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No.: ICC-01/04-01/06
Date: 27 November 2006

THE APPEALS CHAMBER

Before: Judge Georgios M. Pikis, Presiding Judge
Judge Philippe Kirsch
Judge Navi Pillay
Judge Sang-Hyun Song
Judge Erkki Kourula

Registrar: Mr Bruno Cathala

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

Public Document

**Defence Reply to the Observations of the Government of the Democratic Republic
of Congo**

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor
Mr. Ekkehard Withopf, Senior Trial
Lawyer

Counsel for the Defence

Mr. Jean Flamme
Ms. Véronique Pandanzyla

**Counsel for the Victims a/0001/06 to
a/003/06**

Mr. Luc Walley, Mr. Franck Mulenda

Introduction

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

Submissions:

4. As a preliminary observation, the Defence submits that the deadlines imposed for filing submissions has – both in relation to the proceedings before the Pre-Trial Chamber and in the current appellate proceedings – enabled the DRC authorities to mould their legal submissions to concur with the positions adopted by the Prosecutor. In light of the fact that the Defence's application for release is predicated on the wrongful collaboration between the DRC authorities and the ICC Prosecutor, the Defence submits that any concurrence between the two is self-serving. As such, no weight should be accorded to the concurrence between the legal views of the DRC and those of the Prosecutor.
5. The Defence further refers to the fact that the submissions of the DRC were formulated by the Auditor General of the DRC Military Court: the same national entity which was responsible for the wrongful acts which form the subject of the Defence's complaints. In this connection, the Defence submits that it is extremely significant that at no point in time have the authorities of the DRC contested the allegations that Thomas Lubanga Dyilo was deprived of the right to promptly challenge his continued detention before an independent and impartial body, that there was extensive collaboration between the ICC OTP and the DRC authorities in relation to the proceedings against Thomas Lubanga Dyilo, that the conditions of detention in Kinshasa were egregious, or – given the complete lack of evidence against Thomas

Lubanga Dyilo - that the purpose of his continued detention was to facilitate his eventual transfer to the ICC.

6. The Defence is of the view that their silence on these key points amounts to an admission.¹

Relief Sought:

7. The Defence respectfully requests the Honourable Appeals Chamber to:
 - reject the legal submissions of the Government of the DRC; and
 - draw the appropriate inferences from the DRC government's silence on the factual allegations set out the Defence's Appeal Brief of 26 October 2006.

¹ See for example the case of Orhan v. Turkey, Judgement of ECHR: "It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations[...]" Application no. 25656/94) Final judgement 6 November 2002 [available on HUDOC].



Mr. Jean Flamme, Defence Counsel for Thomas Lubanga Dyilo

Dated this 27th day of November 2006

At The Hague