

1 International Criminal Court

2 Appeals Chamber

3 Situation in the Democratic Republic of Congo - ICC-01/04-01/06

4 Judgement - Open Session

5 Friday, 11 July 2008.

6 The hearing starts at 3.48 p.m.

7 COURT USHER: All rise. The International Criminal Court is now
8 in session. Please be seated.

9 PRESIDING JUDGE SONG: Ladies and gentlemen, would you like to
10 register your presence for the record. First of all, Office of the
11 Prosecutor.

12 MR. GUARIGLIA: Good afternoon, your Honour. It's Fabricio
13 Guariglia, senior appeals counsel; appearing together with Mr. Ekkehard
14 Withopf, senior trial lawyer in the Lubanga case; and Mr. Reinhold
15 Gallmetzer, appeals counsel.

16 PRESIDING JUDGE SONG: Thank you. The Defence counsel.

17 MR. DESALLIERS (interpretation): Good day, your Honour. Marc
18 Desalliers. I am here with Caroline Buteau, Marline Jubile (phoen), and
19 Dalida Chrysostomidou.

20 PRESIDING JUDGE SONG: Thank you very much.

21 This afternoon I shall summarise the judgement of the Appeals
22 Chamber in the appeal of Mr. Thomas Lubanga Dyilo against the oral
23 decision of the Trial Chamber of the 18th January 2008, concerning the
24 Prosecutor's disclosure obligations to the Defence.

25 The Appeals Chamber decides this appeal as follows: The decision

1 of the Trial Chamber is confirmed, save that the ruling that the
2 Prosecutor is not under an obligation to serve material that relates to
3 the general use of child soldiers in the Democratic Republic of the Congo
4 is reversed. Judge Georgihos M. Pikis and I partly dissent from this
5 decision.

6 I shall now outline the reasons founding the decision as well as
7 the reasons for the dissent. I should emphasise that the written
8 judgement, which will be filed and notified to the parties shortly after
9 this hearing, is the authentic version and not this summary.

10 I. Procedural history. On the 18th January 2008, Trial
11 Chamber I rendered an oral decision relating to the disclosure
12 obligations of the Prosecutor prior to the commencement of the trial of
13 Mr. Lubanga Dyilo. The Trial Chamber said in the decision, inter alia,
14 the following: "The Defence declined an invitation from the Chamber to
15 set out the defences the accused is likely to rely on together with the
16 anticipated issues in the case. At this stage, his stance is that he
17 relies on the right to silence, which is his undoubted entitlement.
18 However, unreasonable decisions by the Defence to make late disclosure
19 may have an effect on determinations by the Chamber as to what
20 constitutes a fair trial. For instance, given the need to protect
21 witnesses and others who have provided information to the court if the
22 Bench is -- let me start that part again. If the Bench is put in a
23 position at a late stage of the proceedings without any proper
24 justification of being asked to order the disclosure of exculpatory
25 witnesses when, at that point in time, it is impossible to secure their

1 necessary protection. The possibility exists that the court will
2 conclude that the continued trial is fair notwithstanding the failure to
3 reveal their identities to the accused. Accordingly, if the Defence
4 identifies the lines of defence or issues at the significantly and
5 unnecessarily advanced stage, this may have consequences for decisions
6 that relate to disclosure to the accused."

7 The Trial Chamber subsequently granted, at the request of
8 Mr. Lubanga Dyilo, leave to appeal in respect of the following two
9 issues: "Whether unnecessary and unjustified late disclosure by the
10 Defence can properly have an impact on Prosecution disclosure." This is
11 the first issue. And whether "the Chamber was wrong in giving preference
12 to protection of witnesses for the Defence over the Defence right to know
13 the identity of those witnesses and in its conclusion that such
14 preference would not impair the fairness of the trial." This is the
15 second issue.

16 In the impugned decision, the Trial Chamber also ruled that the
17 Prosecution are not under an obligation to serve material that relates to
18 the general use of child soldiers in the DRC. In respect of this ruling,
19 the Trial Chamber granted leave on the following issue: Whether the
20 conclusion of the Trial Chamber "that the Prosecution is not under an
21 obligation to 'serve material that relates to the general use of child
22 soldiers' in the DRC because it does not constitute exculpatory material
23 contravenes Rule 77 of the Rules." This is the third issue.

24 II. On the first and second issues. A majority decision in
25 respect of the first and second issues, the Appeals Chamber determines by

1 a majority that it does not find an identifiable error of law necessary
2 of correction. It therefore confirms the impugned decision in this
3 respect.

4 The Appeals Chamber understands the relevant statements in the
5 impugned decision to be limited to the narrow issue of the prospective
6 situation if the Defence elects to reveal a line of defence or an issue
7 "at an unnecessarily and unjustifiably late stage in proceedings." This
8 limited situation does not directly engage or infringe an accused's right
9 to remain silent. The Appeals Chamber does not consider that the
10 impugned decision imposed any disclosure obligation on the Defence, nor
11 did the decision link the revelation of defences to the entitlement to
12 full Prosecution disclosure.

13 The Appeals Chamber, therefore, considers that the practical
14 effect of the impugned decision was focused on the need to provide
15 further exculpatory material in circumstances in which the fact that
16 material, in the possession or control of the Prosecutor, was of an
17 exculpatory nature only became apparent as a result of something that the
18 Defence disclosed. The impugned decision should not be read so as to
19 place pressure on the accused to testify or to raise defences at an early
20 stage as a condition of obtaining Prosecution disclosure.

21 The essential question which is raised by the first and second
22 issues is, therefore, whether if the Defence unreasonably and
23 unjustifiably makes late disclosure of a defence line or an issue in a
24 manner which makes it impossible to secure the necessary protection of
25 exculpatory witnesses, this can affect whether the Defence obtains all

1 the remaining exculpatory material pertaining to the case and whether the
2 Defence can still receive a fair trial without such full disclosure.

3 Should such a factual situation arise, it would need to be
4 carefully determined on a case-by-case basis. In the absence of any such
5 factual situation, the Appeals Chamber can only comment generally that
6 the ordinary expectation as set out in the Statute and the Rules of
7 Procedure and Evidence is that the Defence would be entitled to receive
8 any additional material in the possession or control of the Prosecutor
9 which a line of defence has revealed as exculpatory in nature regardless
10 of the stage at which the defence was raised.

11 In the abstract, the Appeals Chamber is unable categorically to
12 rule out the possibility that if a factual situation arises in which it
13 could be demonstrated that the Defence had unjustifiably and unreasonably
14 held back the revelation of a line of defence or issue in circumstances
15 that made it impossible for the Court to ensure the protection of the
16 exculpatory witnesses, it may conceivably be possible for the accused to
17 receive a fair trial notwithstanding the non-disclosure of certain
18 limited material.

19 The Appeals Chamber also would like to emphasise the following:
20 The Statute gives an accused person the right to silence, which was
21 expressly recognised by the Trial Chamber in the impugned decision.
22 However, the Appeals Chamber does not regard the impugned decision as
23 having impacted upon the exercise by the accused of his right to silence.
24 The points raised by the relevant part of the impugned decision could
25 only arise if the accused voluntarily chose to raise a defence or issue

1 at a stage in proceedings that was unnecessarily and unjustifiably late.

2 Furthermore, the Appeals Chamber underlines that the disclosure
3 obligations of the Prosecutor are independent of any disclosure
4 obligations of the Defence. The Prosecutor's ordinarily unfettered duty
5 to disclose must necessarily be based, inter alia, on the Prosecutor's
6 understanding of the case as a whole including what is known or
7 anticipated about the possible defence. The fact that the Prosecutor is
8 required to investigate incriminating and exonerating circumstances
9 equally, pursuant to Article 54(1)(a) of the Statute, means that the
10 Prosecutor will be aware, during the course of his investigations, of
11 material that may be of assistance to the Defence.

12 B. Dissenting opinion of Judge Pikis. I shall now summarise
13 the dissenting opinion of Judge Pikis. This summary has been prepared by
14 him.

15 At the outset, the Judge addresses the issues raised for
16 resolution. Contrary to the majority, he determines that issues 1 and 2
17 do arise from the decision of the Trial Chamber that sanctioned their
18 certification as subjects of appeal.

19 Reference is made to the decision of the Trial Chamber giving
20 rise to the appeal wherefrom extracts are cited revealing that the issues
21 raised on appeal are the offspring of the decision of the Trial Chamber,
22 amongst them the following: "However unreasonable decisions by the
23 Defence to make late disclosure may have an effect on determinations by
24 the Chamber as to what constitutes a fair trial." Another passage
25 leading to the same conclusion is the following: "Accordingly, if the

1 Defence identifies lines of defence or issues at a significantly and
2 unnecessarily advanced stage, this may have consequences for decisions
3 that relate to disclosure to the accused."

4 The Trial Chamber itself in its decision granting leave to appeal
5 determined that the issues do arise from its decisions. In relation to
6 issue 1, the following was said: "The issue, therefore, that was
7 addressed in the relevant part of the impugned decision is whether the
8 Prosecution has an inflexible obligation to disclose material
9 irrespective of whether or not the Defence has acted unreasonably in
10 revealing relevant aspects of the defence or the issues to be raised late
11 in the case."

12 In relation to issue 2, it's stated: "If the Bench is put in a
13 position at the late stage of the proceedings without any proper
14 justification of being asked to order the disclosure of exculpatory
15 witnesses when at that point in time it is impossible to secure their
16 necessary protection, the possibility exists that the Court will conclude
17 that the continued trial is fair notwithstanding the failure to reveal
18 their identities to the accused."

19 Reference by the Trial Chamber to the undoubted right of the
20 accused to silence is qualified by its subsequent statement that:
21 "However, unreasonable decisions by the Defence to make late disclosure
22 may have an effect on determinations by the Chamber as to what
23 constitutes a fair trial." This signifies that at some stage of the
24 proceedings the accused is under a duty to disclose. Why is this
25 necessarily implied? Because if there is no duty to disclose, how can

1 there be such a thing as "late disclosure"?

2 The warning of the Trial Chamber to the accused that "... if the
3 Defence identifies lines of defence or issues at a significantly and
4 unnecessarily advanced stage, this may have consequences for decisions
5 that relate to disclosure to the accused," leaves no doubt as to the
6 position of the Trial Chamber on the subject of disclosure of the Defence
7 prior to its articulation at the trial.

8 The right to silence is a fundamental right of the accused.
9 According to Article 67(1)(g) of the Statute, no adverse consequences
10 should be drawn from its exercise in the determination of the guilt or
11 innocence of the accused. According to the decision of the Trial
12 Chamber, the decision of the accused to remain silent may in fact draw
13 adverse consequences; namely, a deprivation of his right to have
14 disclosed to him what the Prosecution is duty-bound to disclose.

15 The accused has a right to have the case against him disclosed.
16 Article 61(3) of the Statute imposes a duty on the Prosecutor to disclose
17 evidence found in his case. Article 67(2) binds the Prosecutor to
18 disclose to the Defence potentially exculpatory or evidence mitigating
19 guilt in his possession or control, as well as evidence that may weaken
20 the case of the Prosecution. As laid down in Article 54(1)(a), the
21 Prosecution has a duty to collect both incriminating and exculpatory
22 evidence.

23 In the opinion, it is stressed the right to silence is interwoven
24 with the presumption of innocence of the accused. The accused is
25 presumed to be innocent. He does not have to prove his innocence. What

1 he must do in order to free himself from the accusation is to cast doubt
2 on its validity. It is his right to be acquitted unless the accusations
3 against him are proven beyond reasonable doubt.

4 This concludes the summary of Judge Pikis's dissenting opinion.

5 C. My own dissenting opinion. I also dissented from the
6 majority decision in respect of the first two issues. In my opinion, the
7 impugned decision is not appealable in this regard. Therefore, the
8 Appeals Chamber should not have considered the merits of the appeal in
9 this respect but should have dismissed the appeal.

10 I am of this view because the parts of the impugned decision to
11 which the first two issues relate were not relevant for any
12 determinations or rulings made by the -- made by the Trial Chamber. The
13 statements in the impugned decision were of highly speculative character,
14 and, as the Trial Chamber recognised in the decision granting leave to
15 appeal, may never arise in the course of the trial.

16 In such circumstances, by considering the merits of the appeal in
17 respect of the first two issues, the Appeals Chamber is not assessing
18 whether what the Trial Chamber has done was correct but whether what it
19 may do in the future would be correct, and this in the absence of any
20 facts. In such circumstances, the Appeals Chamber is assuming the role
21 of an advisory body, which is not provided for in the Statute.

22 III. On the third issue. I shall now turn to the third issue on
23 appeal.

24 The Appeals Chamber finds unanimously that the ruling by the
25 Trial Chamber that "the Prosecution are not under an obligation to serve

1 material that relates to the general use of child soldiers in the DRC"
2 was based on an incorrectly narrow interpretation of Rule 77 of the Rules
3 of Procedure and Evidence and therefore must be reversed.

4 The Appeals Chamber is not persuaded by the arguments raised in
5 this appeal that the Trial Chamber should not have made a ruling on the
6 scope of the Prosecutor's disclosure obligations at all. The question of
7 whether the Prosecutor is obliged to disclose the material in question
8 has arisen before the Trial Chamber because the Prosecutor has made
9 several requests for authorisation of non-disclosure in order to protect
10 witnesses. It is for that reason that the Trial Chamber had to determine
11 whether or not the material in question had to be disclosed in the first
12 place.

13 Nevertheless, the Appeals Chamber finds that the Trial Chamber
14 applied Rule 77 of the Rules of Procedure and Evidence too narrowly.
15 Rule 77 provides in relevant part as follows: "The Prosecutor shall ...
16 permit the Defence to inspect any books, documents, photographs, and
17 other tangible objects in the possession or control of the Prosecutor
18 which are material to the preparation of the defence..."

19 According to the Trial Chamber's view, only material that relate
20 to issues which would either directly undermine the Prosecution case or
21 support a line of arguments of the Defence are material to the
22 preparation of the defence. The wording of Rule 77 of the Rules of
23 Procedure and Evidence, however, does not suggest that the term "material
24 to the preparation of defence" should be construed as narrowly as the
25 Trial Chamber did. Rather, the term should be understood as referring to

1 all objects that are relevant for the preparation of the defence.

2 In the present case, it has been sufficiently demonstrated that
3 the material in question is relevant for the preparation of the defence,
4 inter alia, because it is needed before setting a line of defence to
5 understand properly the situation in Ituri and generally the phenomenon
6 of the use of child soldiers.

7 This concludes the summary of the judgement. Thank you.

8 COURT USHER: All rise.

9 The hearing ends at 4.19 p.m.

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