586-tEN; hereinafter: "Impugned Decision"). The Pre-Trial Chamber decided to reject the application for interim release as well as the application for leave to reply.[2]

10. On 20 October 2006, the Appellant filed the "Defence Appeal Against 'Décision sur la demande de mise en liberté de Thomas Lubanga Dyilo'" (ICC-01/04-01/06-594), and on 26 October 2006, he filed the "Defence Appeal Against the 'Décision sur la demande de mise en liberté de Thomas Lubanga Dyilo'" (ICC-01/04-01/06-618; hereinafter: "Document in Support of the Appeal"). On 1 November 2006, the Prosecutor filed the "Prosecution's Response to Defence Appeal Against the 'Décision sur la demande de mise en liberté de Thomas Lubanga Dyilo'" (ICC-01/04-01/06-637; hereinafter: "Response to the Document in Support of the Appeal").

III. VICTIM PARTICIPATION IN THE APPEAL

11. On 16 November 2006, and without any prior application to the Appeals Chamber, the Victims filed the "Response of Victims a/0001/06, a/0002/06 and a/0003/06 to the appeal of the Defence from the Decision on the application for interim release of Thomas Lubanga Dyilo" (ICC-01/04-01/06-704-tEN; hereinafter "Victims' Response").

12. On the same day, the Appellant filed the "Defence Request for an Order Regarding Non-Compliance with the Time Limits" (ICC-01/04-01/06-708; hereinafter: "Defence

[2] Impugned Decision, p. 8.

Request on Non-Compliance"). The Appellant submitted that the Victims' Response had been filed outside the permitted five day time limit for such a filing as set out in regulation 64 (5) of the Regulations of the Court, and without any request to vary the applicable time limit. He sought the rejection by the Appeals Chamber of the Victims' Response.

A. The order of the Appeals Chamber of 24 November 2006 and resulting submissions

13. On 24 November 2006, the Appeals Chamber issued an order in relation to the Defence Request on Non-Compliance (ICC-01/04-01/06-727; hereinafter: "Order of 24 November"). The Order of 24 November afforded the Prosecutor and the Victims the opportunity of responding to the Defence Request on Non-Compliance, as well as inviting submissions from all participants in relation to the right of the Victims to participate in the appeal, the need, if any, for an application to that end and for an order of the Appeals Chamber validating it, and the modalities for such participation.

1. The Defence response to the Order of 24 November

14. On 29 November 2006, the Appellant filed the "Defence Response to the Appeals Chamber Order of 24 November 2006" (ICC-01/04-01/06-734; hereinafter: "Appellant's Submission further to the Order of 24 November"). Prior to addressing the substance of the Order of 24 November, the Appellant reaffirmed that the Victims had filed their submissions in contravention of the applicable time limits and that they should be rejected as a result. He submitted that the potential prejudice to the rights of the Defence and the need to adjudicate applications for interim release in an expeditious manner should be the guiding principles for the Appeals Chamber in its consideration of the participation of the Victims.[3]

15. In relation to the substance of the Order of 24 November 2006, the Appellant submitted, by reference to regulation 86 (8) of the Regulations of the Court and rule 91 (1) of the Rules of Procedure and Evidence, that the Victims who had participated in the proceedings before the Pre-Trial Chamber were required to file applications in order to be able to participate in the appeal. There was no automatic right to participate.[4]

16. The Appellant submitted, by reference to article 68 of the Statute, that the Victims would need to demonstrate that their personal interests were affected before being permitted

[3] Appellant's Submission further to the Order of 24 November, paras 5, 7 and 41.
[4] Appellant's Submission further to the Order of 24 November, paras 10-12.

to make a filing in the appeal.[5] By reference to the absence of any mention of victims within the terms of rule 118, when contrasted with the terms of rule 119 (3), the Appellant submitted that any participation of victims on an application for interim release – if permitted at all – was limited to the consideration of what conditions were to be imposed upon a person who was to be granted interim release, rather than during the substantive consideration of whether such release should be granted.[6] The Appellant submitted that the request for interim release concerned a fundamental and personal right of the detained person not to be subject to arbitrary detention; and that the requirement that participation of victims should be linked to issues which impacted upon their personal interests would not be satisfied in relation to such a request.[7]

17. The Appellant further submitted that, "unless the scope of the submissions of the legal representatives is strictly limited to issues directly linked to their personal concerns regarding the conditions of release, the Defence would in reality be facing two Prosecutors, one of which is anonymous and not bound by any obligation to formulate its submissions in a manner which is consistent with the role of a prosecutor as an impartial minister of justice"; and that such a circumstance would contradict the requirement in article 68 (3) of the Statute that the participation of victims should not be prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial.[8]

18. The Appellant submitted further that, if permitted to participate, the observations of victims "must be limited to the impact that a successful appeal would have on them. They should not be permitted to respond to the Defence submissions on legal errors made by the Pre-Trial Chamber in relation to the underlying right to provisional release. This is the proper role of the Prosecution".[9]

19. The Appellant submitted further that any observations filed by victims must not prejudice the rights of the Defence, including the right to have an issue determined expeditiously; they must be filed at the same time as the Prosecutor files his response; and the Defence should have an automatic right to file a reply to a response by victims, which was not

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[5] Appellant's Submission further to the Order of 24 November, para. 19.
[6] Appellant's Submission further to the Order of 24 November, paras 20-22.
[7] Appellant's Submission further to the Order of 24 November, para. 25.
[8] Appellant's Submission further to the Order of 24 November, paras 27 and 28.
[9] Appellant's Submission further to the Order of 24 November, para. 33.

granted to the Defence by the Pre-Trial Chamber in apparent violation of rule 91 (2) of the Rules of Procedure and Evidence.[10]

2. The Prosecutor's response to the Order of 24 November

20. On 29 November 2006, the Prosecutor filed the "Prosecution's Response to 'Defence Request for an Order Regarding Non-Compliance with the Time Limits' pursuant to 'Order of the Appeals Chamber' of 24 November 2006" (ICC-01/04-01/06-736; hereinafter: "Prosecutor's Submission further to the Order of 24 November").

21. For similar reasons to those given by the Appellant, the Prosecutor submitted that the submissions of the Victims had been filed outside the time limit provided for by regulation 64 (5) of the Regulations of the Court. For that reason alone the relief requested by the Defence appeared to be warranted.[11] However, noting the invitation of the Appeals Chamber to do so, the Prosecutor proceeded to address the further issues relating to victim participation in the appeal that were raised in the Order of 24 November.

22. Recognising that a different system applied to appeals involving challenges to jurisdiction or admissibility under article 19 (3) of the Statute, the Prosecutor submitted that victim participation in all other appeals was possible pursuant to the provisions of article 68 (3) of the Statute. However, any such participation required a specific application for participation in an individual appeal and a finding by the Appeals Chamber as to whether the issues on appeal affected the personal interests of the victims and whether participation would be appropriate.[12] The fact that the Pre-Trial Chamber had found victim participation to be appropriate did not enable those victims to participate automatically on appeal because whether the interests of the victims were affected by the appeal required separate assessment and "the Appeals Chamber is the master of its own procedure, and cannot be bound by procedural decisions entered by first instance Chambers"[13].

23. The Prosecutor submitted that it was not necessary to have a full fresh determination under rule 89 (1) of the Rules of Procedure and Evidence because, "what must be determined by [the Appeals] Chamber is not the status of the applicants as victim-participants in the case (unless there is a dispute concerning their status), but rather whether the scope of the proper participation of those victims under Article 68 (3) extends to participation in the instant

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[10] Appellant's Submission further to the Order of 24 November, paras 34-36.
[11] Prosecutor's Submission further to the Order of 24 November, paras 10 and 11.
[12] Prosecutor's Submission further to the Order of 24 November, paras 13-15.
[13] Prosecutor's Submission further to the Order of 24 November, para 15.

appellate proceedings."[14] The Prosecutor also submitted that the burden was on the victims to demonstrate that their participation was warranted in the instant appeal because the issue of interim release was one that could arguably affect their personal interests.[15]

24. The Prosecutor submitted that the victims may file a response under regulation 24 (2) when they are permitted to participate, but that the response should be confined to the presentation of views and concerns regarding the issues on appeal and should not result in an infringement of the rights of the accused.[16] The Prosecutor submitted that victims should not be permitted to rely on evidence which did not form part of the record of appeal.[17]

3. The Victims' response to the Order of 24 November

25. On 29 November 2006, the victims filed the "Response of Victims a/0001/06, a/0002/06 and a/0003/06 to the Defence request of 16 November 2006" (ICC-01/04-01/06-739-tEN; hereinafter: "Victims' Submission further to the Order of 24 November").

26. The Victims submitted that their failure to comply with the time limit under regulation 64 (5) was not prejudicial to the rights of the Defence because the Appellant could still respond to the legal arguments contained within the Victims' Response and that that filing should be accepted.[18] In the alternative, they submitted that if the Appeals Chamber rejected the Victims' Response, the Victims' Response to the Request for Interim Release that they had submitted to the Pre-Trial Chamber on 9 October 2006 formed part of the case record and could be taken into account.[19]

27. The Victims submitted that they should be entitled to participate in the appellate proceedings pursuant to rule 91 (2) of the Rules of Procedure and Evidence, to attend any hearing that may be held by the Appeals Chamber and to present their views and concerns, both orally and in writing, with the prior permission of the Appeals Chamber, when their personal interests were directly affected.[20] They submitted that their personal interests were directly affected in the instant appeal for the reasons set out at paragraphs 11 to 15 of the Victims' Response to the Request for Interim Release.[21]

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[14] Prosecutor's Submission further to the Order of 24 November, para. 17.
[15] Prosecutor's Submission further to the Order of 24 November, para. 18.
[16] Prosecutor's Submission further to the Order of 24 November, para. 19.
[17] Prosecutor's Submission further to the Order of 24 November, para. 20.
[18] Victims' Submission further to the Order of 24 November, paras 1 and 2 and p. 4.
[19] Victims' Submission further to the Order of 24 November, para. 3.
[20] Victims' Submission further to the Order of 24 November, para. 4 and p. 4.
[21] Victims' Submission further to the Order of 24 November, para 5.

B. The order of the Appeals Chamber of 4 December 2006 and resulting submissions

28. On 4 December 2006, the Appeals Chamber issued an order (ICC-01/04-01/06751; hereinafter: "Order of 4 December") in relation to the application to participate in the present proceedings, which had been made in the Victims' Submission further to the Order of 24 November (described above). The Order of 4 December permitted the Prosecutor and the Defence to file a response to that application.

1. The Defence response to the Order of 4 December

29. On 6 December 2006, the Appellant filed the "Defence Response to the Appeals Chamber Order of 4 December 2006" (ICC-01/04-01/06-756; hereinafter: "Appellant's Submission further to the Order of 4 December"). The Appellant requested the Appeals Chamber to deny the application for participation, re-emphasising submissions that he had made in the Defence Request on Non-Compliance and the Appellant's Submission further to the Order of 24 November.[22]

2. The Prosecutor's response to the Order of 4 December

30. On 6 December 2006, the Prosecutor filed the "Prosecution's Response to Request of Victims to Participate in the Appeal, pursuant to 'Order of the Appeals Chamber' of 4 December 2006" (ICC-01/04-01/06-757; hereinafter: "Prosecutor's Submission further to the Order of 4 December"). The Prosecutor elaborated upon his previous submission that an application was generally required before victims could participate in appellate proceedings. He made specific reference to regulation 86 (8) of the Regulations of the Court and submitted that interlocutory appellate proceedings were distinct proceedings which merited a case-by-case evaluation of whether participation by victims was appropriate.[23] He further submitted that a regulation, which was subsidiary to the Statute and the Rules of Procedure and Evidence, could not alter the principles governing the scope of victim participation set out in those latter texts. In that connection, the Prosecutor pointed out that rule 89 (1) of the Rules of Procedure and Evidence stated that, if a Chamber grants participation, it "shall then specify the proceedings and manner in which participation is considered appropriate"; and that the Pre-Trial Chamber did not and could not specify that the grant of participation included

[22] Appellant's Submission further to the Order of 4 December, paras 7-11.
[23] Prosecutor's Submission further to the Order of 4 December, paras 12-13.

participation in interlocutory appeals. Such appeals were different proceedings which were convened to consider a specific issue.[24]

31. The Prosecutor accepted that the concerns set out in the Victims' Response to the Request for Interim Release could, if accepted by the Appeals Chamber, demonstrate that the personal interests of the Victims were affected by the issues in the appeal.[25]

32. Given the period of time that had passed as a result of the delay in filing the Victims' Response and the subsequent procedural complications that had resulted, and given the need for a prompt determination of the present appeal, the Prosecutor queried whether the participation of the Victims in this appeal could be seen as appropriate.[26]

33. The Prosecutor also submitted that, while there was no express time limit set down in the Statute, the Rules of Procedure and Evidence or the Regulations of the Court for the filing of an application by victims to participate, such a request should in principle be made as soon as the appeal is filed, or leave to appeal is granted. The victims should in any event file their application to participate prior to the deadline for the filing of any response, even where the effect of the issues raised in the appeal upon the personal interests of the victims did not become clear until the filing of the document in support of the appeal. The Prosecutor further submitted that, if necessary, and especially in cases where there are particularly short time-frames for the filing of responses such as in the present case, the application to participate could be made in the same document as the response.[27]

3. The victims' response to the Order of 4 December

34. On 7 December 2006, the victims filed the "Application by Victims a/0001/06, a/0002/06 and a/0003/06 to reply to the responses of the Defence and the Prosecutor filed in accordance with the Appeals Chamber Order of 4 December 2006" (ICC-01/04-01/06-765-tEN; hereinafter: "Victims' Application for Leave to Reply"). They sought leave to reply to the submissions received further to the Order of 4 December primarily in order to contest the argument that an application was required from the victims before they could participate in the appeal.[28] Without setting out the grounds that they stated they would put forward if leave to reply were granted, they noted that requiring an application to participate in an

[24] Prosecutor's Submission further to the Order of 4 December, para. 13.
[25] Prosecutor's Submission further to the Order of 4 December, para. 15.
[26] Prosecutor's Submission further to the Order of 4 December, paras 16, 17 and 20.
[27] Prosecutor's Submission further to the Order of 4 December, para. 18.
[28] Victims' Application for Leave to Reply, para. 5.

interlocutory appeal ran counter to regulation 86 (8) of the Regulations of the Court and was also inconsistent with regulations 64 (4) and (5).[29] They also submitted that requiring such an application was prejudicial both to the victims and to the efficacy of the proceedings more generally.[30]

C. The Decision of the Appeals Chamber of 12 December 2006

35. On 12 December 2006, the Appeals Chamber rendered a decision (ICC-01/04-01/06-769; hereinafter: "Decision of 12 December"), deciding to disregard the Victims' Response as it had been filed without the leave of the Appeals Chamber, rejecting the Victims' Application for Leave to Reply, and granting the victims a/0001/06, a/0002/06 and a/0003/06 the right to participate in this appeal for the purpose of presenting their views and concerns respecting their personal interests in the issues raised on appeal, giving them until 15 December 2006 to make their submissions and giving the Appellant and the Prosecutor until 20 December 2006 to respond to any such submissions.

36. The Decision of 12 December stated that the reasons underlying it would be given in the judgment. Those reasons are set out below.

1. General considerations relating to victim participation in interlocutory appeals under article 82 (1) (b)

37. This appeal is being determined in the context of victims who were permitted to make submissions in relation to a decision of the Pre-Trial Chamber that has become the subject of an interlocutory appeal. The principles set out below should be read in that light. The Appeals Chamber is aware that this is the first time that it has considered the manner in which victims can participate in interlocutory appeals. It has been assisted in this task by the submissions that the participants have presented on this important issue. The precise application of the principles set out below is likely to be guided by practice and experience.

(a) The need for an application to be filed

38. The Appeals Chamber determines that, in order for victims to participate in an appeal under article 82 (1) (b) of the Statute, an application seeking leave to participate in the appeal must be filed.

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[29] Victims' Application for Leave to Reply, para. 6.
[30] Victims' Application for Leave to Reply, para. 7.

39. The Appeals Chamber finds that the requirement for victims to file an application seeking leave to participate in this type of appeal arises from the wording of article 68 (3) of the Statute, which provides as follows:

> "Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence."

40. It is apparent that the requirement under article 68 (3) that victim participation shall be permitted "at stages of the proceedings determined to be appropriate by the Court" mandates a specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration. It follows that an application from victims seeking leave to participate is required in order to enable the Appeals Chamber appropriately to make that determination.

41. The Appeals Chamber does not read regulation 86 (8) of the Regulations of the Court to affect the requirement for an application for leave to be made by victims before they can participate. Regulation 86 (8) reads as follows:

> "A decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case, subject to the powers of the relevant Chamber in accordance with rule 91, sub-rule 1."

42. Rule 91 (1) reads as follows:

> "A Chamber may modify a previous ruling under rule 89."

43. An interlocutory appeal of this nature, in which a particular issue requires specific consideration, is a separate and distinct stage of the proceedings. The Appeals Chamber, pursuant to article 68 (3), is required to determine whether the participation of victims in relation to that particular appeal is appropriate. It cannot automatically be bound by the previous determination of the Pre-Trial Chamber that it was appropriate for the victims to participate before the court of first instance. The Pre-Trial Chamber could not, at that stage, have had any mandate which could grant the victim participants the right automatically to participate in any interlocutory appeal that may arise. The subject matter and nature of any interlocutory appeal would, at that stage, have been unknown. Hence it would be impossible for the Pre-Trial Chamber, in effect, to deem it to be appropriate for victims to participate in that stage of the proceedings or to determine that their interests would be affected by that

particular interlocutory appeal. The Appeals Chamber therefore reads regulation 86 (8) to be confined to the stage of the proceedings before the Chamber taking the decision referred to in the text of the regulation. The Appeals Chamber notes, in any event, that regulation 86 (8) is subordinate to article 68 (3) (see articles 21 (1) (a) and 52 (1) of the Statute and regulation 1 (1) of the Regulations of the Court). Any contrary reading of its provisions to that set out above would conflict with the requirements of article 68 (3) that it is for the Appeals Chamber to determine whether the participation of victims in a particular interlocutory appeal is appropriate. Furthermore, for the reasons set out above, in the absence of any express mention of victims within regulations 64 (4) or (5), the Appeals Chamber therefore does not interpret the reference to a "participant" or to the filing of "[t]he response" within those provisions to mean that victims have an automatic right to participate in an interlocutory appeal under article 82 (1) (b) of the Statute.

(b) The content of the application

44. In order to allow for a proper determination of the issue by the Appeals Chamber pursuant to article 68 (3) of the Statute, an application should include a statement from the victims in relation to whether and how their personal interests are affected by the particular interlocutory appeal, as well as why it is "appropriate" for the Appeals Chamber to permit their views and concerns to be presented. Furthermore, while it is for the Appeals Chamber to ensure that any views and concerns of victims must be presented "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial", any submissions from victims on these important rights would necessarily be considered by the Appeals Chamber in making its determination.

45. In circumstances in which the particular victims have already been granted leave to participate in the proceedings before the Pre-Trial Chamber, the application would not need to be a repeat of the original application to participate before that Chamber. The application need not specifically address whether or not the person participating is "a victim" within the meaning of rule 85 of the Rules of Procedure and Evidence in the absence of any appeal relating to that matter. The issue for the Appeals Chamber is more limited. Given that the victims have been granted victim status by the Pre-Trial Chamber, the question to be addressed is whether their personal interests are affected by the interlocutory appeal and whether it is appropriate for them to participate at that stage of the proceedings.

(c) The procedure in relation to the application to participate

46. An application to participate should in principle be made as soon as possible after the appeal is filed.

47. Once an application to participate has been received, the Prosecutor and the Defence will thereafter be entitled to reply to the application within a time limit to be set by the Appeals Chamber, in line with the provisions of rule 89 (1) of the Rules of Procedure and Evidence.

48. Thereafter, the Appeals Chamber will rule upon whether, and in what manner, the victims may participate in the appeal, necessarily taking into account the provisions of article 68 (3).

49. Should the Appeals Chamber permit the victims to participate in the appeal, the Prosecutor and the Defence shall be allowed to reply to any filing of the victims, in accordance with the provisions of rule 91 (2) of the Rules of Procedure and Evidence.

2. The Decision of the Appeals Chamber of 12 December

50. In the light of the above considerations, the Appeals Chamber rejected the Victims' Response which was filed on 16 November 2006 as it had been filed without any previous application to the Appeals Chamber. There had therefore not, at that stage, been a determination by the Appeals Chamber that the participation of the victims in the present appeal was appropriate.

51. The Victims' Application for Leave to Reply of 7 December 2006 was rejected because, as can be seen from the facts set out above, the victims had already been given the opportunity to put forward submissions on the question of whether and how they could participate in the appeal further to the Order of 24 November. Furthermore, the Decision of 12 December granted the victims the right to participate, rendering further submissions from them on the subject at that stage to be superfluous.

52. The third paragraph of the Decision of 12 December granted the victims the right to participate in the particular circumstances of the present appeal. The Victims' Submission further to the Order of 24 November contained an application by the victims to participate in the appeal. The Appeals Chamber permitted the Prosecutor and the Appellant to respond to that application by its Order of 4 December.

53. In granting the application, the Appeals Chamber took into account the fact that this is the first case in which the issue of victim participation in an interlocutory appeal under article 82 (1) (b) of the Statute has arisen. As demonstrated by the range of submissions contained within the filings of the participants, the scheme that should apply to victims in such

proceedings was not clear. While the Appeals Chamber therefore recognised that it was permitting participation to take place in circumstances where the original submissions and the later application to participate were filed by the victims at a time which in future cases would be likely to be deemed to have been too late to permit participation in the appeal, the Appeals Chamber did not regard that factor to be an absolute bar to participation in the circumstances of the current case.

54. The Appeals Chamber considered that the personal interests of the victims were affected by the circumstances of the current case, having regard to the nature of the appeal itself and paragraphs 11 to 15 of the Victims' Response to the Request for Interim Release that had been filed before the Pre-Trial Chamber. The Appeals Chamber was not persuaded by the submissions of the Appellant that the victims did not have any right to participate in appeals relating to determinations of whether or not a person subject to a warrant of arrest should be granted interim release. While it is correct that rule 118 does not make any specific reference to victims, the Appeals Chamber deemed the provisions of article 68 (3) to enable it to permit the views and concerns of victims to be expressed at stages of the proceedings that it determined appropriate.

55. The Appeals Chamber also did not accept the submission of the Appellant that, by allowing the victims to participate, the Appellant was facing two prosecutors. Victims can, in principle, participate if their personal interests are affected and the Appeals Chamber considers their participation to be appropriate. It is for the Appeals Chamber to ensure that the manner of their participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. In the present case the Appeals Chamber did not regard the participation of the victims to conflict with these principles. The Appeals Chamber limited its Decision to permit the victims to present their views and concerns respecting their personal interests in the issues raised on appeal. Observations to be received by the victims were therefore limited and had to be specifically relevant to the issues arising in the appeal rather than more generally. Bearing in mind the provisions of rule 91 (2) of the Rules of Procedure and Evidence, the Appeals Chamber provided a timetable within which the Prosecutor and the Appellant could respond to the views and concerns of the victims.

D. Submissions filed following the decision of the Appeals Chamber of 12 December 2006

1. The submissions of the victims

56. On 15 December 2006, the victims filed confidentially the "Submissions by Victims a/0001/06, a/0002/06 and a/0003/06 further to the Appeals Chamber's Decision of 12 December 2006" (ICC-01/04-01/06-776-Conf-tEN; hereinafter: "Victims' Submission further to the Decision of 12 December"); a public redacted version of this document was registered under the number ICC-01/04-01/06-778-tEN. The paragraph numbers of the Victims' Submission pursuant to the Decision of 12 December to which reference is made in this judgment are the same in both the confidential and the public redacted versions of that document.

57. The victims submitted that there was a real risk that the Appellant might "obstruct or endanger the investigation or court proceedings, for instance, by contacting witnesses and even victims in order to influence them", were he to be released.[31] They stated that he might be hostile to those victims participating in the proceedings and that his interim release "might enable him to establish their identities and, thus, potentially pressure them into withdrawing their requests to participate or, even, seek revenge".[32] They further submitted that the Appellant could resume the leadership of the UPC movement if he were granted interim release, which would create the risk that he might launch new recruitment campaigns of children under the age of fifteen, which could affect several children from families participating as victims in the current proceedings.[33] They referred, in this context, *inter alia*, to a report on Children and Armed Conflict in the DRC that was presented to the United Nations Security Council on 13 June 2006; and to a video that was shown by the Prosecutor during the confirmation hearing of the Appellant on 14 November 2006.[34] They concluded that granting interim release might be interpreted by others as proof that the crimes set out in the Warrant of Arrest should not be viewed as very serious.[35]

58. The victims requested the Appeals Chamber to dismiss the appeal and to affirm the Impugned Decision.[36]

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[31] Victims' Submission further to the Decision of 12 December, para. 2.
[32] Victims' Submission further to the Decision of 12 December, paras 3-4.
[33] Victims' Submission further to the Decision of 12 December, paras 5-6
[34] Victims' Submission further to the Decision of 12 December , paras. 7-8
[35] Victims' Submission further to the Decision of 12 December, para. 9.
[36] Victims' Submission further to the Decision of 12 December, p. 5.

2. The response of the Appellant to the submissions of the victims

59. On 20 December 2006, the Appellant filed confidentially the "Defence reply to 'Conclusions des victims a/0001/06, a/0002/06 et a/0003/06 suite à l'ordonance de la chambre d'appel du 12 décembre 2006" (ICC-01/04-01/06-782-Conf; hereinafter: "Appellant's Response to the Victims' Submissions pursuant to the Decision of 12 December").

60. The Appellant submitted that the submissions made by the victims fell outside the parameters prescribed by the Appeals Chamber, alleging that they contained statements made on behalf of others, as well as "vague, anonymous and unsubstantiated allegations".[37]

61. The Appellant submitted further that:

> "...the allegations and evidence referred to within the victims submissions have been cited for the first time at the appellate level. Since the Defence did not have the opportunity to address such allegations at first instance, the Defence respectfully submits that the standard for assessing such allegations should be that which would apply to the first level of review.
>
> Accordingly, in order to support their request that interim release of the suspect be denied, the Victims' Representatives must adduce evidence supporting reasonable grounds to believe that one or more of the conditions of article 58 (1) are satisfied. The Defence submits that the victims' representatives fail to adduce any evidence in support of their allegations and as such these conditions are not met."[38]

62. The Appellant proceeded to argue that there was no evidence that interim release would create a real danger that the suspect would obstruct or endanger the investigation or the court proceedings; and that there was no evidence that interim release would create a risk that the suspect would continue with the commission of the alleged crime.[39] He submitted, *inter alia*, that the Appeals Chamber should not rely on unsupported allegations of witness intimidation.[40] He also strongly disputed the suggestion that an affiliation with the UPC constituted grounds to deny release; objected to the reference to the report before the United Nations Security Council, which he stated had been cited in a misleading manner; and disputed that the video referred to by the victims contained the material which they alleged it to contain and requested the Appeals Chamber to disregard this evidence.[41]

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[37] Appellant's Response to the Victims' Submissions pursuant to the Decision of 12 December, paras 6-8.
[38] Appellant's Response to the Victims' Submissions pursuant to the Decision of 12 December, paras 11-12.
[39] Appellant's Response to the Victims' Submissions pursuant to the Decision of 12 December, paras 13-39.
[40] Appellant's Response to the Victims' Submissions pursuant to the Decision of 12 December, para. 25.
[41] Appellant's Response to the Victims' Submissions pursuant to the Decision of 12 December, paras 31, 35 and 39

63. The Appellant also argued that the assertion of the victims that granting his interim release would be interpreted by others as proof that the crimes in the Warrant of Arrest were not serious was irrelevant to the question of whether he should be granted interim release. He submitted that such a determination was to be decided in accordance with article 60 (2) of the Statute, which did not distinguish between categories of crime listed under the Statute.[42]

3. *The Prosecutor's application for leave to reply to the response of the Appellant*

64. On 22 December 2006, the Prosecutor filed confidentially the "Prosecution Request for Leave to Reply to the Appellant's 20 December 2006 Response to the Observations of Victims a/0001/06, a/0002/06 and a/0003/06" (ICC-01/04-01/06-783-Conf; hereinafter: "Prosecutor's Application for Leave to Reply"); and on 2 January 2007 he filed confidentially "Submissions supplementing the Prosecution's 22 December 2006 Request for Leave to Reply to the Appellant's 20 December 2006 Response to the Observations of Victims" (ICC-01/04-01/06-787-Conf; hereinafter: "Prosecutor's Amended Application for Leave to Reply").

65. In the Prosecutor's Application for Leave to Reply, the Prosecutor requests the Appeals Chamber to grant the Prosecutor leave to reply to the Appellant's Response to the Victims' Submissions pursuant to the Decision of 12 December.[43] He submits that the Appellant's Response to the Victims' Submissions pursuant to the Decision of 12 December went beyond the scope of a response to views and concerns submitted by the victims and beyond the scope of the present appeal. He submits that it is in the "interests of the expeditious conduct of the proceedings and the maintenance of the integrity of the appellate process" that the Prosecutor be allowed to make submissions on these issues to the Appeals Chamber so as to assist "the Chamber to avoid becoming unduly burdened by submissions which are irrelevant to and outside the scope of the issues in the instant appeal".[44] He submits that his request for leave to reply is governed by regulation 24 (5) of the Regulations of the Court.

66. In the Prosecutor's Application for Leave to Reply the Prosecutor already sets out the substantive reply that he wishes to make to the Appellant's Response to the Victims' Submissions pursuant to the Decision of 12 December, arguing that this is appropriate because of the short time limit for the filing of a reply, the fact that the Court was in recess at

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[42] Appellant's Response to the Victims' Submissions pursuant to the Decision of 12 December, paras 40-44.
[43] Prosecutor's Application for Leave to Reply, para. 24.
[44] Prosecutor's Application for Leave to Reply, para. 12.

the time of the filing of the request for leave to reply and the number of court holidays during the relevant period.[45]

4. The Decision of the Appeals Chamber on the Prosecutor's application for leave to reply to the response of the Appellant

67. In view of the determination of the Appeals Chamber in relation to the submissions filed by the Victims and by the Appellant in response (see paragraphs 69 to 73, below), the Appeals Chamber concludes that the Prosecutor's Application for Leave to Reply is unnecessary and is not relevant to the deliberations of the Appeals Chamber. Accordingly, the Appeals Chamber rejects the Prosecutor's Application for Leave to Reply.

68. The Appeals Chamber also notes that the content of the Prosecutor's Application for Leave to Reply is of such a character as to in fact constitute a substantive reply to issues raised by the Appellant. The Appeals Chamber disapproves of a practice of the filing of a substantive reply prior to leave being granted by the Appeals Chamber, which in and of itself may also give rise to the rejection of an application for leave. If a participant anticipates that the Appeals Chamber might not be in a position to dispose of such an application prior to the expiration of the time limit for the filing of a reply, the proper procedural avenue is to file, together with the application for leave to reply, an application for the extension of the time limit.

5. The determination of the Appeals Chamber in relation to the submissions filed by the victims and by the Appellant in response

69. The Appeals Chamber refers to its Decision of 12 December in which it granted the victims the right to participate in this appeal "for the purpose of presenting their views and concerns respecting their personal interests *in the issues raised on appeal*" (emphasis added).

70. Three specific issues are raised by the Appellant in the current appeal: (i) the obligation to review the detention of a suspect periodically pursuant to article 60 (3) of the Statute; (ii) whether the Pre-Trial Chamber was correct in its determination, pursuant to article 60 (4) of the Statute, that the Appellant had not been detained for an unreasonable period due to inexcusable delay by the Prosecutor; and (iii) whether the Pre-Trial Chamber took into account irrelevant factors, or failed appropriately to apply the principles of necessity and proportionality, in determining whether the Appellant should be granted interim release.

[45] Prosecutor's Application for Leave to Reply, para. 15.

71. The victims did not make any explicit link between their submissions and the specific issues raised on appeal. In so far as their concerns purport to provide evidence of why interim release should not be granted to the Appellant, the Appeals Chamber considers that the nature of this appeal is corrective and limited to the specific grounds of appeal raised. It is not a rehearing of the original request for interim release. For that reason, in the context of the present appeal, it is not appropriate either merely to repeat evidence that was before the Pre-Trial Chamber, or to introduce new evidence before the Appeals Chamber, without making any specific link as to how such material affects the Appeals Chamber's determination of the issues raised on appeal.

72. For the above reasons, while the Appeals Chamber has noted the concerns expressed by the victims in relation to what they allege might happen if the Appellant were to be granted interim release, it has not found them to be of assistance in determining the specific grounds before it in the present appeal and therefore has not relied on those concerns in its determination of the merits of the current appeal. In those circumstances, the Appeals Chamber has necessarily also disregarded the response of the Appellant to those concerns.

73. In any event, the Appeals Chamber does not regard it as appropriate, in the circumstances of the present case, to allow the Appellant to broaden the scope of his appeal by means of the evidential arguments that he raises in his response to the submissions of the victims. The Appeals Chamber notes that the Appellant was not granted leave to reply to the observations filed by the Prosecutor and by the victims in the Pre-Trial Chamber. The Appeals Chamber notes further that the Appellant did not raise the failure of the Pre-Trial Chamber to grant him leave to reply as a ground of appeal in the instant case. In those circumstances, the Appellant cannot go beyond the scope of his grounds of appeal in the current case and, in effect, reply for the first time in this appeal to factual allegations that were made in those submissions in the Pre-Trial Chamber.

6. Notification to the Victims

74. The Appeals Chamber notes that the Registrar has not notified the victims of the Appellant's Response to the Victims' Submissions pursuant to the Decision of 12 December, nor of the Prosecutor's Application for Leave to Reply, nor of the Prosecutor's Amended Application for Leave to Reply. Presumably, this was not done because all three documents had been filed confidentially and because the Pre-Trial Chamber in the Decision on Victims Participation had ordered the Registrar to notify the victims of all *public* documents in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.

75. In the present case, the Appeals Chamber considers it appropriate to order the Registrar to notify the victims of the three confidential documents referred to in the preceding paragraph. There is no indication that any of the information contained in these filings should not be disclosed to the victims. In fact, the sole reason for the confidential filings appears to have been the fact that the Victims' Submission further to the Decision of 12 December itself had been filed confidentially.

76. Nevertheless, in the circumstances of the present case the Appeals Chamber considers it appropriate to order that the notification of the documents be delayed, as set out in the dispositive part of this judgment, so as to give the Appellant and the Prosecutor an opportunity to make an application to the Appeals Chamber, should they wish to request that such notification should not take place. Such application, if any, shall set out the reasons for the request. In this context the Appeals Chamber notes that generally, participants who are making filings confidentially should clearly set out the reasons for doing so.

77. The Appeals Chamber notes furthermore that it has not reproduced in the present judgment any information contained in the three documents referred to above that would require protection from the public.

IV. MERITS OF THE APPEAL

A. First ground of appeal: obligation to review detention of a suspect periodically pursuant to article 60 (3) of the Statute

78. As his first ground of appeal, the Appellant argues that the Pre-Trial Chamber failed to fulfil its obligation to review periodically the detention of a suspect pursuant to article 60 (3) of the Statute.

1. Proceedings before the Pre-Trial Chamber and relevant part of the Impugned Decision

79. In his Request for Interim Release, the Appellant submitted to the Pre-Trial Chamber that pursuant to article 60 (3) of the Statute and rule 118 (2) of the Rules of Procedure and Evidence, the Pre-Trial Chamber was under an obligation to review periodically and at least every 120 days the detention of a suspect, that the last decision by the Pre-Trial Chamber on

detention was issued on 10 March 2006, and that for that reason, the Appellant had been held illegally since 10 June 2006.[46]

80. In the Impugned Decision, the Pre-Trial Chamber rejected the submission of the Appellant, taking into account that article 60 (3) and rule 118 (2) appeared after provisions which specifically dealt with applications for interim release brought after the person subject to a warrant of arrest had been surrendered to the Court and holding that a ruling on detention as referred to in those provisions should not be confused with the warrant of arrest rendered under article 58 (1) of the Statute. The Pre-Trial Chamber noted that the Request for Interim Release had been the first request for interim release by the Appellant, that for that reason the Pre-Trial Chamber had not already made a ruling on interim release, and that consequently there had been no violation of article 60 (3) of the Statute and of rule 118 (2) of the Rules of Procedure and Evidence.[47]

2. Arguments of the Appellant

81. On appeal, the Appellant submits that the Pre-Trial Chamber erred in law in finding that the obligation periodically to review its ruling on the release or detention of the person pursuant to article 60 (3) only applies after there has been a request for interim release and a subsequent decision on this request. He argues that "... the expression 'ruling on the release or detention of the person' as detailed in Article 60 (3) is not limited to express decisions on detention issued in response to motions for provisional release filed under Article 60 (2)".[48] He submits that the Warrant of Arrest amounts to a ruling in the sense of article 60 (3) of the Statute, noting that the provision refers to a "ruling" and not a "decision" and that "[i]t can therefore be surmised that the word 'ruling' was used to encompass any different action of the Pre-Trial Chamber which had the result of keeping Thomas Lubanga in detention"[49]. He notes further that article 60 (2) refers to article 58 (1) of the Statute and submits "that the Chamber should not be permitted to evade its obligation to review a ruling on detention purely on the basis that this ruling is not a decision in response to a Defence motion for provisional release under Article 60 (2)"[50].

82. He submits furthermore that he already filed a request for release on 23 May 2006, stating that "[w]hilst the Defence clarified this motion as a challenge to jurisdiction, rather

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[46] Request for Interim Release, para. 33.
[47] Impugned Decision, pp. 4-5.
[48] Document in Support of the Appeal, para. 5.
[49] Document in Support of the Appeal, para. 11.
[50] Document in Support of the Appeal, paras 12-13.

than a request for provisional release in the sense of Article 60(2), the Chamber was still under an obligation to review the application and render a decision on this request"[51]. He submits that the decision of 3 October 2006 which was issued on this application "amounts to a ruling in the sense of Article 60 (3). Although, it was only issued on 3 October, and therefore 120 days hasn't elapsed since that date in order to trigger the Chamber's duty to intervene, the failure of the Trial Chamber to issue a Decision on this issue at an earlier date can not be used against the suspect to deny him the right to review of his detention under this statutory provision"[52].

83. In addition, the Appellant "submits that independently of any motion by the Defence, the language of Article 60 (3) mandates that the Pre-Trial Chamber 'shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the person'." He submits that the contrast between the words in this provision is clear and that "[w]hilst Defence Counsel can submit requests for provisional release for their client at any time, in addition to and regardless of Defence Counsel's actions, the Pre-Trial Chamber shall periodically review its ruling on detention"[53].

84. He concludes his arguments under this ground by submitting that "the Pre-Trial Chamber has erred in law by failing to review the detention of Thomas Lubanga Dyilo on 10 July 2006 at the latest. The Defence submits that the failure to review this ruling must result in his immediate provisional release"[54].

3. Arguments of the Prosecutor

85. The Prosecutor argues that the Pre-Trial Chamber did not err "merely by failing to review a non-existent prior decision on interim release within the 120 day time-frame established by Rule 118(2)"[55]. He submits that the interpretation of the Pre-Trial Chamber that the obligation to review its ruling would only be triggered by a prior decision on an application for interim release was reasonable and not inconsistent with the Statute and the Rules of Procedure and Evidence.[56] He disputes the Appellant's contention that the word "ruling" in article 60 (3) and rule 118 (2) should be construed more broadly than a "decision", noting that no such distinction between the words is made in the French and Spanish versions

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[51] Document in Support of the Appeal, para. 14.
[52] Document in Support of the Appeal, para. 15.
[53] Document in Support of the Appeal, para. 16.
[54] Document in Support of the Appeal, para. 17.
[55] Response to the Document in Support of the Appeal, para. 9
[56] Response to the Document in Support of the Appeal, para. 10.

of the Statute, which refer to "sa décision" and "su decisión" respectively in the text of article 60 (3) and which are both equally authentic.[57] The Prosecutor notes that the Appellant was asked at the Initial Appearance Hearing if he wanted to request interim release and he did not do so.[58] He states that the Appellant cannot rely on the 23 May 2006 Application for Release, having expressly denied that it was a request for interim release and having later identified it as a challenge to jurisdiction, which was ruled upon on 3 October 2006. He submits that "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"[59]. He states that the approach of the Pre-Trial Chamber is consistent with the purpose of article 60 (3) of the Statute, submitting that the legality of initial detention is not contingent upon formal regularity of review by the Chamber. The Prosecutor submits that "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" and that there has been no such change.[60] The Prosecutor argues that the "legality of ongoing detention at this stage is therefore based on the continued applicability of the criteria in Article 58(1), and the non-applicability of the criteria in Article 60(4)"[61].

86. The Prosecutor submits that even if the Pre-Trial Chamber did err in not conducting "a *proprio motu* review of detention prior to the [Impugned Decision] [...] the immediate provisional release of the Appellant is wholly disproportionate to any violation of his procedural rights in these circumstances"[62], referring *inter alia* to the drafting history of the Rules of Procedure and Evidence[63]. He submits that "[g]ranting interim release in response to such an error, [...], 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"[64].

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[57] Response to the Document in Support of the Appeal, para. 11.
[58] Response to the Document in Support of the Appeal, para. 12.
[59] Response to the Document in Support of the Appeal, para. 13.
[60] Response to the Document in Support of the Appeal, para. 14
[61] Response to the Document in Support of the Appeal, para. 14, footnote omitted.
[62] Response to the Document in Support of the Appeal, para. 9.
[63] Response to the Document in Support of the Appeal, para. 15
[64] Response to the Document in Support of the Appeal, para. 16.

4. Determination by the Appeals Chamber

87. In relation to the first ground of appeal and for the reasons set out below, the Appeals Chamber confirms the ruling of the Pre-Trial Chamber that there has not been any failure to comply with the requirements of article 60 (3) of the Statute in the present case.

88. The issue which the Appeals Chamber is called upon to decide on the first ground of appeal is whether the review under article 60 (3) of the Statute is triggered by and limited to a ruling upon an application for interim release pending trial that has been filed by the person subject to a warrant of arrest or whether such a review is of broader application and, more specifically, is triggered by the issuance of a warrant of arrest.

(a) Relevant statutory provisions

89. The following provisions of the Statute and the Rules of Procedure and Evidence are relevant to this ground of appeal.

90. Article 58 of the Statute provides, in relevant part:

> "1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
>
> (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
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> (b) The arrest of the person appears necessary:
>
> (i) To ensure the person's appearance at trial;
>
> (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
>
> (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.
>
> ...
>
> 4. The warrant of arrest shall remain in effect until otherwise ordered by the Court."

91. Article 60 of the Statute provides, in relevant part:

> "1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she

is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions."

92. Rule 118 of the Rules of Procedure and Evidence provides:

"1. If the person surrendered to the Court makes an initial request for interim release pending trial, either upon first appearance in accordance with rule 121 or subsequently, the Pre-Trial Chamber shall decide upon the request without delay, after seeking the views of the Prosecutor.

2. The Pre-Trial Chamber shall review its ruling on the release or detention of a person in accordance with article 60, paragraph 3, at least every 120 days and may do so at any time on the request of the person or the Prosecutor.

3. After the first appearance, a request for interim release must be made in writing. The Prosecutor shall be given notice of such a request. The Pre-Trial Chamber shall decide after having received observations in writing of the Prosecutor and the detained person. The Pre-Trial Chamber may decide to hold a hearing, at the request of the Prosecutor or the detained person or on its own initiative. A hearing must be held at least once every year."

93. The above provisions provide for a person subject to a warrant of arrest to be able to apply for interim release pending trial (article 60 (2)). Article 60 (3) obliges the Pre-Trial Chamber periodically to "review its ruling on the release or detention of the person".

(b) The ruling to be reviewed pursuant to article 60 (3)

94. The ruling that the Pre-Trial Chamber is required to review pursuant to article 60 (3) of the Statute is the determination that it has made in response to an application for interim release pending trial under article 60 (2). This is clear from the order of the statutory provisions. As the Pre-Trial Chamber correctly pointed out, both article 60 (3) and rule 118 (2), which require the Pre-Trial Chamber to review its ruling on release or detention, appear directly after provisions which provide for applications for interim release by the

person subject to a warrant of arrest. It is therefore logical to interpret the review under article 60 (3) to follow from, and be dependent upon, a ruling on a previous application by the detained person for interim release.

95. The Appeals Chamber does not accept the arguments of the Appellant that the ruling referred to in article 60 (3) must be read more broadly and that the Warrant of Arrest amounts to such a ruling.

96. The Appeals Chamber finds unconvincing the assertion of the Appellant that the word "ruling" used in article 60 (3) – and any distinction between that word and the word "decision" – in and of itself encompasses any step taken by the Pre-Trial Chamber that had the result of keeping Thomas Lubanga Dyilo in detention. Furthermore, the Appeals Chamber has noted the submission of the Prosecutor in this regard that the French and Spanish versions of the Statute – which are equally authentic pursuant to article 128 of the Statute – do not make any such distinction referring to the words "décision" and "decisión" in the text of article 60 (3).

97. The Appeals Chamber is also not persuaded that the fact that article 60 (2) refers to article 58 (1) supports the argument of the Appellant. The reference to article 58 (1) is made in the following context. The second and third sentences of article 60 (2) set out how the Pre-Trial Chamber is to determine an application for interim release. It must consider whether the requirements of article 58 (1) are met and either continue to detain or release the person subject to the warrant of arrest depending upon whether or not it is satisfied that those requirements are met. The reference to article 58 (1) in article 60 (2) therefore does not have the broader meaning that the Appellant purports to attribute to it. In any event, the Appeals Chamber notes in passing that there is no indication that there was any stage during the detention of the Appellant during which the requirements of article 58 (1) were not fulfilled.

98. Furthermore, the Appeals Chamber rejects the contention of the Appellant that the failure to interpret the review under article 60 (3) as applying to the Warrant of Arrest results in the Chamber evading its obligation to review a ruling on detention. As is expanded upon in the determination of the second ground of appeal below, there is a distinct and independent obligation imposed upon the Pre-Trial Chamber to ensure that a person is not detained for an unreasonable period prior to trial under article 60 (4) of the Statute. While the review under article 60 (3) ensures that any ruling upon an application for interim release is specifically reconsidered at least every 120 days, there is, in addition, an obligation upon the Pre-Trial Chamber to review the overall period of the detention of the suspect under article 60 (4). In

addition, other provisions of the Statute also have a bearing upon the obligation to ensure that a person subject to a warrant of arrest is not detained for an unreasonable period. Foremost amongst them is the fundamental right, guaranteed by article 67 (1) (c) of the Statute, that an accused shall be entitled to a fair trial without undue delay.

99. Moreover, the Appeals Chamber does not find any other basis upon which to read the ruling referred to in article 60 (3) to be the Warrant of Arrest. For the reasons expressed above, the Appeals Chamber reads the provision so clearly to follow from a ruling upon an application for interim release that had the drafters intended the "ruling" in article 60 (3) to refer to the Warrant of Arrest it could reasonably be expected that they would have expressly said so. In addition, the Appeals Chamber notes that, whereas the Warrant of Arrest in the present case was executed only a few weeks after it was issued, there are and will be other cases in which an arrest warrant is not executed until many months after it has been issued. To require a review of a warrant of arrest at least every 120 days in such circumstances – prior to the person subject to the warrant being in detention – does not appear to be a logical interpretation of the requirements of article 60 (3).

100. For the above reasons, the Appeals Chamber rejects the argument of the Appellant that it is the Warrant of Arrest that triggers the review required pursuant to article 60 (3).[65]

101. The Appeals Chamber notes, in this context, that Thomas Lubanga Dyilo was arrested on 16 March 2006 and arrived in The Hague on the evening of 17 March 2006. At his initial appearance before the Pre-Trial Chamber on 20 March 2006, the Appellant was represented by counsel (Mr. Flamme)[66]. The Presiding Judge informed the Appellant of his rights under the Statute[67], ensured that he had been informed of the crimes which he was alleged to have committed[68] and immediately thereafter the following exchange took place:

> "PRESIDING JUDGE JORDA (interpretation): By virtue of Article 60 of the Statute, Mr. Lubanga Dyilo, you may, during this hearing or after this hearing,

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[65] The Appeals Chamber notes that the Appellant, both in his Request for Interim Release and in his Document in Support of the Appeal refers to a decision concerning his detention of "10 March 2006". He does not provide any further details of that decision and the Appeals Chamber is unaware of any such decision on that date. Given his arguments, the Appeals Chamber assumes that the Appellant meant to refer to 10 *February* 2006, the date of the issuance of the Warrant of Arrest. This assumption is supported by the reference that the Appellant originally made to the 120 day period under rule 118 (2) having expired on 10 June 2006 (Request for Interim Release, para. 33), which is 120 days after 10 February 2006. In addition, when the Appellant later refers to being "illegally detained since 10 July", he refers to that day being "120 days after *the warrant of arrest*" (Document in Support of the Appeal, para. 13) (emphasis added).

[66] ICC-01-04-01-06-T-3-EN, p. 2.

[67] ICC-01-04-01-06-T-3-EN, pp. 4 et seq.

[68] ICC-01-04-01-06-T-3-EN, pp. 6-7.

> request interim release pending trial. Of course, the Chamber will not give an answer, a ruling, immediately, but you may make such a request. If you wish to make such a request, the Prosecutor may be asked to present his observations on this matter. Would you like to make use of this right at this point in time? Perhaps, Mr. Jean Flamme, you would like to consult your client.
>
> MR. FLAMME (interpretation): I myself have not had a lot of time. I was assigned on short notice and arrived on Sunday morning here. I was able to visit Mr. Lubanga in prison promptly, but we have not yet been able to discuss the matter of requesting interim release. We will, however, discuss this matter in some detail, and we will take a decision on this matter in the coming days."[69]

102. As set out at paragraph 4 above, on 20 September 2006, in his Request for Interim Release, the Appellant applied to be granted immediate provisional release. Following submissions received in response thereto the Pre-Trial Chamber issued the Impugned Decision on 18 October 2006, rejecting the application for interim release. That decision is subject to periodic review pursuant to article 60 (3) of the Statute and rule 118 (2) of the Rules of Procedure and Evidence.

(c) The Appellant's application for release of 23 May 2006

103. The Appeals Chamber also rejects the argument that the Appellant makes at paragraphs 14 and 15 of his Document in Support of the Appeal to the effect that the decision of the Pre-Trial Chamber upon the request for release that he filed on 23 May 2006 ("Application for Release")[70] amounts to a ruling within the meaning of article 60 (3) of the Statute; and that the failure to issue an earlier decision on that request denied him the right to have his detention reviewed under article 60 (3).

104. The Appellant himself accepts that he "clarified" his Application for Release "as a challenge to jurisdiction, rather than a request for provisional release in the sense of Article 60 (2)"[71].

105. Indeed, it is apparent from the record that the Pre-Trial Chamber initially responded to the Application for Release as though it was a request for provisional release pursuant to article 60 (2) and rule 118.[72] In response thereto, the Appellant made clear that his "application of 23 May 2006 *does not seek interim release*, but release"[73] (emphasis added). Following further submissions from the Appellant and from the Prosecutor, the Pre-Trial

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[69] ICC-01-04-01-06-T-3-EN, p. 7, lines 9-22
[70] Application for Release, ICC-01/04-01/06-121-tEN.
[71] Document in Support of the Appeal, para. 14.
[72] Order on the application for release, ICC-01/04-01/06-128-tEN, 29 May 2006.
[73] Submissions relative to the Order of 29.5.2006, ICC-01/04-01/06-131-tEN, 31 May 2006.

Chamber ordered the Defence "to make clear which procedural remedy it is using for the Application for Release of Thomas Lubanga Dyilo"[74]. In response thereto, the Appellant re-characterised his application "as a **challenge to jurisdiction**"[75]. The application thereafter proceeded as a challenge by the Defence to the jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute. Various further filings were submitted – including observations from the Democratic Republic of the Congo and victims, and responses thereto – prior to the Pre-Trial Chamber rendering its decision on the application on 3 October 2006[76]. That decision was affirmed on appeal by the Appeals Chamber on 14 December 2006[77].

106. In the above circumstances, and given the interpretation of article 60 (3) of the Statute that the Appeals Chamber has set out above, the decision of the Pre-Trial Chamber on the Application for Release cannot amount to a ruling within the meaning of article 60 (3). It was not an application for interim release. It follows that the alleged failure to issue an earlier decision on the Application for Release did not in any way deny the Appellant the right to have his detention reviewed under article 60 (3). The ruling referred to in article 60 (3) could (and did) only come into being following his Request for Interim Release, which was filed on 20 September 2006. This request resulted in the Pre-Trial Chamber's decision, delivered in a timely manner on 18 October 2006[78], which is the subject of this appeal.

107. The majority of the Appeals Chamber notes the intention of Judge Pikis to deliver a separate opinion, in which he proposes to consider the human rights aspects of the Appellant's pre-trial detention. In view of its above conclusions, which are based on its interpretation of the fundamental legal texts of the Court, the majority of the Appeals Chamber does not consider it necessary, for a determination of the appeal the subject of this Judgment, to consider this issue.

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[74] Order relating to the Application for Release, ICC-01/04-01/06-191, 13 July 2006.
[75] Submissions Further to the Order of 13 July 2006, ICC-01/04-01/06-197-tEN, 17 July 2006.
[76] 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.
[77] See "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" of 14 December 2006 (ICC-01/04-01/06-772).
[78] Submissions on the request were received from both the Prosecutor and the Victims in the case prior to the decision being rendered, see "Observations des victims a/0001/06, a/0002/06 et a/0003/06 sur la demande de mise en liberté introduite par la défense", 9 October 2006 (ICC-01/04-01/06-530); "Prosecution's Response to the Defence Request for Interim Release", 9 October 2006 (ICC-01/04-01/06-531).

B. Second ground of appeal: unreasonable period of detention prior to the confirmation of charges

108. As his second ground of appeal, the Appellant submits that he has been held in detention prior to the confirmation of charges for an unreasonably long period.

1. Proceedings before the Pre-Trial Chamber and relevant part of the Impugned Decision

109. In his Request for Interim Release, the Appellant submitted to the Pre-Trial Chamber that he had been held in detention for an unreasonably long period prior to the confirmation of the charges because of a delay attributable to the Prosecutor, and that according to the relevant human rights standards, he should be released.[79] He submitted that the Pre-Trial Chamber in assessing the length of his detention should take into consideration the period during which the Appellant had been detained in the Democratic Republic of the Congo prior to his surrender to the Court.

110. In the Impugned Decision, the Pre-Trial Chamber, having first considered that the conditions in article 58 (1) of the Statute continue to be fulfilled, stated the following:

> "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;
>
> CONSIDERING that since pre-trial detention cannot be extended to an unreasonable degree; that reasonableness cannot be assessed *in abstracto* but depends on the particular features of each case; and that to assess the reasonableness of the detention, it is particularly important to assess the complexity of the case;
>
> CONSIDERING that, in the instant case, the period of detention to be considered under article 60 of the Statute started on 16 March 2006, the date of the surrender of Thomas Lubanga Dyilo to the Court;
>
> CONSIDERING that the case before the Court is complex, particularly because the vast majority of the evidence is abroad and that the volume of evidence supporting the prosecution is huge;
>
> CONSIDERING, finally, that the organs of the Court have acted swiftly and that at no moment were proceedings dormant;

[79] Request for Interim Release, paras 34 et seq.

CONSIDERING that for these reasons and at this stage in the proceedings, the length of Thomas Lubanga Dyilo's detention cannot be considered unreasonable;"[80]

2. Arguments of the Appellant

111. In relation to the second ground of appeal, the Appellant submits, first of all, that the Pre-Trial Chamber "appeared to subordinate [article 60 (4)] to Article 60 (2) and the conditions therein" and that by first considering whether or not the conditions for continued detention pursuant to article 60 (2) read with article 58 (1) of the Statute were met, the Pre-Trial Chamber made an error of law because article 60 (4) of the Statute should be considered completely independently.[81] He argues that the correct interpretation of article 60 (4) is that if there has been inexcusable delay the Court shall consider release "regardless of whether the conditions in article 58(1) are still met"[82]. He states that "[i]t is not clear from the Decision whether the examination of Article 60(4) was subordinate to Article 60(2). However, to the extent that the Decision in any way subordinated the right to seek interim release under Article 60(4) to the application of Article 60(2), it should be reversed"[83].

112. Second, the Appellant argues that he has been detained for an unreasonably long period of time within the meaning of article 60 (4) of the Statute. He submits that even if only the period he had spent in detention at the Court is considered, it amounted to an unreasonably long period of pre-trial detention.[84] He emphasises that charges against him had not yet been confirmed and that his status as a suspect rather than as an accused should not be confused[85] and refers to parts of the drafting history of the Statute, to the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (hereinafter: "ICTY"), to the International Covenant on Civil and Political Rights and to two national jurisdictions. Moreover, the Appellant argues that the Pre-Trial Chamber should have taken into account the time the Appellant had spent in detention and under house arrest in the Democratic Republic of the Congo prior to his surrender to the Court.[86] To support his argument, he refers to article 78 (2) of the Statute, to jurisprudence of the ICTY, and to international human rights norms.[87] Finally, the Appellant argues that the Pre-Trial Chamber should not have taken into account that the majority of the evidence in the case against him

[80] Impugned Decision, p. 6-7, footnotes omitted.
[81] Document in Support of the Appeal, para. 18.
[82] Document in Support of the Appeal, para. 20.
[83] Document in Support of the Appeal, para. 22.
[84] Document in Support of the Appeal, paras 24 and 32.
[85] Document in Support of the Appeal, para 23.
[86] Document in Support of the Appeal, paras 33 et seq. and para. 48.
[87] Document in Support of the Appeal, paras 39 et seq.

was located abroad and that there was a significant amount of evidence because this would always be the case in international criminal proceedings.[88]

113. Third, the Appellant argues that the inexcusable delay has been the fault of the Prosecutor.[89] He refers to the Pre-Trial Chamber's statement that "the organs of the Court have acted with celerity and at no moment has the procedure remained inactive" and submits that the Pre-Trial Chamber failed to address the issue of inexcusable delay properly.[90] He submits that there must be an inexcusable delay when a suspect has been detained for seven and a half months without the charges having been confirmed.[91] The Appellant argues that the Prosecutor had been aware of the detention of the Appellant in the Democratic Republic of the Congo and that the Prosecutor should have waited with an application for a warrant of arrest until the Appellant had had an opportunity to challenge his detention in the Democratic Republic of the Congo and until the Prosecutor had sufficient evidence for the confirmation of the charges.[92] He submits that the amount of work the Prosecutor has to perform does not justify the delay.[93]

3. Arguments of the Prosecutor

114. The Prosecutor disputes the arguments of the Appellant. As to the alleged subordination of article 60 (4) to article 60 (2) of the Statute, the Prosecutor submits that the Impugned Decision included decisions under article 60 (2) (which refers to article 58 (1)) as well as under article 60 (4) of the Statute and that these decisions were independent of each other.[94] He submits that this approach of the Pre-Trial Chamber did not involve any error of law because if the Pre-Trial Chamber had found that the conditions of article 58 (1) of the Statute did not continue to apply, the Appellant would have been released on that basis and any determination under article 60 (4) of the Statute would have become unnecessary.[95]

115. As to the purported unreasonableness of the period in detention, the Prosecutor contests the reliance on the drafting history, noting that the Appellant is referring to drafts that contained procedures which eventually were not adopted and that his references in any event

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[88] Document in Support, paras 43-44.
[89] Document in Support, heading 2.3.
[90] Document in Support of the Appeal, paras 23 and 46.
[91] Document in Support of the Appeal, para. 47.
[92] Document in Support of the Appeal, para. 48-49.
[93] Document in Support of the Appeal, para. 50.
[94] Response to the Document in Support of the Appeal, para. 18
[95] Response to the Document in Support of the Appeal, paras 19-20.

were incomplete.[96] The Prosecutor argues that the procedures foreseen in the Rules of Procedure and Evidence of the ICTY and the International Criminal Tribunal for Rwanda (hereinafter: "ICTR") and in national jurisdictions as well as the human rights jurisprudence on which the Appellant relies differ substantially from the pre-trial procedure at the Court.[97]

116. As to the argument of the Appellant that the Pre-Trial Chamber should have included time spent in detention in the Democratic Republic of the Congo, the Prosecutor submits that the Appellant had failed to raise this argument properly before the Pre-Trial Chamber because he had only generally referred to arguments made in earlier filings.[98] The Prosecutor notes that the arguments of the Appellant in respect of article 78 (2) of the Statute and specific jurisprudence of the ICTY had not been raised before the Pre-Trial Chamber.[99] As to the substance of the arguments, the Prosecutor submits that the detention in the Democratic Republic of the Congo bears no connection with the conduct of the Prosecutor and thus cannot be considered an inexcusable delay. The Prosecutor submits that article 78 of the Statute is inapplicable[100] and that 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."[101]

117. As to the question of whether the Prosecutor is responsible for an inexcusable delay, the Prosecutor disputes the arguments made by the Appellant. He submits that some of the arguments the Appellant makes merely repeat his arguments before the Pre-Trial Chamber without demonstrating any appealable error of law or fact or procedural error. The Prosecutor submits that the Appellant merely disagrees with the exercise of discretion of the Pre-Trial Chamber, and that the Appellant should not be allowed to disguise such disagreement with the Pre-Trial Chamber as grounds of appeal.[102] In relation to the alleged concerted action between the Prosecutor and the authorities of the Democratic Republic of the Congo, the Prosecutor submits that the argument should be dismissed *in limine* because the Appellant had not raised this issue before the Pre-Trial Chamber.[103] The Prosecutor submits furthermore that the issue of concerted action had been raised in relation to the Appellant's challenge of jurisdiction, which led to a decision by the Pre-Trial Chamber that has also been appealed.

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[96] Response to the Document in Support of the Appeal, paras 22-24.
[97] Response to the Document in Support of the Appeal, paras 25-26, 30.
[98] Response to the Document in Support of the Appeal, para. 31.
[99] Response to the Document in Support of the Appeal, para. 32.
[100] Response to the Document in Support of the Appeal, para. 34.
[101] Response to the Document in Support of the Appeal, para. 35.
[102] Response to the Document in Support of the Appeal, paras 37-39.
[103] Response to the Document in Support of the Appeal, para. 40.

The Prosecutor submits that the Appellant may not litigate the same issue in two separate proceedings before the same court.[104] Finally, the Prosecutor submits that "the burden on the Appellant is to show that the Pre-Trial Chamber *erred* by failing properly to assess the factors and information allegedly establishing 'inexcusable delay' by the Prosecution, and thus warranting release under Article 60 (4)" and that "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"[105]. The Prosecutor disputes the arguments regarding the premature application for a warrant of arrest, readiness for the confirmation hearing and deprivation of the appellant's right to seek review of his detention, by stating that the argument had not been accepted by the Pre-Trial Chamber and that the Appellant merely repeats his position without attempting to demonstrate any error of the Pre-Trial Chamber. The Prosecutor refutes what he states is "the added 'twist' of an alleged malicious intent by the Prosecution aimed at preventing the Appellant from challenging his detention by the DRC authorities" as being unsupported by factual material and as having never been raised when requesting provisional release.[106]

4. Determination by the Appeals Chamber

118. In relation to the second ground of appeal and for the reasons set out below, the Appeals Chamber determines that the Pre-Trial Chamber did not err in finding that the Appellant had not been detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor.

119. Article 60 (4) of the Statute reads as follows:

> "The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions."

120. The Appeals Chamber is not persuaded by the argument of the Appellant that the Pre-Trial Chamber erroneously subordinated article 60 (4) of the Statute under article 60 (2) of the Statute. Article 60 (4) is independent of article 60 (2) in the sense that even if a detainee is appropriately detained pursuant to article 60 (2) of the Statute, the Pre-Trial Chamber shall consider releasing the detainee under article 60 (4) of the Statute if the detainee is detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. Nothing in

[104] Response to the Document in Support of the Appeal, para. 41.
[105] Response to the Document in Support of the Appeal, para. 42.
[106] Response to the Document in Support of the Appeal, para. 43.

the Impugned Decision suggests that the Pre-Trial Chamber misconceived the relationship between the two provisions or that the Pre-Trial Chamber did not release the Appellant pursuant to article 60 (4) of the Statute because the conditions for release under article 60 (2) of the Statute were not met. The Appeals Chamber agrees with the Prosecutor that the Impugned Decision contains two separate decisions, namely one on the basis of article 60 (2) and one on the basis of article 60 (4) of the Statute. This becomes apparent from the reasoning of the Impugned Decision: in the final paragraph of page 4 of the Impugned Decision, the Pre-Trial Chamber characterised the Request for Interim Release as the "first application for Thomas Lubanga Dyilo's interim release submitted by the Defence under article 60(2) of the Statute" and in the second paragraph of page 5 the Pre-Trial Chamber again referred to article 60 (2) of the Statute. In the following three paragraphs the Pre-Trial Chamber addressed the conditions of article 58 (1) of the Statute, to which article 60 (2) of the Statute refers. In the final paragraph on page 6 of the Impugned Decision, the Pre-Trial Chamber commenced its review of the reasonable time of detention prior to trial and although the Pre-Trial Chamber did not make reference to article 60 (4) of the Statute once again, it is clear that the Pre-Trial Chamber based that part of its decision on that provision.

121. The Appeals Chamber also sees no merit in the argument of the Appellant that the Pre-Trial Chamber in its consideration of article 60 (4) of the Statute should have taken into account the periods that the Appellant had spent in detention and house arrest in the Democratic Republic of the Congo. The Appeals Chamber has already noted in paragraph 42 of the "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" of 14 December 2006 (ICC-01/04-01/06-772; hereinafter: "Judgment on the Challenge to Jurisdiction") that the alleged crimes for which the Appellant had been held in detention in the Democratic Republic of the Congo prior to his surrender to the Court were separate and distinct from the alleged crimes that led to the issuance of the warrant for his arrest. There is no reason to depart from this finding in the present appeal. As noted by the Appeals Chamber in paragraph 44 of the Judgment on the Challenge to Jurisdiction, issues regarding prior detention are relevant where they are part of the "process of bringing the Appellant to justice for the crimes that form the subject-matter of the proceedings before the Court." As the Appellant's prior detention was not part of that process and was thus not part of the detention pursuant to the Warrant of Arrest issued by the Pre-Trial Chamber, there is no reason to take that period into account for the purpose of article 60 (4) of the Statute. For the same reason, the argument of the Appellant in relation to article 78 (2) of the Statute must fail.

Irrespective of whether or not that provision has any applicability in the present case, even the wording of article 78 (2) of the Statute does not support the argument: pursuant to the second sentence of the provision, "[t]he Court may deduct any time otherwise spent in detention in connection with *conduct underlying the crime*" (emphasis added).

122. The Appeals Chamber is not persuaded by the argument of the Appellant that the Pre-Trial Chamber erred in finding that the Appellant has not been detained for an unreasonable period prior to trial due to the inexcusable delay of the Prosecutor, if only the time spent in detention on the basis of the Warrant of Arrest is taken into account. The Appeals Chamber does not agree with the Appellant that his detention on the basis of the Warrant of Arrest since 16 March 2006 to the date of the Impugned Decision (seven months and three days) amounts to a period of detention prior to trial that is *per se* unreasonably long. The Appeals Chamber agrees with the finding of the Pre-Trial Chamber that the unreasonableness of any period of detention prior to trial cannot be determined in the abstract, but has to be determined on the basis of the circumstances of each case. The references by the Appellant to the drafting history of the Rome Statute and to the Rules of Procedure and Evidence of the ICTY are misguided. As the Prosecutor correctly notes, rule 40*bis* of the Rules of Procedure and Evidence of the ICTY as well as article 28 (2) of the draft Statute for an International Criminal Court of 1994 of the International Law Commission[107] refer to situations where a suspect is *provisionally* arrested prior to the issuance of a warrant of arrest on the basis of a confirmed indictment. In the present case the Appellant is detained on the basis of the Warrant of Arrest issued by the Pre-Trial Chamber, which had found in the Decision on the Warrant of Arrest that there were reasonable grounds to believe that the Appellant had committed crimes within the jurisdiction of the Court and that his arrest appeared necessary to ensure his presence at trial and to ensure that he does not obstruct or endanger the investigation or the court proceedings.

123. Nor is the Appeals Chamber persuaded by the argument of the Appellant that the Pre-Trial Chamber should not have taken into account the location and amount of evidence when determining the reasonableness of the period of detention because such factors would always be present in international criminal proceedings. This contention is unfounded. While it is likely that most of the cases that will come before the Court will tend to be complex, this alone does not mean that the complexity of the case, and in particular the amount and location of the evidence, cannot be taken into account when assessing the reasonableness of the period

[107] See *Yearbook of the International Law Commission, 1994*, vol. II (Part Two).

of detention pursuant to article 60 (4) of the Statute. The Appeals Chamber notes in this context the references by the Prosecutor to decisions of the ICTY and ICTR, where the complexity of the case was taken into consideration in respect of the reasonableness of the period of pre-trial detention.

124. As to the argument of the Appellant that the Pre-Trial Chamber failed to address properly the question of inexcusable delay of the Prosecutor, the Appeals Chamber notes that the reference in the Impugned Decision to the swiftness of action of the organs of the Court in the present case is open to misunderstanding. While taken by itself, the reference could be understood as a cursory discussion of the question of inexcusable delay, the context of the reference indicates that the swiftness of action was a consideration for the determination of the reasonableness of the pre-trial detention. Notably, in the paragraph following the reference to the swiftness of action, the Pre-Trial Chamber concluded that the period of detention of the Appellant cannot be considered unreasonable. Furthermore, in footnote 17 to the first paragraph on page 7 of the Impugned Decision the Pre-Trial Chamber referred to the judgment of the ECHR in the case of *Van der Tang v. Spain,* where the ECHR considered at paragraph 75 of that judgment that the swiftness of action of the judicial authorities is a factor for determining the reasonableness of pre-trial detention. Thus, it appears to be the proper reading of the Impugned Decision that the question of inexcusable delay was not addressed at all. This approach by the Pre-Trial Chamber is acceptable in the present case because after having determined that the period of detention was not unreasonable, the question of the inexcusable delay had become moot. Nevertheless, the Appeals Chamber reiterates in this context the need for clear reasoning and regrets that the Pre-Trial Chamber did not explain in more detail on what basis it reached the conclusion that all organs of the Court had acted swiftly.

C. Third ground of appeal: interim release under article 60 (2) of the Statute

125. As his third ground of appeal, the Appellant argues that the Pre-Trial Chamber should have granted interim release pursuant to article 60 (2) of the Statute.

1. Proceedings before the Pre-Trial Chamber and relevant part of the Impugned Decision

126. The Appellant did not make specific arguments in relation to articles 60 (2) and 58 (1) of the Statute in his Request for Interim Release except that he refers, in the abstract, to

certain criteria that apply in the ECHR[108] and in one paragraph[109] states that the fact that a person believes he or she has been illegally detained and wishes to challenge detention cannot be cited as a factor in determining that the person may wish to abscond, and that although the Prosecutor intends to charge the Appellant with serious violations of international humanitarian law, the ICTY Appeals Chamber has repeatedly held that even serious charges such as war crimes and crimes against humanity cannot in themselves justify pre-trial detention.

127. In the Prosecutor's Response to the Request for Interim Release, the Prosecutor submitted that the conditions for continued detention were still met. As to the reasonable grounds to believe that the Appellant had committed a crime (article 58 (1) (a) of the Statute), the Prosecutor argued that the Pre-Trial Chamber had determined in the Decision on the Warrant of Arrest that such grounds existed and that the situation had not changed since and noted that the Appellant had not made any submissions rebutting the findings of the Pre-Trial Chamber in that respect.[110] Similarly, the Prosecutor submitted with respect to article 58 (1) (b) of the Statute that the first two conditions of that provision continue to be met, noting that the Appellant did not make any factual submissions in relation to that provision.[111]

128. In the Victims' Response to Request for Interim Release, the victims noted that the Appellant did not explain why the conditions which justified the warrant of arrest were no longer met and emphasised the consequences to the victims of a possible provisional release.[112]

129. The Pre-Trial Chamber made the following finding in respect of article 60 (2) of the Statute:

> "CONSIDERING that article 60(2) of the Statute provides that '[a] person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.';
>
> CONSIDERING that under article 21(3) of the Statute, the application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights;

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[108] Request for Interim Release, paras. 41-43.
[109] Request for Interim Release, para. 46.
[110] Prosecutor's Response to Request for Interim Release, para. 10
[111] Prosecutor's Response to Request for Interim Release, paras 11-13.
[112] Victims' Response to Request for Interim Release, para. 11.

> CONSIDERING that the conditions set forth in article 58(1) of the Statute continue to be fulfilled in so far as there are still reasonable grounds to believe that Thomas Lubanga Dyilo has committed crimes within the jurisdiction of the Court and that his detention remains necessary to ensure his appearance at trial or does not obstruct or endanger the investigation or the court proceedings;
>
> CONSIDERING that, because of the gravity of the crimes with which Thomas Lubanga Dyilo is charged, there is a substantial risk that he may wish to abscond from the jurisdiction of the Court; that Thomas Lubanga Dyilo's main ties are in the Democratic Republic of the Congo; and that there are also reasonable grounds to believe that Mr Thomas Lubanga Dyilo has been the President of the UPC since it was founded on 15 September 2000, that at the beginning of or in mid-September 2002, Mr Thomas Lubanga Dyilo established the FPLC as the military wing of the UPC and that he immediately became its commander-in-chief which, in the circumstances, allowed him to establish numerous contacts nationally and internationally which would readily enable him to abscond from the jurisdiction of the Court;
>
> CONSIDERING also, that Thomas Lubanga Dyilo now knows the identities of certain witnesses; that the Prosecution states that if Thomas Lubanga Dyilo were to be released and were thus to be in a position to have completely unmonitored communications with the outside world, there would be a risk that he would, directly, or indirectly with the help of others, exert pressure on the witnesses, thus obstructing or endangering the court proceedings; and that it appears that some witnesses, who appeared at the trials of middle- or high-ranking UPC members before the *Tribunal de Grande Instance* of Bunia, have been killed or threatened" [113]

2. Arguments of the Appellant

130. In his Document in Support of the Appeal, the Appellant submits, first of all, that the Pre-Trial Chamber, in making its decision under article 60 (2) of the Statute, took into account irrelevant issues.[114] The Appellant argues that the Pre-Trial Chamber incorrectly considered that the gravity of the alleged crimes of the Appellant justified his continued detention.[115] He submits furthermore that the fact that the principal links of the Appellant remained in the Democratic Republic of the Congo should not have been taken into account by the Pre-Trial Chamber because the Appellant had sought release not to that country, but to Belgium or to the United Kingdom.[116] The Pre-Trial Chamber also should not have taken into account the international connections of the Appellant, as there had been no indication that he would use these connections.[117] Furthermore, the Appellant submits that the Pre-Trial Chamber should not have taken into account that the Appellant now knew of the identities of some of the

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[113] Impugned Decision, pp. 5-6; footnotes omitted.
[114] Document in Support of the Appeal, paras 54 et seq.
[115] Document in Support of the Appeal, para. 56
[116] Document in Support of the Appeal, para. 57.
[117] Document in Support of the Appeal, para. 58.

witnesses, as this was "completely unfair" to the Appellant because the Pre-Trial Chamber had placed him in the "position of having to choose between the right to a fair trial and the right to be provisionally released."[118] Finally, the Appellant argues that the Pre-Trial Chamber should have taken into account mitigating factors, in particular that the Appellant would have surrendered to the Court voluntarily, if he had had a chance to do so, and that he has been a model detainee at the Court's detention unit.[119]

131. Secondly, the Appellant submits that the Pre-Trial Chamber failed to take into account the principles of necessity and proportionality because it failed to consider whether or not there were less restrictive means to ensure the attendance of the Appellant at trial, arguing that article 60 (2) of the Statute gives the Pre-Trial Chamber the possibility of ordering the interim release of a detainee, with or without conditions.[120]

3. Arguments of the Prosecutor

132. The Prosecutor contests the arguments of the Appellant. He submits that the Pre-Trial Chamber did not abuse its discretion when it denied the application for interim release under article 60 (2) of the Statute and that the issue that is for the Appeals Chamber to determine is whether or not the Pre-Trial Chamber considered the relevant factors and accorded them appropriate weight.[121] The Prosecutor submits that appellate bodies in the review of discretionary decisions generally show deference to the exercise of discretion, and that an appellate body would not find an error merely because that body would have come to a different conclusion than the court of first instance, and that on that basis of this standard of review the exercise of discretion by the Pre-Trial Chamber in the Impugned Decision had not been erroneous.[122] As to the argument by the Appellant that the Pre-Trial Chamber should not have considered the gravity of the alleged crimes, the Prosecutor submits that the Pre-Trial Chamber merely considered the gravity of the crimes to be one of the factors which create a risk that the Appellant may wish to abscond and that there was no suggestion that the Pre-Trial Chamber considered the gravity of the crime in isolation.[123] As to the arguments that the Pre-Trial Chamber should not have considered the international connections of the Appellant, the Prosecutor submits that these were only factors that the Pre-Trial Chamber took into consideration and that all factors considered together led the Pre-Trial Chamber to determine

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[118] Document in Support of the Appeal, para. 59
[119] Document in Support of the Appeal, para. 60.
[120] Document in Support of the Appeal, paras 61-62.
[121] Response to the Document in Support of the Appeal, para. 44.
[122] Response to the Document in Support of the Appeal, paras 44-45
[123] Response to the Document in Support of the Appeal, paras 46-47.

that there was a risk of absconding.[124] Similarly, the Prosecutor submits that the Pre-Trial Chamber did not determine that there was a risk to witnesses if the Appellant were released merely because he now knew some of their identities, but that this was only one factor and that it was not the physical location of the Appellant that was the key issue, but his continued influence in the region.[125] As to the argument that the Pre-Trial Chamber should have taken into account that the Appellant would have appeared voluntarily, had he had an opportunity to do so, the Prosecutor submits that the Pre-Trial Chamber was right in not considering this factor because it was "extraneous, irrelevant and hypothetical".[126] The Prosecutor submits furthermore that the Appellant has failed to identify any discernible error in relation to the necessity and proportionality of the continued detention of the Appellant; he notes that pursuant to article 60 (2) of the Statute, the person *shall* continue to be detained.[127]

4. Determination by the Appeals Chamber

133. In relation to the third ground of appeal and for the reasons provided below, the Appeals Chamber determines that the Pre-Trial Chamber did not err in finding that the Appellant should continue to be detained pursuant to article 60 (2) read with article 58 (1) of the Statute.

134. At the outset, the Appeals Chamber deems it appropriate to clarify that the decision on continued detention or release pursuant to article 60 (2) read with article 58 (1) of the Statute is not of a discretionary nature. Depending upon whether or not the conditions of article 58 (1) of the Statute continue to be met, the detained person *shall* be continued to be detained or *shall* be released. Therefore, the Appeals Chamber is not persuaded by the submissions of the Prosecutor as to the purported discretionary character of the decision under article 60 (2) of the Statute.

135. The Appeals Chamber notes that the Pre-Trial Chamber in the Impugned Decision found that the continued detention of the Appellant appeared to be necessary for two reasons: first, the Pre-Trial Chamber found that the continued detention of the Appellant appeared necessary to ensure the appearance of the Appellant at trial. Second, the Pre-Trial Chamber found that the continued detention of the Appellant appeared necessary to prevent him from obstructing the proceedings of the court.

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[124] Response to the Document in Support of the Appeal, paras 49-50.
[125] Response to the Document in Support of the Appeal, paras 50-51.
[126] Response to the Document in Support of the Appeal, paras 52-53.
[127] Response to the Document in Support of the Appeal, para. 55.

136. In relation to the first reason for continued detention the Pre-Trial Chamber based its finding on the consideration that the Prosecutor intended to charge the Appellant with serious crimes, that his main ties remained in the Democratic Republic of the Congo, and that because of his international contacts he is readily able to abscond from the jurisdiction of the Court, if released. The Appeals Chamber notes that it would have been preferable for the Pre-Trial Chamber to explain in more detail why it reached its conclusion that the Appellant may abscond. Nevertheless, on the basis of the arguments raised by the Appellant on appeal the Appeals Chamber cannot discern any error on the part of the Pre-Trial Chamber. The Appeals Chamber is not persuaded by the argument of the Appellant that the Pre-Trial Chamber should not have taken into account the gravity of the crimes allegedly committed by the Appellant. As the Prosecutor correctly notes, the Pre-Trial Chamber did not take into account the gravity of the crimes in isolation but as part of its consideration that the Appellant might abscond. If a person is charged with grave crimes, the person might face a lengthy prison sentence, which may make the person more likely to abscond. Similarly, the Appeals Chamber is not persuaded by the argument that the Pre-Trial Chamber should not have taken into account that the main ties of the Appellant still are in the Democratic Republic of the Congo because the Appellant sought release not to that country but to the United Kingdom or to Belgium. The Request for Interim Release lacked any concrete information by the Appellant as to the modalities of his interim release. Against that background, there is no reason why the Pre-Trial Chamber should not have taken into account the main ties of the Appellant are in the Democratic Republic of the Congo because it is not inconceivable that he may wish to abscond to that country.

137. Furthermore, the Appeals Chamber is not persuaded by the argument of the Appellant that the Pre-Trial Chamber should not have taken into account the international contacts of the Appellant because there had been no evidence before that Chamber that the Appellant actually would make use of these contacts to abscond. The Appeals Chamber notes that any determination by a Pre-Trial Chamber of whether or not a suspect is likely to abscond necessarily involves an element of prediction. The Appeals Chamber notes furthermore that in paragraph 100 of the Decision on the Warrant of Arrest the Pre-Trial Chamber had noted publicly voiced concerns of the Appellant about the prospect of being prosecuted before the Court. In the second paragraph of page 2 of the Impugned Decision the Pre-Trial Chamber had made reference to the Decision on the Warrant of Arrest. Although it would have been preferable for the Pre-Trial Chamber to explain in more detail in the Impugned Decision itself why it came to the conclusion that the Appellant might abscond, it is clear that there was

sufficient information before the Pre-Trial Chamber that enabled the Pre-Trial Chamber to make an assessment that such a risk indeed existed.

138. Finally, the Appeals Chamber sees no merit in the argument of the Appellant that the Pre-Trial Chamber should have taken into account that the Appellant would have surrendered voluntarily to the Court, if only he had had an opportunity to do so. The Appeals Chamber agrees with the Prosecutor that there was no reason for the Pre-Trial Chamber to do so because his voluntary surrender is merely hypothetical. The Appeals Chamber notes in this context that in the *Stanisic* decision to which the Appellant refers, the ICTY Trial Chamber took into account the hypothetical voluntary surrender of the detainee on the basis of concrete evidence of an intention to surrender voluntarily.[128] The Appellant in the present case has not presented any such evidence.

139. The Pre-Trial Chamber considered that the continued detention also appeared necessary to ensure that the Appellant does not obstruct or endanger the investigations or the court proceedings (article 58 (1) (b) (ii) of the Statute), noting in particular that the Appellant now knew the identities of some of the witnesses and that there would be a risk that he would exert pressure on the witnesses. The Pre-Trial Chamber also recalled a finding it had made in paragraph 101 of the Decision on the Warrant of Arrest as to the endangerment of witnesses in Bunia. The Appeals Chamber notes that the reasoning in the Impugned Decision as to the potential endangerment of witnesses is scarce. However, as the reasons for detention pursuant to article 58 (1) (b) (i) to (iii) of the Statute are in the alternative, the question of whether or not the continued detention of the Appellant appears necessary under article 58 (1) (b) (ii) is ultimately not decisive for the present appeal because in any event and for the reasons explained above the Pre-Trial Chamber's finding as to the necessity of continued detention to ensure the presence of the appellant at trial justified the decision to deny release under article 60 (2) of the Statute. For that reason, the Appeals Chamber will not consider any further the arguments of the Appellant in relation to article 58 (1) (b) (ii) of the Statute.

140. The Appeals Chamber is not persuaded by the argument of the Appellant that the Pre-Trial Chamber failed to take into account the principle of necessity and proportionality when deciding that the Appellant should not be released under article 60 (2) of the Statute. As the Appeals Chamber has already explained above, it cannot discern any error in the conclusion of the Pre-Trial Chamber that the continued detention of the Appellant appears necessary to

[128] ICTY, Trial Chamber, "Decision on Provisional Release", *P v Stanisic*, 28 July 2004, paras 19-20.

ensure his appearance at trial. As the decision under article 60 (2) of the Statute is not of a discretionary nature, there was no reason for the Pre-Trial Chamber to make the principle of necessity and proportionality an independent consideration in its decision.

V. APPROPRIATE RELIEF

141. On an appeal pursuant to article 82 (1) (b) of the Statute the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). As the Appeals Chamber has found that the three grounds of appeal that have been raised by the Appellant are without merit, it is appropriate to confirm the Impugned Decision and to reject the appeal.

Judge Pikis appends a separate opinion to this Judgment; Judge Song appends a dissenting opinion regarding the participation of victims.

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

Judge Erkki Kourula
Presiding Judge

Dated this 13th day of February 2007

At The Hague, The Netherlands

Separate Opinion of Judge Georghios M. Pikis

1. While in agreement with the judgment delivered and the resolution of every issue considered therein, I deem it necessary to write a separate opinion in order to express my reasons in relation to the legal framework governing detention and release of the arrestee pending trial seen in the light of the provisions of article 21 (3) of the Statute.

2. Arrest under the Statute entails the detention of the arrestee during the criminal proceedings that follow in respect of which the arrest was authorized. The object of detention is first and foremost to ensure the appearance of the person before the Court regarded as necessary under the Statute for the due conduct of the judicial proceedings. The presence of the accused is judged essential at every stage of the proceedings and a prerequisite for the holding of the trial (article 63 (1) of the Statute). Although the confirmation hearing may in the circumstances specified in article 61 (2) of the Statute (see also rule 125 of the Rules of Procedure and Evidence) be held in the absence of the person against whom the charges are leveled, such course must in the nature of things be an exceptional one.

3. The arrest of a person is not intended as an aid to the investigation of a case but as a means of securing his/her appearance before the Court in proceedings sequential thereto.

4. To justify the arrest of a person the Prosecutor must produce before the Chamber such evidence, arising from his investigation, as is apt to provide "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court". The availability of evidential material establishing grounds leading to a reasonable belief that the arrestee committed a crime or crimes in accordance with article 58 (1) of the Statute is a *sine qua non* for the issuance of a warrant of arrest.

5. The founding of a valid cause for the detention of the person does not rest on reasonable suspicion, but on "grounds" founded on evidential material giving rise to a reasonable belief that a crime has been committed by the appellant (article 58 (2) of the Statute). Belief denotes mental acceptance of a statement, fact, doctrine, thing, etc., as true or existing,[1] whereas suspicion denotes a faint belief that something is the case.[2] In either case, the belief or suspicion must be reasonable, i.e. it must have an objective foundation. Belief imports a higher standard of acceptability of something compared to suspicion. What elevates

[1] Shorter Oxford Dictionary, Volume I A-M (Oxford University Press, 2002), page 213.
[2] Shorter Oxford Dictionary, Volume II N-Z (Oxford University Press, 2002), page 3128.

further the test of acceptability of an application for an arrest warrant under the Statute is that such belief must be founded on concrete facts cogent to the extent of creating a reasonable belief that the person committed the crimes for which his/her arrest is sought. That the investigation of the Prosecutor may continue after the arrest of a person does not qualify his obligation to produce before the Pre-Trial Chamber such evidential material as to reasonably justify the belief that the person committed the crimes attributed to him/her.

6. The existence of such grounds is not of itself conclusive for the issuance of a warrant of arrest. One or more of the causes identified in article 58 (1) (b) of the Statute must co-exist in order to justify the issue of such a warrant. Firstly, the need to ensure the appearance of the accused at the trial; secondly, the avoidance of the risk of the person obstructing or endangering the investigation or court proceedings; thirdly, the prevention of the person repeating crimes similar to the ones that form the subject of the application for the issue of an arrest warrant.

7. The issue of a warrant of arrest or a summons to appear paves the way for the commencement of judicial proceedings respecting the crimes the person is believed to have committed. In fact, the Pre-Trial Chamber that issues the warrant of arrest is required to hold a hearing to confirm the charges within "a reasonable time" after the person's appearance before the Court (article 61 (1) of the Statute). It may be repeated that the presence of the person is stipulated as necessary at the confirmation hearing and a prerequisite for the holding of the trial.

8. Article 60 of the Statute postulates a number of safeguards designed to ensure that the need for the detention of the person subsists after arrest; the pendency of the proceedings not being of itself conclusive. In the first place, as early as the arrestee arrives at the seat of the Court he/she must be brought before the Pre-Trial Chamber charged to inquire into the accusations against the person. Upon his/her appearance before the Court, the Pre-Trial Chamber must see that the person is apprised of his/her rights under the Statute, most importantly of the right to apply for interim release pending trial (article 60 (1) of the Statute). The record of the pre-trial proceedings in this case suggests that the Pre-Trial Chamber discharged this duty thoroughly, making it clear to Mr. Lubanga Dyilo that he had the right to apply for his interim release on that same day.[3] He did not seek his interim release then or at any time during the ensuing five months. An inconclusive application as to its object made by

[3] Transcript of the hearing of 20 March 2006 (ICC-01-04-01-06-T-3-EN), page 7.

Mr. Lubanga Dyilo on 23 May 2006,[4] was adjusted, when requested[5] by the Pre-Trial Chamber to define its object, as a challenge[6] to the jurisdiction of the Court to take cognizance of the case against him, acceptance of which would, of course, result in his release. The outcome of the application is mirrored in the judgment of the Appeals Chamber in appeal 01/04-01/06 OA4.[7]

9. The legal framework within which proceedings for interim release may be raised and the principles governing the exercise of the powers of the Pre-Trial Chamber on this matter are articulated in the provisions of article 60 (2) of the Statute. Unlike a motion for interim release that may be made orally on the first appearance of the detainee before the Pre-Trial Chamber, any subsequent application to that end must be made in writing in accordance with the provisions of rule 118 (3) of the Rules of Procedure and Evidence. Mr. Lubanga Dyilo made such an application[8] on 20 September 2006, the determination[9] of which by the Pre-Trial Chamber is the subject-matter of the appeal proceedings[10].

10. The criteria set down in article 60 (2) of the Statute for determining the need for the continued detention of the arrestee are the same as those laid down in article 58 (1) of the Statute. The difference between the two provisions of the Statute (articles 60 (2) and 58 (1)) lies in the change of the time perspective from which justification and necessity of the detention are to be judged. The Pre-Trial Chamber must decide whether the conditions set down in article 58 (1) of the Statute essential for the justification of the detention of the person exist at the time of consideration of an application for interim release.

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[4] *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo* "Application for Release" 23 May 2006 (ICC-01/04-01/06-121)

[5] *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).

[6] *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).

[7] *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo* "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defecne Challenge to the Jurisdiction of the Court pursuant to article 19 (2) of the Statute of 3 October 2006" 14 December 2006 (ICC-01/04-01/06-772)

[8] *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v Thomas Lubanga Dyilo* "Request for further information regarding the confirmation hearing and for appropriate relief to safeguard the rights of the Defence and Thomas Lubanga Dyilo" 20 September 2006 (ICC-01/04-01/06-452).

[9] *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo* "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo" 18 October 2006 (ICC-01/04-01/06) hereinafter "Appealed decision".

[10] *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v Thomas Lubanga Dyilo* "Defence Appeal Against 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'" 20 October 2006 (ICC-01/04-01/06-594).

11. The Pre-Trial Chamber concluded in the decision under appeal that the detention of the appellant was both justified and necessary by reference to the criteria set out in article 58 (1) and the data before the Chamber at the time the decision was taken.[11]

12. The appellant complains that the decision under review is flawed because the Pre-Trial Chamber heeded facts irrelevant to the subject of the inquiry, whereas it omitted to pay due heed to facts relevant thereto.[12] Neither aspect of this ground of appeal was substantiated, for the reasons indicated in the judgment delivered, a position with which I associate myself.

13. Another complaint of the appellant, the one upon which great emphasis was laid, is that the Pre-Trial Chamber misconstrued the provisions of article 60 (3) insofar as it ruled that the review contemplated therein is confined to a prior decision on the propriety of the continued detention of the arrestee in face of changed circumstances and not to any other decision entailing his incarceration, such as the decision authorizing his arrest.[13] In his submission, a duty is cast upon the Pre-Trial Chamber to review on its own motion within the time frame specified in rule 118 (2) of the Rules of Procedure and Evidence (120 days) any decision authorizing the detention of the person.

14. The interpretation of article 60 (3) of the Statute is the key to the resolution of the issue in question. Article 60 (3) reads as follows:

> The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

15. The guide to the interpretation of the Statute is the language used to convey what is intended that the statutory provision should embody (see also article 31 of the Vienna Convention on the Interpretation of Treaties (23 May 1969)[14] and the judgment of the Appeals Chamber in the case 01/04 OA3[15]). The word "review" to which the provisions of article 60 (3) of the Statute are anchored signifies the revisitation of a subject previously

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[11] Appealed decision, page 6.
[12] *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo* "Defence Appeal Against the 'Décision sur la demande de mise en liberté de Thomas Lubanga Dyilo'" 26 October 2006 (ICC-01/04-01/06-618) hereinafter "document in support of the appeal", paragraphs 54 to 62.
[13] See document in support of the appeal, paragraphs 8 to 17.
[14] 1155 United Nations Treaty Series 18232, signed on 23 May 1969 and entered into force on 27 January 1980.
[15] *Situation in the Democratic Republic of the Congo* "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" 13 July 2006 (ICC-01/04-168), paragraph 33.

visited. What is the subject to be revisited? The answer is "a ruling on the release or detention of the person". A question of interim release can only arise if the subject is in detention. The decision pertaining to the issue of a warrant of arrest revolves around the necessity to constrain the freedom of a person, whereas the release of a person from custody signifies the opposite, i.e. freedom from constraint; necessarily the antecedent detention of a person is the subject of any proceeding for his/her interim release. The submission of the appellant cannot be reconciled with the grammatical construction of article 60 (3) of the Statute. The context, where the paragraph dealing with the matter under examination notably paragraph 3 is encountered, is article 60 of the Statute, intended to provide safeguards against the unjustified prolongation of the detention of the person arrested. Hence, provision is made for the person's interim release in a proper case. The word "ruling" in a judicial context has a settled meaning. It denotes "the outcome of a court's decision either on some point of law or on the case as a whole"[16]. It is synonymous with a judicial decision.[17] In this case, there was no prior ruling on the possible release of Mr. Lubanga Dyilo from custody. From whatever angle article 60 (3) of the Statute is seen, the inescapable conclusion is that it refers to the review of a previous decision bearing on the justification of the continuation of the detention of the person in custody.

16. Article 21 (3) of the Statute ordains the application and interpretation of every provision of the Statute in a manner consistent with internationally recognized human rights. Internationally recognized human rights in this area, as may be distilled from the Universal Declaration of Human Rights[18] and international[19] and regional[20] treaties and conventions on

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[16] *Garner B A* , Black's Law Dictionary, 7th Edition, (West Group, St. Paul Minnesota 1999), page 1334.
[17] See also paragraph 85 of the judgment delivered.
[18] Adopted and proclaimed by the United Nations General Assembly Resolution 217 A (III) of 10 December 1948, Article 9 reads: "No one shall be subjected to arbitrary arrest, detention or exile."
[19] Article 9 of the *International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A (XXI), U.N. Document A/6316 (1966) entered into force 23 March 1976, 999 United Nations Treaty Series 171, reads: "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5 Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."
[20] Article 5 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950), 213 United Nations Treaty Series 221 et seq., registration no. 2889, reads: "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in

human rights, acknowledge a right to an arrested person to have access to a court of law vested with jurisdiction to adjudicate upon the lawfulness and justification of his/her detention. Such a right is afforded to the arrestee from the outset. Detention can only be sanctioned on the authority of a judicial warrant in accordance with the provisions of article 58 (1) of the Statute. Moreover, a right is bestowed on the detainee to question the need for the continuation of his/her detention at any time thereafter with no limitation as to the number of times that he/she may invoke the jurisdiction of the Court for this purpose (see articles 60 (2) and 60 (3) of the Statute).

17. Article 60 (3) of the Statute adds an additional safeguard to the armoury of the law for the protection of a right of a person not to be exposed to unjustified prolongation of his/her detention. The Pre-Trial Chamber is required, in the circumstances earlier elicited, to assume on its own motion the task of reviewing an earlier ruling denying the release of a person. Far from detracting from the internationally recognized human rights of the detainee, article 60

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accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him. 3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

Article 6 of the *African Charter on Human and Peoples' Rights*, signed on 27 June 1981, entered into force on 21 October 1986, 1520 United Nations Treaty Series 26363, reads: "Each individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

The American Convention on Human Rights, "Pact of San José, Costa Rica", signed on 22 November 1969, entered into force on 18 July 1978, 1144 United Nations Treaty Series 17955, provides in article 7: "1. Everyone has the right to personal liberty and security. 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. 3. No one shall be subject to arbitrary arrest or imprisonment. 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him. 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial. 6 Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. [...] The interested party or another person in his behalf is entitled to seek these remedies." 7. [..].

(3) of the Statute requires the Court to keep under surveillance the justification of the further detention of the arrestee.

18. I espouse the view that the subject of the review contemplated in article 60 (3) is a prior decision of the Court ruling on the release of the arrestee from custody given under the provisions of the preceding paragraph of article 60 of the Statute, notably paragraph 2.

19. Article 60 (4) of the Statute casts a duty upon the Court to ensure that detention of a person is not prolonged for an unreasonable period prior to trial owing to inexcusable delay on the part of the Prosecutor in taking the steps necessary to bring him/her to trial. This is a free-standing provision, designed to ensure that the judicial process is not protracted and sequentially detention of the person is not extended because of unjustified delays on the part of the Prosecutor. The appellant contended that the Pre-Trial Chamber subordinated paragraph 4 to paragraph 2 of article 60,[21] an unsubstantiated proposition, as indicated in the judgment delivered.

20. If delay on the part of the Prosecutor is identified, power is acknowledged to the Chamber to release the arrestee subject to conditions or unconditionally. In light of the finding of the Pre-Trial Chamber upheld by this court that there was no delay, it is unnecessary to probe further the issue of the powers of the Chamber under article 60 (4) of the Statute.

21. The Pre-Trial Chamber determined there was no delay in the conduct of the proceedings and inferentially none on the part of the Prosecutor in advancing the case before the Court. I agree that the ground of appeal relating to this aspect of the case is ill-founded.

22. Paragraph (4) of article 60 of the Statute must, like every provision of article 60, be interpreted and applied according to the tenor and in the spirit of internationally recognized human rights bearing on the timeliness of the conduct of judicial proceedings. Ensuring that a person is tried within a reasonable time is a paramount duty of the Court. Delay in the proceedings cannot be at the expense of the detainee. In addition to the duty cast upon the Pre-Trial Chamber under paragraph 3, paragraph 4 of article 60 of the Statute enjoins the Chamber to keep pre-trial proceedings under survey with a view to warding off delays in the progress of the case before the Court to the detriment of the rights of the detainee. It may be

[21] Document in support of the appeal, paragraphs 18 to 22.

reminded that the Appeals Chamber had occasion to examine the requisites of a fair trial and the implications of any derailment therefrom in the case 01/04-01/06 OA4[22].

23. The provisions of the Statute relevant to the detention of a person prosecuted, pre-trial detention in particular, viewed as a whole, give expression to internationally recognized human rights bearing on the judicial process. They ensure that detention may only be ordered by a judicial authority and then solely for a valid cause, namely the existence of grounds, founded on evidence gathered by the Prosecutor, giving rise to a reasonable belief that a crime within the jurisdiction of the Court has been committed by the person subject to arrest. Moreover, it must be necessary for the purposes signified in article 58 (1) (b) of the Statute. On the first appearance of the person before the Court, the arrestee is assured a right to contest the justification of the warrant of arrest and sequentially his/her detention. The rights acknowledged to the person detained and the processes established by the Statute for a review of the lawfulness and justification of the deprivation of liberty at every stage of pre-trial detention accord with and give effect to internationally recognized human rights for the protection of the person against unlawful and unjustified detention. Lastly, a right to compensation vests in a detainee, who is the victim of unlawful arrest or detention, in the circumstances and manner envisaged by article 85 of the Statute.

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

Judge Georghios M. Pikis

Dated this 13th day of February 2007

At The Hague, The Netherlands

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[22] *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v Thomas Lubanga Dyilo* "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) of the Statute of 3 October 2006" 14 December 2006 (ICC-01/04-01/06-772).

Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims

1. For the following reasons, I respectfully disagree with the view of the majority of the Appeals Chamber that is expressed in today's "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'" (hereinafter: "Judgment") regarding the scheme of participation of victims in appeals brought under article 82 (1) (b) of the Statute. I also disagree with the reasons for which the majority of the Appeals Chamber rejected the "Réponse des victims a/0001/06, a/0002/06 et a/0003/06 à l'appel de la Défense concernant la Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo" of 16 November 2006 (ICC-01/04-01/06-704; hereinafter: "Victims' Response") in the decision of the Appeals Chamber of 12 December 2006 (ICC-01/04-01/06-769; hereinafter: "Decision of 12 December"); nevertheless, I agree with the rejection of the Victims' Reponse. I am in full agreement with the remainder of the Judgment.

2. The majority of the Appeals Chamber is of the view that in appeals proceedings pursuant to article 82 (1) (b) of the Statute participation of victims who have participated in the proceedings that gave rise to the appeal is dependent upon an application by these victims and on subsequent authorisation by the Appeals Chamber (see paragraphs 38 et seq. of the Judgment). On that basis, the majority authorised victims to participate in the present appeal (see the third decision on page 3 of the Decision of 12 December). In my view, the approach of the majority is not warranted by the relevant provisions of the Statute, the Rules of Procedure and Evidence and the Regulations of the Court and leads to unnecessary procedural steps that are bound to slow down the appellate process.

3. In my view, no application by the victims is necessary to file a response to the document in support of the appeal in appeals proceedings pursuant to article 82 (1) (b) of the Statute, provided that the victims in question have participated in the proceedings that gave rise to the appeal. This results from regulation 64 (4) and (5) of the Regulations of the Court, pursuant to which participants may file a response to the document in support of the appeal within five days of the notification of that document. There is no reason why the word "participant" in these provisions should not include *all* participants to the proceedings that gave rise to the appeal, including victims.

4. That victims may file a response to the document in support of the appeal without prior authorisation is further supported by regulation 86 (8) of the Regulations of the Court, which provides that decisions on the participation of victims shall apply throughout the proceedings

in the same case. An appeal under article 82 (1) (b) of the Statute is an extension of the proceedings before the Pre-Trial Chamber regarding interim release and therefore it is appropriate to qualify the appeal as being the "same case" in the sense of regulation 86 (8) of the Regulations of the Court. For that reason, the Appeals Chamber should not overturn lightly a decision of the Pre-Trial Chamber regarding the appropriateness of victims' participation in relation to proceedings on interim release or even rule on the issue again without good reason to do so.

5. I am not persuaded by the majority's interpretation of regulation 86 (8) of the Regulations of the Court, which "reads regulation 86 (8) to be confined to the stage of the proceedings before the Chamber taking the decision referred to in the text of the regulation" (paragraph 43 of the Judgment). This reading renders regulation 86 (8) of the Regulations of the Court superfluous because it states the obvious: the decision of a Chamber is applicable throughout the proceedings before the same Chamber unless and until it is modified.

6. Nor am I convinced by the majority's reasoning that the Appeals Chamber cannot be bound by the Pre-Trial Chamber's determination that the participation of victims is appropriate (paragraph 43 of the Judgment). An appeal pursuant to article 82 (1) (b) of the Statute addresses issues arising from proceedings before the Pre-Trial Chamber. Therefore, the assumption of regulation 86 (8) of the Regulations of the Court that decisions on victims' participation taken by the Pre-Trial Chamber also apply to appellate proceedings is justified and logical. Clearly, if the Appeals Chamber considers that in specific appeals, the participation of victims would be inappropriate, it could issue an order to that effect. This is expressly acknowledged by regulation 86 (8) of the Regulations of the Court, which is "subject to the powers of the relevant Chamber in accordance with rule 91, sub-rule 1." Furthermore, any participation of victims that would go beyond the filing of a response pursuant to regulation 64 (4) and (5) of the Regulations of the Court would require prior authorisation by the Appeals Chamber.

7. I am not convinced by the opinion of the majority of the Appeals Chamber that a separate application by victims to participate in the appeal and a decision by the Appeals Chamber thereupon is necessary because article 68 (3) of the Statute "mandates a specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration" (paragraph 40 of the Judgment). I note that article 68 (3) of the Statute provides that the *Court* shall permit the participation of victims. The word "Court" does not necessarily refer solely to the Appeals Chamber, acting in

a particular interlocutory appeal. In the present context, I read the word "Court" to include the plenary of the Judges of this Court. Pursuant to article 52 (1) of the Statute read with rule 4 of the Rules of Procedure and Evidence, the plenary of the Judges has a mandate to adopt Regulations of the Court "necessary for its routine functioning". The regulation of the participation of victims when a case moves from one Chamber to another Chamber squarely falls within this mandate. Thus, the plenary of the Judges of this Court, by adopting regulation 64 (4) and (5), determined how victims who have participated in the proceedings that gave rise to the impugned decision may participate appropriately in interlocutory appeals: they may file a response, as may any other participant. The majority ignores this decision of the plenary of the Judges.

8. Regulation 64 (4) and (5) of the Regulations of the Court not only saves time and resources of the Court. It also is fully consistent with the wording and spirit of article 68 (3) of the Statute. The personal interests of the victims are necessarily affected if they have participated in the proceedings before the Pre-Trial Chamber in relation to interim release, arguing that the detainee should not be released, and the resulting decision denying release subsequently is appealed: on appeal, the decision of the Pre-Trial Chamber could be reversed, leading to the release of the detainee. Therefore, it is appropriate that the victims submit their views and concerns to the Appeals Chamber by way of filing of a response to the document in support of the appeal.

9. As to the present case, the Appeals Chamber should have rejected the Victims' Response because it was filed outside of the time limit stipulated by regulation 64 (5) of the Regulations of the Court. The Victims did not advance any reasons as to why they were in breach of this time limit.

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

Judge Sang-Hyun Song

Dated this 13th day of February 2007

At The Hague, The Netherlands