

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-01/04-01/07**

Date: **17 August 2009**

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

***IN THE CASE OF
THE PROSECUTOR
v. Germain KATANGA and Mathieu NGUDJOLO CHUI***

PUBLIC

Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp

**Prosecution Response to Defence motion for a declaration on unlawful detention and
stay of proceedings**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Counsel for the Defence of Germain Katanga
Mr David Hooper

Counsel for the Defence of Mathieu Ngudjolo Chui
Mr Jean-Pierre Kilenda Kakengi Basila

Legal Representatives of Victims

Ms Carine Bapita Buyangandu
Mr Hervé Diakiese
Mr Vincent Lurquin
Mr Jean Chrysostome Mulamba Nsokoloni
Ms Flora Mbuyu Anjelani
Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Mr Jean-Louis Gilissen
Mr Joseph Keta

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Other Section

I. Introduction

1. The Defence requests that the Chamber make a declaration on the unlawfulness of the detention of Germain Katanga (“Accused”) by the authorities of the Democratic Republic of the Congo (“DRC authorities”) from 26 February 2005 until his transfer to the ICC on 18 October 2007, and order a stay or termination of the proceedings against the Accused due to “abuse of process”.¹ The Defence requests a declaration by the Chamber that the Accused can never be tried for the crimes with which he is charged before this Court and, by implication, for the other crimes that constituted the basis for his arrest and detention by the DRC authorities.²
2. The Defence Motion refers to three different phases during which the Accused alleges that his rights have been violated. The first phase concerns the period from his arrest by the DRC authorities on 26 February 2005 until the announcement by the Prosecution of a second investigation related to the situation in the DRC in November 2005. The second phase is from November 2005 until the issuance by Pre-Trial Chamber I of the warrant of arrest against him on 2 July 2007. The third phase reaches from 2 July 2007 until the transfer of the Accused to the Court on 18 October 2007.
3. For the purposes of this response, the Prosecution will divide the relevant time frame into two periods. The first period stretches from the arrest of the Accused by the DRC authorities on 26 February 2005 until the transmission by the Registry to the DRC authorities of the Court’s request for arrest and surrender of the Accused on 18 September 2007 (“First Period”). The second period extends from 18 September 2007 – the date this Court notified a formal request to the DRC for the Accused’s arrest and surrender – until the transfer of the Accused to the Court on 18 October 2007 (“Second Period”).
4. The Accused’s detention during the First Period cannot be attributed to the Court and cannot affect the jurisdiction of this Court. In the *Lubanga* case, where the accused had also been detained by the DRC authorities before the Court issued its warrant of arrest, the Appeals Chamber found that issues regarding his prior detention were relevant only where they were part of the “process of bringing the accused to justice for crimes that form the subject-matter of the proceedings before the Court”.³ “[I]t is only in relation to [the

¹ Defence Motion, paras. 121-131.

² The Defence has previously indicated that it opposes trial against the Accused in this Court and, if released, it will also challenge, on human rights grounds, any trial against the Accused in the DRC. ICC-01/04-01/07-T-65-ENG, 1 June 2009, p. 117, lines 16-21.

³ ICC-01/04-01/06-772 OA4, 14 December 2006, para. 44; see also ICC-01/04-01/06-824 OA7, 13 February 2007, para. 121.

process conducted before this Court] that breaches of the rights of the suspect or the accused may provide grounds for halting the process.”⁴

5. In addition, there is no evidence to support allegations of “concerted action” between the Prosecutor and the DRC authorities to detain Lubanga in order to ensure that he would be in custody and available for surrender to the Court.⁵ The Appeals Chamber affirmed, explaining that “[m]ere knowledge on the part of the Prosecutor of investigations carried out by the Congolese authorities is no proof of involvement on his part in the way they were conducted or the means including detention used for the purpose.”⁶ The DRC authorities expressly confirmed that the Accused had not been kept in detention for facts related to Bogoro.⁷
6. The Second Period of detention of the Accused by the DRC authorities dates from the time the Court transmitted to the DRC authorities a formal request for the Accused’s arrest and surrender. The detention based on the ICC’s request for surrender lasted approximately one month. It is attributable to the Court. However, this period of detention and the subsequent procedure of surrender of the Accused to the Court were legally and factually unblemished.
7. Finally, the Defence does not substantiate that the Accused suffered torture or any other serious form of mistreatment which could have the consequence that this Court cannot properly proceed against him. A stay of proceedings is the most exceptional of remedies, to be applied only in cases where it is impossible to secure a fair trial of the Accused.⁸
8. The Prosecution submits that, for the reasons stated below, the Defence Motion should be dismissed in its entirety.

II. Relevant Factual Background

9. On 25 June 2007, the Prosecution filed an application for a warrant of arrest for Germain Katanga.⁹
10. On 2 July 2007, Pre-Trial Chamber I issued a warrant for the arrest of the Accused.¹⁰ [REDACTED].¹¹

⁴ ICC-01/04-01/06-772 OA4, 14 December 2006, para. 44. See also ICC-01/04-01/06-824 OA7, 13 February 2007, para. 121.

⁵ ICC-01/04-01/06-512, 3 October 2006, pp. 6-9.

⁶ ICC-01/04-01/06-772 OA4, 14 December 2006, para. 42.

⁷ ICC-01/04-01/07-T-65-ENG, 1 June 2009, p. 86, lines 1-5. ICC-01/04-01/07-1189-Anx-tENG, 16 July 2009, p. 5. See also ICC-01/04-01/07-T-65-ENG, 1 June 2009, p. 85, lines 10-14, p. 91, lines 20-24; p. 93, lines 14-25.

⁸ ICC-01/04-01/06-772 OA4, 14 December 2006, Para. 39.

⁹ ICC-01/04-348-US-Exp and ICC-01/04-350-US-Exp.

11. [REDACTED].¹²

12. [REDACTED].¹³

13. [REDACTED].¹⁴

14. On 17 October 2007, the Accused was taken from the *Centre Pénitentiaire et de Rééducation de Kinshasa*, where he had been detained, and brought before the competent DRC judicial authorities.¹⁵ The DRC authorities determined that he was the person named in the warrant,¹⁶ notified the Accused of the warrant of arrest,¹⁷ and read out the charges against him.¹⁸ During this process, he was assisted by his Counsel.¹⁹ On the same date, the Accused was medically examined by a doctor designated by the Court, who certified that the Accused was fit to travel.²⁰

15. On 18 October 2007, the Accused was transferred to the Court's detention centre in The Hague,²¹ where he was subjected to a medical examination.²² He was then visited by staff of the Court, who gave him a file containing the Court's basic legal documents, including a certified copy of the warrant of arrest,²³ and read him his rights pursuant to Regulation 186 of the Regulations of the Registry.²⁴

16. On 20 and 22 October 2007, *ad hoc* counsel appointed by the Court met with the Accused in the detention centre.²⁵

¹⁰ ICC-01/04-01/07-1.

¹¹ ICC-01/-4-01/07-2-Conf, 2 July 2007, pp. 4 and 7. Pursuant to Decision ICC-01/04-01/07-211, dated 20 February 2008, this document is reclassified as confidential.

¹² ICC-01/04-01/07-497-Conf-Exp 22 May 2008, paras. 3, 4 and 6.

¹³ ICC-01/04-01/07-497-Conf-Exp 22 May 2008, para. 8.

¹⁴ ICC-01/04-01/07-497-Conf-Exp 22 May 2008, para. 12. See also ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, Annex 3.6.

¹⁵ ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, pp. 2-3 (on 14 December 2007, this document was reclassified as public); ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, Annex 3.7; ICC-01-04-01-07-T-5-ENG, 22 October 2007, p. 19, lines 11-12 and 15-21.

¹⁶ ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, Annex 3.7.

¹⁷ ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, pp. 2-3. On 14 December 2007, this document was reclassified as public.

¹⁸ ICC-01-04-01-07-T-5-ENG, 22 October 2007, p. 19, lines 11-12 and 15-21.

¹⁹ ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, p. 3; see also ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, Annex 3.3. See further submissions of Mr. Keita during the initial appearance of the Accused that confirm that the Accused was able to consult with his lawyer already during the morning of 17 September 2007 (ICC-01-04-01-07-T-5-ENG, 22 October 2007, p. 19, lines 13-15).

²⁰ ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, p. 3. See also Annex 4 thereto. See further allegation by the Defence to the contrary: Defence Motion, para. 36.

²¹ ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, pp. 3-4..

²² ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, p. 4. See also ICC-01-04-01-07-T-5-ENG, 22 October 2007, p. 20, lines 22-23.

²³ See ICC-01/04-01/07-44-Anx, indicating, among other that the Accused has been provided with document ICC-01/04-01/07-1.

²⁴ ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, p. 4. See also Annex 7, and ICC-01-04-01-07-T-5-ENG, 22 October 2007, p. 21, lines 1-3.

²⁵ ICC-01-04-01-07-T-5-ENG, 22 October 2007, p. 21, lines 3-10.

17. On 22 October 2007, the Accused appeared before Pre-Trial Chamber I.²⁶ During the Accused's initial appearance, the Registry and the *ad hoc* counsel made submissions regarding the Accused's arrest and transfer.
18. The confirmation hearing in the case against the Accused was held from 27 June to 16 July 2008,²⁷ and on 26 September 2008, Pre-Trial Chamber I confirmed the charges against the Accused.²⁸
19. On 16 June 2009, the Chamber dismissed a Defence challenge to the admissibility of the case against the Accused.²⁹
20. On 30 June 2009, the Defence filed the "Defence motion for a declaration on unlawful detention and stay of proceedings" ("Defence Motion").³⁰

III. Argument

1. Relevant Legal Framework

a) The doctrine of abuse of process and stay of the proceedings

21. In its decision on the similar motion by Lubanga's Defence, the Appeals Chamber held that:

"The power to stay proceedings for abuse of process, as indicated, is not generally recognised as an indispensable power of a court of law, an inseparable attribute of the judicial power. The conclusion to which the Appeals Chamber is driven is that the Statute does not provide for stay of proceedings for abuse of process as such."³¹
22. In light of article 21(3) of the Statute, the Appeals Chamber nevertheless found that

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

²⁶ ICC-01-04-01-07-T-5-ENG, 22 October 2007.

²⁷ ICC-01/04-01/07-T-38-ENG CT (27 June 2008); ICC-01/04-01/07-T-39-ENG CT (30 June 2008); ICC-01/04-01/07-T-40-ENG ET (2 July 2008); ICC-01/04-01/07-T-41 -ENG ET (2 July 2008); ICC-01/04-01/07-T-42-ENG ET (3 July 2008); ICC-01/04-01/07-T-43-ENG ET (4 July 2008); ICC-01/04-01/07-T-44-ENG ET (7 July 2008); ICC-01/04-01/07-T-45-ENG ET (9 July 2008); ICC-01/04-01/07-T-46-ENG ET (11 July 2008); ICC-01/04-01/07-T-48-ENG CT (14 July 2008); ICC-01/04-01/07-T-49-ENG ET (15 July 2008); ICC-01/04-01/07-T-50-ENG ET (16 July 2008).

²⁸ ICC-01/04-01/07-716-Conf.

²⁹ ICC-01/04-01/07-1213.

³⁰ ICC-01/04-01/07-1258-Conf-Exp. On 2 July 2009, the Defence filed a "Public Redacted Version of the Defence motion for a declaration on unlawful detention and stay of proceedings (ICC-01/04-01/07-1258-Conf-Exp)".

³¹ ICC-01/04-01/06-772 OA4, 14 December 2006, para. 35.

sustain the efficacy of the judicial process as the potent agent of justice.”³² The Appeals Chamber has specified that the violation of the law or breach of the rights of the Accused must exceed a very high threshold of gravity: “[n]ot every infraction of the law or breach of the rights of the accused in the process of bringing him/her to justice will justify stay of proceedings. The illegal conduct must be such as to make it otiose, repugnant to the rule of law to put the accused on trial.”³³ As a consequence, the “power of a court of law to stay proceedings should be sparingly exercised”.³⁴

23. The Appeals Chamber thus emphasized that the remedy of a stay applies only – a) where “either the foundation of the prosecution or the bringing of the accused to justice is tainted with illegal action or gross violation of the rights of the individual making it unacceptable for justice to embark on its course;”³⁵ b) “[w]here the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed”;³⁶ or c) “[i]f, at the outset, it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process”.³⁷

b) Relevance of detention by national authorities to the proceedings before the Court

24. The Appeals Chamber also has ruled that issues regarding prior detention are relevant only where they are part of the “process of bringing the accused to justice for crimes that form the subject-matter of the proceedings before the Court”.³⁸ The ICC does not sit as a court of appeal reviewing detention in the national system:³⁹ “it is only in relation to [the process conducted before this Court] that breaches of the rights of the suspect or the accused may provide grounds for halting the process”.⁴⁰
25. According to the Appeals Chamber, a stay of the proceedings may be imposed if an accused has been “illegally detained and ill-treated by the [national] authorities and [...] the Prosecutor had illegally colluded with these authorities, in contravention of the rights

³² ICC-01/04-01/06-772 OA4, 14 December 2006, para. 39.

³³ ICC-01/04-01/06-772 OA4, 14 December 2006, para. 30.

³⁴ ICC-01/04-01/06-772 OA4, 14 December 2006, para. 31.

³⁵ ICC-01/04-01/06-772 OA4, 14 December 2006, para. 31.

³⁶ ICC-01/04-01/06-772 OA4, 14 December 2006, para. 39.

³⁷ ICC-01/04-01/06-1486 OA13, 21 October 2008, Paras. 76.

³⁸ ICC-01/04-01/06-772 OA4, 14 December 2006, para. 44; see also ICC-01/04-01/06-824 OA7, 13 February 2007, para. 121. According to the established practice before this Court, detention by national authorities prior to the transfer of an Accused to the Court is also not relevant for the purposes of Article 60(4); see ICC-01/04-01/07-330, p. 11; see also ICC-01/04-01/07-426.

³⁹ See para. 70 below.

⁴⁰ ICC-01/04-01/06-772 OA4, 14 December 2006, para. 44. See also ICC-01/04-01/06-824 OA7, 13 February 2007, para. 121.

of the [accused]”.⁴¹ While torture or serious mistreatment of the suspect that is “in some way related to the process of arrest and transfer of the person” to the Court might – if sufficiently outrageous – justify the non-assumption of the jurisdiction in any given case, the mere detention by national authorities has no bearing on the issue of abuse of process.⁴² A Trial Chamber of the ICTY has recently found that “it could only be in exceptional circumstances that actions of a third party that is completely unconnected to the Tribunal or the proceedings could ever lead to those proceedings being stayed. Where an accused is seriously mistreated by such a third party, that mistreatment is unlikely to be a barrier to a fair trial which can be secured in various other ways, for example, by excluding any evidence obtained by torture at the hands of the third party”.⁴³

c) The jurisprudence adduced by the Defence does not support the Defence Motion

26. The jurisprudence quoted by the Defence does not support its arguments. To the contrary, an analysis of the factual basis of the cases relied upon in the Defence Motion and the conclusions drawn by the respective courts in those cases corroborates that a stay of proceedings based on abuse of process is the most exceptional of remedies. It also shows that any abuse must be related to the process of bringing a person to justice for crimes that form the subject-matter of the proceedings for which a stay is sought.
27. The facts and arguments advanced by the Defence in the *Lubanga* case are similar to those found in the Defence Motion.⁴⁴ In *Lubanga*, the accused had been detained by the DRC authorities over a period of almost 11 months prior to the issuance by the Court of a warrant of arrest against him.⁴⁵ The defence argued that the detention was unlawful, the treatment abusive, and the Prosecution complicit in the actions by the DRC authorities, which the accused further claimed were intended to facilitate his unimpeded arrest and

⁴¹ ICC-01/04-01/06-1486 OA13, 21 October 2008, para. 79 (emphasis added). See also Lord Bridge in *Bennet v. Horseferry Road Magistrates' Court*, House of Lords, 24 June 1993, 3 All ER (All England Law Reports), p. 155 (quoted by the Appeals Chamber in ICC-01/04-01/06-772 OA4, 14 December 2006, para. 29).

⁴² ICC-01/04-01/06-512, 3 October 2006, p. 10. See also ICC-01/04-01/07-772 OA4, 14 December 2006, paras. 10 and 43.

⁴³ *Prosecutor v. Karadzic*, IT-95-5/18-PT, Decision on the Accused's Holbrooke Agreement Motion, 8 July 2009, para. 85.

⁴⁴ Defence Motion, paras. 123-124 and 129.

⁴⁵ ICC-01/04-01/06-772 OA4, 14 December 2006, para. 5. Lubanga was arrested by the DRC authorities on 19 March 2005 (see ICC-01/04-520-Anx2, 10 February 2006, para. 33). An arrest warrant against Lubanga was issued by Pre-Trial Chamber I on 10 February 2006 (ICC-01/04-01/06-2). The request for the arrest and surrender of the accused has been transmitted to the DRC authorities on [REDACTED] (ICC-01/04-01/06-9-US).

surrender to this Court under the warrant issued by the Court.⁴⁶ The Pre-Trial Chamber found no evidence to support allegations of “concerted action” between the Prosecutor and the DRC authorities to detain Lubanga in order to ensure that he would be available for surrender to the Court.⁴⁷ The Appeals Chamber affirmed, explaining that “[m]ere knowledge on the part of the Prosecutor of investigations carried out by the Congolese authorities is no proof of involvement on his part in the way they were conducted or the means including detention used for the purpose.”⁴⁸ The Appeals Chamber further emphasized that “the crimes for which Mr. Lubanga [...] was detained by the Congolese authorities were separate and distinct from those which led to the issuance of the warrant for his arrest”.⁴⁹ Accordingly, the Appeals Chamber dismissed Lubanga’s motion to halt the proceedings.⁵⁰

28. This rationale is consistent with the decisions of other international tribunals. For example, in the *Nikolic* case,⁵¹ the ICTY Trial Chamber found that Nikolic was illegally seized and abducted from the territory of Federal Republic of Yugoslavia (FRY) and transferred to the Stabilisation Force (SFOR), and ultimately to the ICTY. The Trial Chamber further found that neither SFOR nor the Prosecution were involved in these acts. It ruled that, despite the abduction and the level of violence allegedly used against *Nikolic*, there was no egregious violation of Nikolic's rights or the fundamental principle of due process of law sufficient to require that he not be tried.⁵² The Appeals Chamber held that jurisdiction would not have been set aside even if the conduct of *Nikolic's* captors had been attributed to SFOR and, by extension, to the Prosecution.⁵³
29. In the case against *Barayagwiza*,⁵⁴ it was found that the accused spent over a year and a half in detention in Cameroon at the behest of the ICTR Prosecutor, who repeatedly requested the Cameroonian authorities to provisionally arrest and detain him.⁵⁵ He was shown a copy of the charges against him only after having been detained for almost five

⁴⁶ Ibid, para. 6.

⁴⁷ ICC-01/04-01/06-512, 3 October 2006, pp. 6-9.

⁴⁸ ICC-01/04-01/06-772 OA4, 14 December 2006, para. 42.

⁴⁹ Ibid.

⁵⁰ ICC-01/04-01/06-772 OA4, 14 December 2006, paras. 43-44. The Appeals Chamber came to this conclusion having considered a number of national authorities referred to in the Defence Motion (see Supreme Court of South Africa in *State v. Ebrahim*, Decision of 26 February 1991 [1991] 2 SA 553 (Defence Motion, para. 126 and Lubanga Appeals Decision, para. 29); English Court of Appeal in *Huang v Secretary of State*, [2005] 3 All ER 435 (Defence Motion, para. 130, Lubanga Appeals Decision, para. 39)).

⁵¹ See Defence Motion, para. 123.

⁵² *Prosecutor v. Nikolic*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Case No. IT-94-2PT, 9 October 2002, paras. 114 and 116.

⁵³ Ibid, paras. 18 and 33.

⁵⁴ See Defence Motion, para. 123; see also paras. 79, 86, 91 and 105.

⁵⁵ *Prosecutor v. Barayagwiza*, Appeals Chamber Decision of 3 November 1999, paras. 5-7.

months.⁵⁶ Moreover, after his transfer to the ICTR, he was not brought before a judge until over three months later.⁵⁷ Its finding of direct and persistent involvement of the Prosecutor and the failure of the ICTR to afford appropriate protections persuaded the Appeals Chamber of the ICTR that (a) the fundamental rights of the accused had been egregiously and repeatedly violated, and (b) the Prosecutor's failure to diligently act was tantamount to negligence.⁵⁸ It concluded that under these circumstances an invocation of the abuse of process doctrine was justified.⁵⁹ However, the Appeals Chamber reviewed and reversed itself, a significant event overlooked by the Defence. In the second *Barayagwiza* decision, the Appeals Chamber found that "new facts diminished the role played by the failings of the Prosecutor as well as the intensity of the violations of the rights of the [accused]". It concluded that in light of these new facts a stay of the proceedings was "disproportionate in relation to the events",⁶⁰ and ordered that the accused be tried and remain in detention.⁶¹

30. Finally, in the case against "*Duch*",⁶² the defence argued that the case before the Extraordinary Chamber in the Courts of Cambodia (ECCC) was a continuation of the case before the Military Court ("MC") that held the accused in detention since 10 May 1999, since the Investigating Judge of the MC terminated the proceedings against the accused in favour of the ECCC.⁶³ The Trial Chamber found that any violations of the rights of the accused could not be attributed to the ECCC, among other things because there was no evidence that the ECCC judicial authorities were involved in the accused's court file before the MC, and in particular that they influenced the decision concerning the detention of the accused.⁶⁴ Although the Trial Chamber of the ECCC found that the prior detention of the accused by the MC was in violation of Cambodian domestic law and of internationally recognized principles of fair trial,⁶⁵ it declined to find an abuse of process

⁵⁶ Ibid, para. 98.

⁵⁷ Ibid, para. 9.

⁵⁸ Ibid, para. 106.

⁵⁹ Ibid, paras. 100-101.

⁶⁰ *Prosecutor v. Barayagwiza*, Appeals Chamber Decision on Prosecutor's Request for Review or Reconsideration, 31 March 2000, paras. 71 and 74.

⁶¹ Ibid, para. 75.

⁶² *Kaing Guek Eav alias "Duch"*, Case N° 001/18-07-2007/ECCC/TC, Decision on Request for Release, of 15 June 2009, cited in Defence Motion, para. 121.

⁶³ Ibid, paras. 9 and 13.

⁶⁴ Ibid, para. 14.

⁶⁵ Ibid, para. 21.

and to release the accused, as the said violations were not attributable to the ECCC and did not amount to torture or serious mistreatment.⁶⁶

2. The detention of the Accused by the DRC authorities does not require a stay of the proceedings or any other remedy

31. The Prosecution submits that during the First Period of detention (i.e. up until 18 September 2007), the detention of the Accused by the DRC authorities is unrelated to the process of bringing the Accused to justice for crimes that form the subject-matter of the proceedings before the Court. The First Period detention is therefore irrelevant for the purposes of the proceedings before this Court. In addition, statutorily, the Prosecution did not owe the Accused any duty of care during that period.
32. The Second Period of Detention is attributable to the Court. However this period of detention, as well as the following procedure of surrender of the Accused to the Court, were both legally and factually unblemished.
33. The Defence did not substantiate any of the allegations that the Accused has been subject to torture or serious mistreatment tantamount to an abuse of process sufficient to warrant a stay or termination of the proceedings.

1. The First Period of Detention of the Accused by the DRC authorities (26 February 2005 until 18 September 2007)

a) Detention by the DRC authorities was unrelated to the process of bringing the Accused to justice for crimes that form the subject-matter of the proceedings before the Court

34. Detention of the Accused by the DRC authorities from 26 February 2005 onwards was unrelated to the process which led to the issuance of a warrant of arrest by the Court. The Defence concedes that “[t]he killing of nine MONUC peacekeepers constituted the reason for the initial arrest of the accused”.⁶⁷ Any further detention of the Accused by the DRC authorities was also not based on the crimes for which the Accused has been charged before the Court nor related to the process of bringing him to trial before the Court. The DRC authorities expressly confirmed that “[t]he Bogoro case has not been the subject of

⁶⁶ Ibid, paras. 33-34.

⁶⁷ Defence Motion, para. 11. See also submission of DRC authorities: ICC-01/04-01/07-T-65-ENG, 1 June 2009, p. 85, lines 4-7.

any proceedings opened in the DRC [...] and the Congolese judicial authorities have to date taken no procedural step of any kind in regard to it”.⁶⁸ On this basis, *inter alia*, this Chamber has concluded that there is no conclusive evidence demonstrating that the judicial authorities of the DRC were conducting an investigation into the facts charged in the pending case before this Court.⁶⁹

b) Until its request for arrest and surrender was served on the DRC authorities, the Court was not involved in the detention of the Accused by the DRC authorities

35. The heart of the Defence argument is that the First Period of detention somehow can be attributed to the Prosecution or this Court, which must be accountable for any abuse that may have occurred during that detention. This argument is wrong factually and legally. Factually, the Prosecution or any other organ of the Court was not involved in the Accused’s arrest and detention by the DRC authorities prior to the transmission by the Registrar of the Court’s request for his arrest and surrender. As a matter of law, absent receipt by a national authority of a request for provisional arrest or for arrest and surrender, no detention by national authorities can be imputed to the Court unless there is clear and unequivocal evidence of concerted action or collusion.⁷⁰

36. As the Appeals Chamber has held, mere knowledge on the part of the Prosecution of investigations carried out by the DRC authorities is not proof of involvement in their conduct or their detention of the Accused.⁷¹ Likewise, knowledge of the DRC authorities of the fact that the Prosecution is carrying out investigations cannot by itself suggest the existence of concerted action between the two.

37. The facts here do not suggest that the Accused was held by the DRC authorities to enable his transfer to the ICC. In its extension of provisional detention on 10 April 2007, DRC authorities did indicate that after a period of 60 days they would consider the release of the Accused, and thereafter they did not order his release.⁷² But that does not reflect an

⁶⁸ ICC-01/04-01/07-1189-Anx-tENG, 16 July 2009, p. 5. See also ICC-01/04-01/07-T-65-ENG, 1 June 2009, p. 85, lines 10-14, p. 91, lines 20-24; p. 93, lines 14-25.

⁶⁹ ICC-01/04-01/07-1213, 16 June 2009, paras. 70-71.

⁷⁰ See Articles 59 and 92. See para. **Error! Reference source not found.** below.

⁷¹ ICC-01/04-01/06-772 OA4, 14 December 2006, para. 42. ICC-01/04-01/06-772 OA4, 13 February 2007, para. 121.

⁷² See Defence Motion, Annex K1; see also ICC-01/04-01/07-420-Conf-AnxA, 21 April 2008, paras. 9 and 89.

effort to assist the Prosecution; the Prosecution notes that other persons held with the Accused by the DRC authorities continue to be detained at this date.⁷³

38. Nor did the Prosecution influence the continued detention of the Accused from July through 18 September 2007. [REDACTED].⁷⁴
39. [REDACTED].⁷⁵ [REDACTED].⁷⁶ [REDACTED].⁷⁷
40. Accordingly, the Registry's request for arrest and surrender, filed in the Court records on 6 July 2007,⁷⁸ [REDACTED].⁷⁹
41. While seemingly conceding that the DRC detention before 18 September was not attributable to the Court, the Defence complains in the alternative that the Court was obliged to speedily transmit the request for surrender. The Court has no duty under the Statute or the Rules to transmit a request for arrest and surrender without delay.⁸⁰ To the contrary, the Statute envisages a process of consultation with the requested State to facilitate successful implementation of a request for cooperation under Part IX. Article 87(4) provides that "[i]n relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families". In this sense, it may be legitimate for the Court to time the transmission of a request for arrest and surrender by taking into consideration the concerns of the DRC authority that transmission of the request could adversely affect safety and the success of the DDR operation.
42. The timing by the Court of the transfer of the request for arrest and surrender did not violate any rights of the Accused, and it did not cause any prejudice to him. The Accused was already in custody independent of the process before the Court. There is no indication that the DRC authorities would have released him within those last few weeks.
43. Equally, as argued below, the Accused did not have a right to be charged by and surrendered to the Court at the earliest opportunity.⁸¹ The existing pre-condition of the Accused, i.e. detention by the DRC authorities, and whether this was in violation of the

⁷³ The DRC authorities recently indicated that the proceedings against the co-accused are still ongoing (ICC-01/04-01/07-1007, 30 March 2009, Annex I, para. 4).

⁷⁴ ICC-01/-4-01/07-2-Conf, 2 July 2007, pp. 4 and 7. Pursuant to Decision ICC-01/04-01/07-211, dated 20 February 2008, this document is reclassified as confidential.

⁷⁵ ICC-01/04-01/07-497-Conf-Exp 22 May 2008, paras. 1-2.

⁷⁶ ICC-01/04-01/07-497-Conf-Exp 22 May 2008, paras. 3, 4 and 6.

⁷⁷ ICC-01/04-01/07-497-Conf-Exp 22 May 2008, para. 4.

⁷⁸ ICC-01/04-01/07-6.

⁷⁹ ICC-01/04-01/07-497-Conf-Exp 22 May 2008, para. 8.

⁸⁰ [REDACTED].

⁸¹ See para. 48 below.

Accused's rights, is a different question that must be separated from the issue of the timing of the transfer of the request.

44. Contrary to the Defence arguments, Article 59 and Rule 117 do not require a different conclusion.⁸² First, these provisions only apply after a request for arrest and surrender has been transmitted to national authorities. When the requested State receives the request, certain obligations of that State and this Court are triggered. Until the triggering event occurs there is no duty under either provision.⁸³ Second, under Article 59(2), national authorities have a duty to determine whether the rights of the person named in the warrant of arrest were respected during the execution of that warrant.⁸⁴ Article 59(2) does not impose a further obligation on national authorities, or on the ICC, to review the legality of any previous detention of the person for national criminal proceedings that are unrelated to the process before the Court.⁸⁵ The Appeals Chamber has ruled that the Court's role is confined to reviewing the degree of compliance by national authorities with the terms of Article 92.⁸⁶
45. As a result of the above, the detention of the Accused by the DRC authorities from 26 February 2005 up until the notification to the DRC authorities of the request for arrest and surrender on 18 September 2007 is not attributable to the Court. It was a result of a national arrest warrant and the Court was not involved in that detention.

⁸² Defence Motion, paras. 81, 104-105.

⁸³ The Defence appears to concede this, by stating that as a consequence of the delay by the Registry of the transmission of the request for arrest and surrender, "the accused was deprived of the protection of Article 59 of the Statute and Rule 117 of the Rules of Procedure and Evidence" (Defence Motion, para. 110).

⁸⁴ ICC-01/04-01/06-512, 3 October 2006, p. 6.

⁸⁵ Ibid, p. 6. See for example the description of the elements of the review under Article 59(2) in Schlunck, "Article 59 – Arrest proceedings in the custodial State" in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999), pp. 767-768 – stating that "The arrest proceedings are governed by the law of the custodial State. Article 59 does not tackle the criteria of proper process. Basically it means that the warrant be duly served of the person arrested" and referring to "the suspect's right to be informed about the charges and the grounds for the detention."

⁸⁶ ICC-01/04-01/06-772 OA4, 14 December 2006, para. 41. See also para. 68 below. The analogy proposed by the Defence in this context to Rule 40bis and to the *Barayagwiza* decision of the ICTR is misplaced (see Defence Motion, para. 105). Rule 140bis of the Rules of Procedure and Evidence of the ICTR refers to the procedure for transfer of a person to the ICTR, who has been provisionally detained by national authorities following a request by the ICTR to that effect. In fact, *Jean-Bosco Barayagwiza* was detained by the authorities of Cameroon at the behest of the Prosecutor of the ICTR, who repeatedly requested the Cameroonian authorities to provisionally arrest *Mr. Barayagwiza* pursuant to ICTR Rule 40 (see *Prosecutor v. Barayagwiza*, Appeals Chamber Decision of 3 November 1999, paras. 5 and 7).

c) The Prosecution and the Court did not owe the Accused a duty of care while detained by the DRC authorities

46. The Defence suggests that the Prosecution owed the Accused a duty of care that obligated it to ameliorate the circumstances of his detention by the DRC authorities. It contends that had the Prosecution properly respected this duty, it would have requested the Accused's surrender much earlier and/or informed the Pre-Trial Chamber of the conditions under which the Accused was being detained by national authorities. The Prosecution's failure to take either of these steps, the Defence finally argues, contributed to the abuse of the Accused's rights and requires a remedy from this Court.⁸⁷
47. The Prosecution had no duty of care to the Accused while detained by the DRC authorities prior to the transmission to the DRC authorities of the request for arrest and surrender.⁸⁸ The Defence misconstrues the Prosecutor's duty under Article 54(1)(c) to "fully respect the rights of the persons arising under the Statute". In particular, the Defence misinterprets the right of an accused under Article 67(1)(c) to be tried without undue delay. The rights under Article 67, including the right to be tried without undue delay apply to a person against whom charges have been confirmed,⁸⁹ as well as to a "person subject to a warrant of arrest or a summons to appear".⁹⁰ However, these rights do not extend to a person who is not subject to an enforceable warrant of arrest or a summons to appear (i.e. a warrant or a summons that has been issued by a Chamber and transmitted to national authorities and/or served on the person).
48. Contrary to the contention of the Defence, the Prosecution was not obliged to seek a warrant of arrest at the very earliest moment that the Accused became a principle suspect.⁹¹ The Prosecution has multiple statutory duties. Under Article 54(1)(a) it is obliged to "establish the truth" and to "extend the investigations to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under [the] Statute, and, in doing so, investigate incriminating and exonerating circumstances equally". It also has a duty to respect the safety and wellbeing of witnesses and victims.⁹² And the Prosecution has a duty not to proceed against a person, with the attendant consequences on the person's liberty and other important interests, unless and until there

⁸⁷ Defence Motion, paras. 81-85.

⁸⁸ See Defence Motion, paras. 81-100.

⁸⁹ Article 67(1).

⁹⁰ Rule 121(1).

⁹¹ Defence Motion, para. 90.

⁹² Article 54(1)(b).

are reasonable grounds to believe that the person is guilty of a crime within the jurisdiction of the Court. Additionally, investigations of complex cases, far from the seat of the Court, and in regions of instability and risk, take time and cannot be concluded as soon as the Prosecution has identified the person that appears to bear responsibility for the investigated crimes.

49. Article 58 does not set any deadline for the Prosecution for an application for a warrant of arrest. Article 58(1) only states that the Prosecution may apply for a warrant of arrest and the Pre-Trial Chamber may issue such a warrant “[a]t any time after the initiation of an investigation”.⁹³ Nor does it set a benchmark requiring that a warrant be issued “as soon” as the Prosecution has uncovered evidence of individual criminal responsibility.
50. In this instance, the Prosecution at all times acted expeditiously and with due diligence. The Prosecutor did not “sit back until he was ready”, as suggested by the Defence,⁹⁴ but he also did not act prematurely. The Prosecution instead investigated thoroughly and applied for an arrest warrant when it was confident that it could establish reasonable grounds to believe that the Accused committed the crimes for which he was charged.⁹⁵
51. Further, in the absence of indications that the Accused was subject to torture or serious mistreatment during his prior detention⁹⁶, it is irrelevant whether the Prosecution was in possession of information that suggested that the Accused may have been detained contrary to national law or internationally recognized standards for arrest and detention.⁹⁷ Moreover, unless the previous detention of the Accused by the DRC authorities was part of the process of bringing him to justice for the crimes which form the subject-matter of proceedings before this Court, the Statute does not vest the Prosecution, or the Court as a whole, with authority to assess whether such detention was in compliance with the applicable legal standards.⁹⁸

⁹³ Pre-Trial Chamber I has found that “neither article 58(1) nor article 58(7) of the Statute require the Prosecution to request the issuance of an arrest warrant or a summons to appear whenever there is reasonable grounds to believe that a person is criminally liable under the Statute” (ICC-02/05-185, 4 February 2009, para. 14).

⁹⁴ Defence Motion, paras. 91-92. The Defence draws once again an improper analogy to the Barayagwiza case, where the Prosecutor had requested the authorities to provisionally detain the accused, but it then failed to take appropriate action to secure the transfer of the accused to the ICTR (*Prosecutor v. Barayagwiza*, Appeals Chamber Decision of 3 November 1999, paras. 5-9).

⁹⁵ Article 58(1)(a). In any event, as found by the US Supreme Court, to prosecute a defendant following investigative delay does not deprive the defendant of due process (see *US v. Eugene Lovasco, Sr.*, 9 June 1977, 431 U.S. 783, 97 S.Ct. 2044).

⁹⁶ See para. 25 above.

⁹⁷ Defence Motion, paras. 84-85.

⁹⁸ See paras. 70-73 below.

52. The Prosecution does also not have a duty to inform the relevant Chamber of the Court of issues pertaining to the fact and the conditions of detention by national authorities.⁹⁹ Such information would be irrelevant for the Chamber's exercise of its functions.¹⁰⁰ The requirements for the issuance of a warrant of arrest are exhaustively listed in Article 58(1). If these requirements are met, then the issuance of a warrant of arrest is mandatory.¹⁰¹

2. The Second Period of detention of the Accused by the DRC authorities (18 September 2007 until 18 October 2007)

53. The Second Period of detention extends to only one month and followed the transmission to the DRC authorities of the request for arrest and surrender. Because that period is part of the process of bringing the Accused to justice for crimes that form the subject-matter of the proceedings before the Court, it is attributable to the Court.¹⁰² This Second Period as well as the procedure for surrender of the Accused to the Court were legally and factually unblemished.

a) The Second Period of detention is not a continuation of the First Period of detention

54. Contrary to the contention of the Defence,¹⁰³ the detention of the Accused by the DRC authorities that followed from the notification by the Court of the request for arrest and surrender is not a continuation of the prior detention of the Accused. The fact that the former detention was tied to a national investigation and ordered by national authorities, without participation or influence by this Court, should end the inquiry. But even if the First and Second Periods could somehow be linked in theory, the facts demonstrate that they are separate events:

- (i) The Second Period of detention is based on a request for arrest and surrender made by the Court and served upon the DRC authorities. The surrender is based on this Court's arrest warrant. The First Period of detention is based solely on decisions by the DRC authorities to arrest and detain the Accused.¹⁰⁴

⁹⁹ Defence Motion, paras. 94-100.

¹⁰⁰ The only exception concerns information that is relevant for the purpose of the admissibility of a case (ICC-01/04-169 OA, 13 July 2006, para.48; see also ICC-02/05-185, 4 February 2009, para. 25). However, none of the information that the Defence claims should have been communicated to the Chamber concerns that issue.

¹⁰¹ ICC-01/04-169 OA, 13 July 2006, paras. 42-44.

¹⁰² To this extent, the Prosecution agrees with the Defence that not everything that « goes on before an accused is in The Hague is of no relevance » (Defence Motion, para. 82).

¹⁰³ Defence Motion, paras. 101-108; see also paras. 5, 92 and 127(3).

¹⁰⁴ See paras. 34 and 41 above.

(ii) The arrest warrant underlying the Second Period is based on the Accused's alleged responsibility for the crimes committed in the context of an attack on Bogoro, while the arrest and investigations underlying the First Period of detention are based on separate and distinct facts.¹⁰⁵

(iii) The Court was involved in the Accused's detention during the Second Period, while it was not involved in his detention during the First Period.¹⁰⁶

55. Finally, the Defence submits that the prior detention of the Accused can or should be attributed to the Court because the Court benefitted from it.¹⁰⁷ The argument appears to be that but for the prior detention, the Accused would not have been surrendered. This too is both factually incorrect and legally irrelevant. Factually, the Prosecution notes that the DRC authorities were willing and able to deliver Mathieu Ngudjolo, even though he was at liberty when the Court transmitted to the DRC authorities a request for his arrest and surrender.¹⁰⁸ Thus, there is no support for the suggestion that the Accused would not similarly have been arrested and surrendered had he not already been in custody. The suggestion is also legally irrelevant. The Court was not involved in the prior detention and cannot be made a participant after-the-fact in the circumstances of that earlier detention.

b) The Second Period of detention and the procedure for the Accused's surrender to the ICC were legally and factually unblemished.

56. Apart from a complaint about the length of detention – one month – the Defence does not allege that the Accused's rights were violated during the Second Period. It does claim, however, that his rights were violated during the process of his surrender to the Court.

57. At the outset, the Prosecution questions the factual basis for the Accused's claim. The record regarding the surrender of the Accused to the Court consists of statements made and information provided to the Court by other participants to the proceedings, such as the Registry and *ad hoc* counsel of the Accused during the initial appearance on 22 October 2007.¹⁰⁹ The allegations by the Defence that the Accused's rights were violated during this period are at odds with this record.¹¹⁰

¹⁰⁵ See para. 34 above.

¹⁰⁶ See paras. 35-45 and 53 above.

¹⁰⁷ Defence Motion, para. 202.

¹⁰⁸ ICC-01/04-01/07-717, para. 45.

¹⁰⁹ ICC-01-04-01-07-T-5-ENG, 22 October 2007.

¹¹⁰ Defence Motion, paras. 34-39.

58. The Prosecution also questions the Defence suggestion that one month is an unreasonable period of time for the requested State to independently ascertain the lawfulness and sufficiency of the request. That period is consistent with the surrender of other persons to this Court and it is significantly shorter than most national systems require for extradition. The request for the arrest and surrender of Thomas Lubanga, for example, was transmitted to the DRC authorities on [REDACTED].¹¹¹ He was transferred to the Court's detention centre in The Hague on 17 March 2006.¹¹² A request for the surrender of Jean-Pierre Bemba was sent to the Kingdom of Belgium on [REDACTED].¹¹³ The accused was transferred to the Court's detention centre on 3 July 2008.¹¹⁴
59. Because the period of delay is reasonable, there is no need to consider whether excessive delay could deprive the Court of jurisdiction over the Accused. Moreover, the Prosecution submits that a failure by a national authority to act promptly cannot deprive this Court of the ability to prosecute.¹¹⁵ Such an interpretation would enable a State to effectively shield a person from justice, by delaying their surrender.
60. In the present case, as the record reflects, the domestic procedures complied with Article 59(2) and were carried out with the respect of the rights of the Accused.¹¹⁶ [REDACTED].¹¹⁷ On 17 October 2007, the Accused was brought before the competent judicial authorities. Those authorities determined that the Accused was the person sought,¹¹⁸ notified him of the warrant of arrest,¹¹⁹ and read out the charges against him.¹²⁰ During this process, he was assisted by his Counsel.¹²¹ On the same date, the Accused was medically examined by a doctor designated by the Court, who certified that the

¹¹¹ ICC-01/04-01/06-9-US.

¹¹² ICC-CPI-20060302-125.

¹¹³ ICC-01/05-15-US-Exp.

¹¹⁴ ICC-CPI-20080703-PR335.

¹¹⁵ In *Prosecutor v. Nikolic*, the ICTY rejected the claim that a deprivation of rights during the surrender of the Accused deprived the Court of jurisdiction. In that case the defendants was illegally arrested – indeed, abducted – and forcibly transferred to SFOR authorities. The Court concluded that the Accused's rights had not been so "egregiously violated" as to deprive the Court of jurisdiction (see *Prosecutor v. Nikolic*, IT-94-2-AR-73, Decision on Interlocutory Appeal Concerning Legality of Arrest of 5 June 2003, para. 32).

¹¹⁶ See ICC-01/04-01/06-772 OA4, 14 December 2006, para. 41.

¹¹⁷ ICC-01/04-01/07-497-Conf-Exp 22 May 2008, para. 12. See also ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, Annex 3.6.

¹¹⁸ ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, Annex 3.7.

¹¹⁹ ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, pp. 2-3. On 14 December 2007, this document was reclassified as public.

¹²⁰ ICC-01-04-01-07-T-5-ENG, 22 October 2007, p. 19, lines 11-12 and 15-21. See allegations by the Defence to the contrary: Defence Motion, para. 34.

¹²¹ ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, p. 3; see also ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, Annex 3.3. See further submissions of Mr. Keita during the initial appearance of the Accused that confirm that the Accused was able to consult with his lawyer already during the morning of 17 September 2007 (ICC-01-04-01-07-T-5-ENG, 22 October 2007, p. 19, lines 13-15).

See allegation by the Defence to the contrary: Defence Motion, para. 34.

Accused was fit to travel.¹²² On 18 October 2007, the Accused was transferred to the detention centre in The Hague.¹²³ At the detention centre, the Accused was immediately subjected to a medical examination.¹²⁴ He was then visited by staff of the Court, who handed to him a file containing the Court's basic legal documents, including a certified copy of the warrant of arrest,¹²⁵ and who read to him his rights pursuant to Regulation 186 of the Regulations of the Registry.¹²⁶ On 20 October 2007, the Accused met for four hours with Court-provided counsel. On 22 October, the Accused and counsel met for another two hours prior to the initial appearance of the Accused before the Court.¹²⁷

61. Thus, the period of detention and the processes described above were appropriate and compliant with the Statute, Rules and the Regulations.

3. The Defence did not substantiate any allegation of torture or serious mistreatment

62. According to the Appeals Chamber, a stay of proceedings may be imposed if an accused has been "illegally detained and ill-treated by the [national] authorities and [...] the Prosecutor had illegally colluded with these authorities, in contravention of the rights of the [accused]".¹²⁸ While torture or serious mistreatment of the suspect that is "in some way related to the process of arrest and transfer of the person" to the Court may justify the non-assumption of the jurisdiction, mere detention by national authorities has no bearing on the issue of abuse of process.¹²⁹

63. The Defence alleges that the "length and the extent of the unlawful detention" of the Accused by the DRC authorities amounts to "serious mistreatment".¹³⁰ In particular, the Defence claims that the Accused was unlawfully detained by the DRC authorities,¹³¹

¹²² ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, p. 3. See also Annex 4 thereto. See further allegation by the Defence to the contrary: Defence Motion, para. 36.

¹²³ ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, pp. 3-4.

¹²⁴ ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, p. 4. See also ICC-01-04-01-07-T-5-ENG, 22 October 2007, p. 20, lines 22-23. See allegation by the Defence to the contrary: Defence Motion, para. 39.

¹²⁵ See ICC-01/04-01/07-44-Anx, indicating, among other that the Accused has been provided with document ICC-01/04-01/07-1.

¹²⁶ ICC-01/04-01/07-40-Conf-Exp, 22 October 2007, p. 4. See also Annex 7, and ICC-01-04-01-07-T-5-ENG, 22 October 2007, p. 21, lines 1-3. See further allegation by the Defence to the contrary: Defence Motion, para. 39.

¹²⁷ ICC-01-04-01-07-T-5-ENG, 22 October 2007, p. 21, lines 3-10.

¹²⁸ ICC-01/04-01/06-1486 OA13, 21 October 2008, Para. 79. See also Lord Bridge in *Bennet v. Horseferry Road Magistrates' Court*, House of Lords, 24 June 1993, 3 All ER (All England Law Reports), p. 155 (quoted by the Appeals Chamber in ICC-01/04-01/06-772 OA4, 14 December 2006, para. 29).

¹²⁹ ICC-01/04-01/06-512, 3 October 2006, p. 10. See also ICC-01/04-01/07-772 OA4, 14 December 2006, paras. 10 and 43.

¹³⁰ Defence Motion, paras. 61, 77 and 122.

¹³¹ Defence Motion, paras. 61-68.

deprived of the right to be brought promptly before the judicial authorities,¹³² deprived of the right to be informed of the charges,¹³³ and denied the assistance of counsel.¹³⁴

64. The Prosecution notes that these allegations largely consist of unsupported statements by the Defence.¹³⁵ Moreover, the allegations do not establish that the Accused has been subject to serious mistreatment. Not every violation of a right amounts to mistreatment, and not every serious violation of a right amounts to serious mistreatment. The Prosecution submits that serious mistreatment requires proof of acts causing grave physical or mental suffering or injury or constituting a serious attack on human dignity.¹³⁶ The claims made by the Defence are inadequate to establish that the Accused has been subject to serious mistreatment.
65. Moreover, according to the Appeals Chamber, a stay of the proceedings may be ordered only if the breaches of the rights of the accused are such as to make it impossible to conduct a fair trial. The Prosecution submits that the Defence has failed to establish that the treatment of the Accused was of such a nature so as to preclude a fair trial which could be secured in various other ways, for example, by excluding any evidence obtained by such mistreatment.

IV. Remedy

66. The Defence requests that the Chamber a) review any irregularities in the prior detention of the Accused, even if any violations of human rights cannot be attributed to the Court; b) enter a finding that the prior detention was illegal; and c) decide on the appropriate remedy which may be awarded or left to a later decision.¹³⁷
67. The primary remedy requested by the Defence is that the Chamber stay or terminate the proceedings against the Accused.¹³⁸ In the alternative, the Defence submits that the Chamber declare that the Accused is entitled to compensation,¹³⁹ and, in the event of a conviction, to a reduction of the sentence.¹⁴⁰

¹³² Defence Motion, paras. 69-72.

¹³³ Defence Motion, paras. 73-76.

¹³⁴ Defence Motion, para. 77.

¹³⁵ See paras. 62-65 and 69-77. See also paras. 6-39.

¹³⁶ See for instance definition of "cruel treatment" adopted by the ICTY (*Prosecutor v. Haradinaj*, T-04-84-T, Trial Judgement, 3 April 2008, para. 126).

¹³⁷ Defence Motion, para. 121.

¹³⁸ Defence Motion, paras. 2 and 122-131.

¹³⁹ Defence Motion, paras. 2 and 132-135.

¹⁴⁰ Defence Motion, paras. 2 and 136-138.

68. Finally, the Defence requests the Chamber “to consider whether it would be appropriate to order an evidentiary hearing in the determination of this matter”.¹⁴¹

69. The Prosecution objects to all these proposals. The Defence has not demonstrated abuse, much less the entitlement to any remedy.

a) The Chamber should not enter a finding with respect to the legality of the detention by the DRC authorities or any violations of the rights of the Accused

70. The Prosecution submits that the Chamber should refrain from entering a finding on the legality of the detention of the Accused by the DRC authorities and on whether the Accused’s rights have been violated during that period. To do so at all, and in particular based on incomplete facts, would overstep this Court’s mandate and the statutory limits to its jurisdiction.

71. The Appeals Chamber has ruled that the Court does not have the power “to review the correctness of the decision of the [national] authority to sanction the enforcement of the warrant of arrest”.¹⁴² The Court’s role under Article 59(2) is confined to reviewing the process of arrest for compliance with national law and deciding if the rights of the arrestee were properly respected in the context of the implementation by national authorities of a request for arrest and surrender.¹⁴³ The Court’s powers of supervision under Article 59(2) therefore only relate to the process of arrest and surrender by national authorities subsequent to the notification of a request for arrest and surrender by the Court. Article 59(2) does not impose an obligation on national authorities, or a power to the Court, to review the legality of any previous detention of the Appellant for national criminal proceedings unrelated to Court proceedings.¹⁴⁴

72. Review of the period of detention of the Accused by the DRC authorities that is unrelated to the process of bringing the Accused to justice for crimes that form the subject-matter of

¹⁴¹ Defence Motion, para. 120. The Defence also requests the Prosecutor to “consider if it is prepared to accept the contents of the affidavits annexed to this motion” (Defence Motion, para. 120). The Prosecution hereby informs the Chamber that the Prosecution is *not* prepared to accept the content of the affidavits annexed to the Defence Motion.

¹⁴² ICC-01/04-01/06-772 OA4, 14 December 2006, para. 41.

¹⁴³ ICC-01/04-01/06-772 OA4, 14 December 2006, para. 41.

¹⁴⁴ ICC-01/04-01/06-512, 3 October 2006, p. 6. See also description of the elements of the review under Article 59(2) in Schlunk, “Article 59 – Arrest proceedings in the custodial State” in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999), pp. 767-768 – stating that “The arrest proceedings are governed by the law of the custodial State. Article 59 does not tackle the criteria of proper process. Basically it means that the warrant be duly served of the person arrested” and referring to “the suspect’s right to be informed about the charges and the grounds for the detention.”

the proceedings before the Court would exceed the jurisdiction of the Court. As stated by the Appeals Chamber, “the parameters set forth in the charges define the issues to be determined at trial and limit the Trial Chamber’s authority to the determination of those issues”.¹⁴⁵

73. The Court may also not review the detention of the Accused by national authorities for the purposes of any claim for compensation pursuant to Article 85 and Rules 173-175.¹⁴⁶ A right to compensation under Article 85 is limited to instances where a person has been unlawfully arrested or detained (1) in violation of specific provisions of the Statute, the Rules or international law, but only (2) in connection with proceedings before the Court.¹⁴⁷ The Court has no duty, or authority, to pay compensation to a person who has been detained by national authorities for conduct that is unrelated to the process of bringing the person to justice for the crimes charged before the Court.¹⁴⁸

b) The Chamber should dismiss the Defence request to impose a stay or termination of the proceedings

74. For the reasons set out above, the Prosecution submits that the Defence Motion does not substantiate any abuse in this Court of the process of bringing the Accused to justice for the crimes charged before the Court. The Prosecution acted within the Statute when it fully investigated the case before seeking an arrest warrant. The Court did not abuse the Accused’s rights in any fashion. Without abuse attributable to the Court, there is no reason to consider staying or discontinuing the proceedings.

¹⁴⁵ ICC-01/04-01/06-1432 OA10, 11 July 2008, para. 63.

¹⁴⁶ Defence Motion, paras. 134-135.

¹⁴⁷ See *Christopher Staker*, Compensation to an arrested or convicted person, in Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court, Second Edition, C.H. Beck Hart Nomos, (2008), pp. 1500-1502.

¹⁴⁸ A commentator observed that Article 85(1) is ambiguous, in that it does not specify whether it is limited to unlawful conduct by Court officials, or whether it also extends to unlawful arrests and detention by State authorities and other persons in connection with proceedings before the Court. Under either interpretation, however, there must still be a connection with this Court’s proceedings. Absent that requisite connection, the Court need not reach the additional complication: assuming an unlawful arrest or detention by State actors can trigger an entitlement to compensation, is the lawfulness of an arrest or detention by State authorities a matter that can be determined by the Court, and does paragraph 1 merely impose an obligation on States Parties to establish their own means for compensating victims of unlawful arrests and detentions in connection with ICC proceedings. If the former is the correct interpretation, presumably any compensation awarded by the Court in respect of unlawful conduct of State officials would be paid by the State concerned, rather than by the Court (*Christopher Staker*, Compensation to an arrested or convicted person, in Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court, Second Edition, C.H. Beck Hart Nomos, (2008), p. 1502).

c) The Court should not declare that the Accused is entitled to compensation or to a reduction of the sentence

75. The Chamber should not declare that the Accused is entitled to compensation or to a reduction of the sentence.¹⁴⁹ The Chamber has not been properly seized with any requests in relation to compensation. Rule 173(1) provides that “[a]nyone seeking compensation on any of the grounds indicated in article 85 shall submit a request, in writing, to the Presidency, which shall designate a Chamber composed of three judges to consider the requests”. Contrary to the contention of the Defence,¹⁵⁰ this Chamber thus does not have the authority to grant the remedy. Rule 173 expressly states that the judges who decide on any request for compensation “shall not have participated in any earlier judgement of the Court regarding the person making the request”. This implies that the Chamber shall refrain from making any finding or declaration in relation to compensation of the Accused. In addition, the Court is not the proper forum to seek compensation for alleged violations of the rights of the Accused that are unrelated to the process of bringing him to justice of the crimes charged before this Court.¹⁵¹

76. The additional or alternative request for a reduction of the sentence is premature. Article 76(1) provides that “in the event of a conviction”, the Trial Chamber shall consider the appropriate sentence to be imposed. While arguments pertaining to the sentence may be raised during trial or in the context of a separate sentencing hearing pursuant to Articles 76(2) and (3) and Rule 143, the Chamber may not make any finding with respect to sentence prior to entering a conviction against the Accused.

d) The chamber should dismiss the Defence request to order an evidentiary hearing

77. The Prosecution submits that there is no need for the Chamber to hold an evidentiary hearing in order to determine the matter. The Chamber has before it all the facts –

¹⁴⁹ In the cases against Duch before the ECCC and against Barayagwiza before the ICTR, the respective Chambers declared before the beginning of the trials that the accused was entitled to compensation and, in case of a conviction, to a reduction of the sentence (see dispositiv in *Kaing Guek Eav alias “Duch”*, Case N° 001/18-07-2007/ECCC/TC, Decision on Request for Release, of 15 June 2009; and *Prosecutor v. Barayagwiza*, Appeals Chamber Decision on Prosecutor’s Request for Review or Reconsideration, 31 March 2000). No analogy may be drawn from these cases as a) they were decided against a different procedural framework; b) the detention in both cases was based on the same conduct for which the persons were then tried before the international forum; and c) in the Barayagwiza case, the accused was held in detention by national authorities subject to a request by the ICTR for provisional arrest pursuant to Rule 40 of the Rules of Procedure and Evidence of the ICTR.

¹⁵⁰ Defence Motion, para. 135.

¹⁵¹ See para. 70 above arguing that the Court is neither a global human rights monitoring body nor an appellate court with a mandate to review the laws of States or decisions of their judicial bodies.

namely, that the First Period of detention in the DRC by the DRC authorities was independent of and cannot be attributed to the Prosecution and the Court; that the Second Period of detention, lasting approximately 30 days, was for a reasonable period and was consistent with detentions of other persons whose surrender was sought by this Court; and the process of surrender was not accompanied by abuse or mistreatment. The Chamber has also granted the parties ample opportunity, including substantial extra pages for their written submissions, within which to make all the necessary legal and factual arguments.

78. However, in the event that the Chamber decides that it can and should review the legality of the detention of the Accused by the DRC authorities, then the Prosecution submits that the DRC authorities should have the opportunity to be heard before the Chamber would enter its finding to that effect.

e) Conclusion

79. For the reasons set out above, the Prosecution respectfully requests that the Chamber dismiss the Defence Motion in its entirety.



Luis Moreno-Ocampo, Prosecutor

Dated this 17th day of August 2009

At The Hague, The Netherlands