

1 International Criminal Court

2 Appeals Chamber

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

4 Appeals Judgement - Open Session

5 Tuesday, 21 October 2008

6 The hearing starts at 3.35 p.m.

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

9 JUDGE SONG: May I ask the Court Officer to call the cases.

10 COURT OFFICER: The Situation in the Democratic Republic of the
11 Congo, the case of the Prosecutor versus Thomas Lubanga Dyilo, the
12 Appeals Chamber presided by Judge Song in the Appeals OA12 and OA13.

13 JUDGE SONG: Thank you. May I ask the parties and participants
14 to place themselves on the record starting from the Office of the
15 Prosecutor.

16 MS. CRISCITELLI: Thank you, your Honour. Attending the hearing
17 today is Mr. Ekkehard Withopf, Senior Trial Lawyer; Mr. Manoj Sachdeva,
18 Trial Lawyer; Ms. Julieta Solano, Trial Lawyer; Mr. Ben Batros, Appeals
19 Counsel; and I'm Sara Criscitelli, and I'm the Senior Appeals Counsel.

20 JUDGE SONG: Thank you very much. And now the Defence, please.

21 MS. MABILLE (interpretation): President, the Defence today will
22 be represented by Mr. Biju-Duval, my learned colleague Mr. Marc
23 Desalliers, and myself, Catherine Mabilille. Thank you, Your Honour.

24 JUDGE SONG: And now the representatives of the victims.

25 MS. PELLET (interpretation): Thank you, president. I am Sarah

1 Pellet from the Office of Public Counsel for Victims, and I represent
2 Mr. Luc Walleyne today who represents victims 1, 2, 3, 106, thank you.

3 JUDGE SONG: Representative of the victims? No more? Okay.

4 Thank you very much.

5 This afternoon the Appeals Chamber will deliver its judgement in
6 respect of the -- of two appeals of the Prosecutor against decisions of
7 Trial Chamber I. His appeal against the decision of the 13th June 2008
8 to stay the proceedings in the case of Mr. Lubanga Dyilo, and his appeal
9 against the decision of the 2nd July 2008 to order the release of
10 Mr. Lubanga Dyilo.

11 In the next couple of minutes, I shall summarise the two
12 judgements of the Appeals Chamber in these appeals. Please note that the
13 written judgements are the only authentic version. They will be notified
14 to the participants in these proceedings after this hearing. I shall
15 begin my summary with the appeal against the decision to stay the
16 proceedings.

17 On the 13th June 2008, the Trial Chamber decided to stay the
18 proceedings in respect of Mr. Lubanga Dyilo. In view of the Trial
19 Chamber, there was no prospect that a fair trial could be held because
20 the Prosecutor was unable to disclose a large number of documents
21 containing potentially exculpatory information and information relevant
22 to the preparation of the defence. The Prosecutor had obtained the
23 documents in question from several information providers, in particular
24 from the United Nations on the condition of confidentiality, and these
25 information providers had refused to consent to their disclosure to the

1 Defence and in most cases to the Trial Chamber.

2 The Prosecutor based this practice on Article 54(3)(e) of the
3 Rome Statute, according to which he may agree not to disclose at any
4 stage of the proceedings documents or information that the Prosecutor
5 obtains on the condition of confidentiality and solely for the purpose of
6 generating new evidence unless the provider of the information consents.

7 The Appeals Chamber has decided this appeal as follows:

8 The decision of Trial Chamber I of the 13th June 2008 is
9 confirmed. The appeal is dismissed.

10 This decision is unanimous, although Judge Pikis appends a
11 separate opinion to the judgement.

12 Let me now go over the main points that led the Appeals Chamber
13 to reach this decision.

14 The Prosecutor has raised three grounds of appeal in respect of
15 the decision of the 13th June 2008, namely that the Trial Chamber had
16 misinterpreted the scope of Article 54(3)(e) of the Statute, this is the
17 first ground of appeal; that the Trial Chamber had mischaracterised the
18 Prosecutor's use of that provision, this is the second ground of appeal;
19 and that the stay of the proceedings was an excessive and premature
20 remedy, this is the third ground of appeal.

21 In a filing dated the 14th October 2008, the Prosecutor informed
22 the Appeals Chamber that he wished to discontinue his appeal in respect
23 of the first two grounds of appeal leaving open the question of whether
24 such a partial discontinuance is possible under Rule 157 of the Rules of
25 Procedure and Evidence. The Appeals Chamber has decided to consider the

1 arguments raised under the first two grounds of appeal nevertheless.

2 The first two grounds of appeal are inextricably linked with the
3 third ground of appeal, and the latter cannot be determined without
4 considering the questions raised under the former. The Appeals Chamber
5 notes, furthermore, that the Prosecutor bases several of his arguments
6 under the third ground of appeal which he wishes to maintain upon his
7 argument under the first and second grounds.

8 The Appeals Chamber, however, is not persuaded by any of the
9 arguments raised by the Prosecutor. The Appeals Chamber cannot identify
10 any error in the interpretation of Article 54(3)(e) of the Statute by the
11 Trial Chamber or in its characterisation of the Prosecutor's use of that
12 provision. A textual interpretation of Article 54(3)(e) of the Statute
13 indicates that the Prosecutor may only rely on the provision for a
14 specific purpose, namely in order to generate new evidence. This
15 interpretation is confirmed by the context of Article 54(3)(e) of the
16 Statute. It follows from the Article 54(1) of the Statute that the
17 investigatory activities of the Prosecutor must be directed towards the
18 identification of evidence that can eventually be presented in open court
19 in order to establish the truth and to assess whether there is criminal
20 responsibility under the Statute.

21 While the Appeals Chamber acknowledges the arguments of the
22 Prosecutor as to the importance of Article 54(3)(e) of the Statute, in
23 particular in the early stages of an investigation, it must be emphasised
24 that the use of Article 54(3)(e) of the Statute by the Prosecutor must
25 not lead to breaches of his obligations vis-a-vis the suspect or the

1 accused person. Therefore, whenever the Prosecutor relies on Article
2 54(3)(e) of the Statute, he must bear in mind his obligations under the
3 Statute and apply that provision in a manner that will allow the Court to
4 resolve the potential tension between the confidentiality to which the
5 Prosecutor has agreed and the requirements of a fair trial.

6 In the present case, however, the Prosecutor agreed with the
7 information providers that the material he had obtained would not even be
8 disclosed to the Chambers of the court and subsequently obtained large
9 amounts of documents under these agreements even though he did not know
10 whether the material would contain material that was potentially
11 exculpatory. In doing so, the Prosecutor effectively prevented the Trial
12 Chamber from assessing the material that had been obtained and from
13 determining whether a fair trial can be held even without the disclosure
14 of all documents.

15 The Appeals Chamber notes that pursuant to Article 67(2) of the
16 Statute, and in line with relevant jurisprudence of human rights courts,
17 it must be the Chamber and not the Prosecutor who takes a final decision
18 regarding disclosure of potentially exculpatory material. While a
19 Chamber may not order the disclosure to the Defence of material obtained
20 by the Prosecutor on the condition of confidentiality without the prior
21 consent of the information provider, the relevant material must be placed
22 before the Chamber.

23 Under the agreements concluded by the Prosecutor, however, such a
24 disclosure to the Chamber was not possible, resulting in the situation
25 that led the Trial Chamber to stay the proceedings in the present case.

1 Let me now turn to the third ground of appeal, namely that the
2 submission of the Prosecutor that the imposition of the stay was
3 premature and excessive.

4 The Appeals Chamber is not persuaded by the arguments of the
5 Prosecutor. It is important to note in this context the character of the
6 stay that has been imposed by the Trial Chamber.

7 This stay was not absolute and permanent, tantamount to an
8 acquittal or complete termination of the proceedings but conditional.
9 The Trial Chamber acknowledged that the stay could be lifted if and when
10 a fair trial has become possible in all respects.

11 In the view of the Appeals Chamber, the imposition by the Trial
12 Chamber of such a conditional stay was justified in the circumstances of
13 the case. The proceedings were stayed one week prior to the scheduled
14 start of the trial, at a time when large numbers of documents had not
15 been disclosed to the Defence or even to the Chamber. The issue of
16 disclosure of documents covered by confidentiality agreement had been
17 raised already before the Pre-Trial Chamber and had been constantly on
18 the agenda of the Trial Chamber since September 2007.

19 In spite of assurances by the Prosecutor that the information
20 providers would be willing to give their consent to the disclosure of the
21 documents, the lifting of the confidentiality turned out to be
22 problematic. Several attempts to find a solution to the problem had
23 failed. The developments immediately before the decision to stay the
24 proceedings did not indicate a substantial change in the position of the
25 information providers. The information providers continued to be

1 reluctant to make the material available even to the Trial Chamber, which
2 is, as explained before, mandated by Article 67(2) of the Statute to
3 assess whether the material would have to be disclosed had it not been
4 obtained under Article 54(3)(e) of the Statute.

5 In such a situation, had the Trial Chamber decided to go ahead
6 with the trial, there would always have been a lurking doubt as to
7 whether the undisclosed material would have potentially changed anything
8 for the outcome of the trial.

9 I shall now turn to the separate opinion of Judge Pikis who has
10 provided me with the following summary.

11 At issue in this appeal is the correctness of the decision of the
12 Trial Chamber to stay proceedings on grounds of impossibility to hold a
13 fair trial. Impossibility arose primarily because of inability on the
14 part of the Prosecutor to disclose exculpatory material in his possession
15 to which the accused was entitled as of a right by the charter of the
16 rights of the accused embodied in Article 67 of the Statute, in paragraph
17 (2) in particular.

18 Disclosure of exculpatory material is essential for the
19 preparation of the accused for the trial. The right to do so, i.e., to
20 have proper facilities and time for preparation of one's defence is also
21 assured as a fundamental right of the accused.

22 Exonerating evidence goes to the guilt or innocence of the
23 accused, which is the central issue at the trial. In the absence of such
24 evidence, any verdict of the Trial Chamber, it is pointed out, would be
25 clouded by knowledge of the existence of exonerating evidence not before

1 the Court and the uncertainty inherent therewith.

2 The Prosecutor, by his appeal, disputes the validity of the order
3 as a disproportionate and premature measure. The possibility of being in
4 a position to disclose such evidence at a future time had not, in his
5 contention, disappeared. The Defence, on the other hand, supported the
6 subjudicial decision as correct in every respect and invited the Appeals
7 Chamber to uphold it, whereas the victims joined the Prosecutor in
8 opposing the decision.

9 The exonerating material was received primarily from the United
10 Nations and some other information providers under confidentiality
11 agreements envisaged by Article 54(3)(e) of the Statute. A mass of the
12 documents collected was received prior to the start of the investigations
13 in June 2004. For a period of nine months the Trial Chamber kept
14 pressing for the disclosure of exonerating material to the accused in the
15 possession of the Prosecutor. The United Nations and some information
16 providers refused to give their consent to disclosure. They also refused
17 the invitation of the Trial Chamber itself to make disclosure to the
18 Court for the purpose of enabling it to evaluate the significance of such
19 evidence.

20 In the process, the Trial Chamber made reference to the right of
21 the accused to be tried without undue delay. The Trial Chamber held that
22 the Prosecutor wrongly received the documents under consideration
23 pursuant to the provisions of Article 54(3)(e) of the Statute, which in
24 its view limit material that may be received to what is described as lead
25 material, i.e., clues as to the existence of evidence, not material

1 constituting evidence in itself. In this regard, the Trial Chamber
2 admonished the Prosecutor for collecting in confidence evidential
3 material without any certainty that he would be able to use it and
4 disclose it to the accused.

5 It is explained that Article 54(3)(e) does not confine the right
6 of the Prosecutor to receive evidence in confidence to lead material.
7 What it binds him to do is to seek new evidence reproducing the material
8 in his possession. Nonetheless, the fact remained that the Prosecutor
9 was stranded with evidence received in confidence that he was unable to
10 produce, failing in his duty to do so imposed by Article 67(2) of the
11 Statute, a failure not mitigated by the existence of the confidentiality
12 agreements.

13 The omission of the Prosecutor to reproduce the evidence in his
14 hands by new evidence is accentuated by the failure of the Prosecutor to
15 collect exonerating evidence that he is duty-bound to gather under the
16 provisions of Article 54(1)(a) of the Statute.

17 The Prosecutor was also duty-bound to disclose exonerating
18 material to the accused at the confirmation stage to enable the person
19 then under investigation to present his case before the Pre-Trial
20 Chamber, including amenity to challenge Prosecution evidence and the
21 adoption of evidence in support of his defence.

22 It is pointed out that the confirmation of charges is neither
23 automatic nor free from an evaluation of the evidence adduced. Having a
24 direct bearing on the decision of the Pre-Trial Chamber whether to
25 confirm the charges or not.

1 The right of the accused to trial without delay is assured as a
2 fundamental right of the accused. The expeditiousness of the proceedings
3 as a distinct element of a trial is mandated by Article 64(2) of the
4 Statute, casting a corresponding duty on the Trial Chamber. The time
5 perspective from which the holding of a fair trial is judged is the time
6 at which the trial should be held.

7 To guard against the eventuality of evidence not being produced
8 before the Chamber, Article 69(3) provides the Court shall have the
9 authority to request the submission of evidence that it considers
10 necessary for the determination of truth. In this case, it was made
11 clear that such evidence, exculpatory in nature, would not be
12 forthcoming, with the consequence that the truth could not crystallise at
13 the trial.

14 The following is said in conclusion: The Trial Chamber attached
15 no conditions to the order to stay the proceedings, whereas its
16 foundation, impossibility of holding a fair trial underlined the
17 permanence of the order. Impossibility admits of no qualification. It
18 derives from the judgement of the Appeals Chamber of the 14th December
19 2006 that stay brings the proceedings to an end. This is the inevitable
20 outcome of impossibility to piece together the constituent elements of a
21 fair trial. Stay is therefore irrevocable.

22 The following quotation from the judgement of the Appeals Chamber
23 of the 14th December 2006 signifies the consequences of impossibility of
24 holding a fair trial: "A fair trial is the only means to do justice. If
25 no fair trial can be held, the object of the judicial process is

1 frustrated and the process must be stopped."

2 The pertinent question in this appeal is whether the finding of
3 impossibility to hold a fair trial and sequential order to stay the
4 proceedings are justified. The answer is in the affirmative. The
5 finding of impossibility to hold a fair trial seals the end of the
6 proceedings.

7 For the reasons given, the order to stay proceedings is
8 confirmed.

9 This concludes the summary of the separate opinion of Judge Pikis
10 in the appeal against the decision to stay the proceedings.

11 Let me now turn to the second judgement that is being delivered
12 today, the judgement on the Prosecutor's appeal against the decision of
13 Trial Chamber I of the 2nd July 2008 to release Mr. Lubanga Dyilo.

14 The Trial Chamber ordered the release of Mr. Lubanga Dyilo as a
15 result of its decision to stay the proceedings in that case. The Trial
16 Chamber considered that the release of Mr. Lubanga Dyilo was the
17 inevitable consequence of the stay of the proceedings because Mr. Lubanga
18 Dyilo cannot be detained merely for preventive purposes.

19 For the reasons I shall summarise now, the Appeals Chamber has
20 decided this appeal by a majority as follows: The decision of Trial
21 Chamber I of the 2nd July 2008 entitled "Decision on the release of
22 Thomas Lubanga Dyilo" is reversed.

23 Trial Chamber I is directed to decide anew whether Mr. Lubanga
24 Dyilo should remain in detention or whether he should be released with or
25 without conditions. The Prosecutor has raised two grounds of appeal in

1 relation to the decision to release. The Appeals Chamber sees merit only
2 in his second ground of appeal. As his first ground of appeal, the
3 Prosecutor submits that the Trial Chamber made a procedural error when
4 deciding on the release of Mr. Lubanga Dyilo before the Appeals Chamber
5 had decided on his appeal against the decision to stay the proceedings.
6 In the view of the Prosecutor, this could frustrate his appeal against
7 the decision to stay the proceedings because the Court might never be
8 able to exercise its jurisdiction in respect of Mr. Lubanga Dyilo if he
9 is released.

10 The Appeals Chamber is not persuaded by this argument. Decisions
11 of the Trial Chamber, even on fundamental questions, are not merely
12 provisional decisions that require the approval of the Appeals Chamber
13 before they can be enforced. Therefore, it was not erroneous for the
14 Trial Chamber to decide on the release of Mr. Lubanga Dyilo before this
15 Appeals Chamber could determine the appeal on the decision to stay the
16 proceedings.

17 The Appeals Chamber notes in this context that the Statute gives
18 an appellant the possibility to apply for suspensive effect of an appeal.
19 The Prosecutor made use of this right and subsequently the Appeals
20 Chamber indeed suspended the execution of the decision to release
21 Mr. Lubanga Dyilo. The Appeals Chamber, however, sees merit in the
22 arguments that the Prosecutor raises under the second ground of appeal.

23 The Prosecutor submits that the Trial Chamber should not have
24 ordered the unconditional release of Mr. Lubanga Dyilo in the present
25 case. In the view of the Appeals Chamber, the Trial Chamber was wrong in

1 finding that the inevitable consequence of the decision to stay the
2 proceedings against Mr. Lubanga Dyilo was his unconditional and immediate
3 release.

4 Pre-conviction detention at the court is regulated by Articles 60
5 and 58(1) of the Statute. Detention is only possible if there are at
6 least reasonable grounds to believe that the person in question has
7 committed crimes under the jurisdiction of the court and if his or her
8 detention is necessary for one or more of the three reasons listed in
9 Article 58(1) of the Statute.

10 If the conditions for detention under Article 58(1) of the
11 Statute are not fulfilled, the Chamber must, in accordance with
12 Article 60(2) of the Statute, order the release of the detained person
13 with or without conditions.

14 It follows from these provisions that if a Chamber imposes a
15 conditional stay of the proceedings, the unconditional release of the
16 accused person is not the inevitable consequence or the only correct
17 course to take. A conditional stay can be lifted if a fair trial later
18 becomes possible. It is not tantamount to an acquittal or to a permanent
19 termination of the proceedings. Therefore, the court is not necessarily
20 permanently barred from exercising jurisdiction in respect of the person
21 concerned.

22 The Trial Chamber expressly recognised this in stating that the
23 stay it imposed was capable of being lifted in the future. For that
24 reason, if a Chamber imposes a conditional stay of the proceedings, it
25 will have to consider all relevant circumstances and base its decision on

1 release or detention upon the criteria of Articles 60 and 58(1) of the
2 Statute. In particular, the necessity of the continued detention will
3 have to be assessed carefully. If the conditions for continued detention
4 are not met, the Chamber will have to determine whether in the particular
5 circumstances of the case release should be with or without conditions.

6 In the present case the Trial Chamber failed to take all relevant
7 factors into consideration. The Appeals Chamber notes that on the
8 29th May 2008, the Trial Chamber had found, in a decision reviewing the
9 detention of Mr. Lubanga Dyilo, that the continued detention of
10 Mr. Lubanga Dyilo was necessary because he was likely to return to the
11 Democratic Republic of the Congo with the probable consequence that the
12 court would no longer be able to secure his attendance at trial.

13 The Appeals Chamber also notes the submissions of the Prosecutor
14 in period between the decision to stay the proceedings on the 13th of
15 June, 2008, and the decision to release Mr. Lubanga Dyilo on the 2nd of
16 July, 2008. These submissions indicated that some of the information
17 providers, in particular the United Nations, were willing to reconsider
18 their position and to find ways of making the documents in question
19 available to the Defence or at least to the Trial Chamber.

20 In its decision to release Mr. Lubanga Dyilo unconditionally, the
21 Trial Chamber failed to give proper weight to all these factors and
22 erroneously focused only the fact that the proceedings had been stayed.

23 The Appeals Chamber has decided to remand the matter to the Trial
24 Chamber for a new determination of the question of release of Mr. Lubanga
25 Dyilo. The Trial Chamber will have to decide, in light of today's

1 judgement of the Appeals Chamber, and will have to take into account all
2 relevant factors.

3 This concludes my summary of the judgement of the Appeals Chamber
4 on the appeal against the decision to release Mr. Lubanga Dyilo. I shall
5 now turn to the summary of Judge Pikis dissenting opinion in this case,
6 which he has prepared.

7 Following stay of proceedings against the accused on grounds of
8 impossibility to hold a fair trial, the Trial Chamber ordered his
9 release. The Trial Chamber underlined that in the absence of the
10 prospect of a trial, the accused cannot be held in custody or subjected
11 to provisional release as purely preventive measures to deter him from
12 committing further crimes. In such circumstances, the release of the
13 accused from captivity was inevitable. The word "impossible" denotes
14 something unattainable as opposed to "possible" which denotes the
15 opposite, something attainable.

16 The Prosecutor argued, on the one hand, that release was a
17 premature measure as no decision should be taken in the matter pending
18 the outcome of the appeal against the decision to stay the proceedings
19 and, on the other hand, that the prospect of disclosure of exculpatory
20 evidence in his possession at a future stage could not be ruled out.
21 Therefore, release was a disproportionate and premature measure.

22 The Prosecution argued in support of the subjudicial decision,
23 adding that even if there was residual power to lift the stay, the
24 release of the accused would be the inevitable consequence of the
25 decision taken.

1 The victims expressed the concerns about the implications of
2 release of the accused with respect to the unstable situation in the
3 Democratic Republic of the Congo. If accused were to be released, his
4 release should be subject to stringent conditions including his
5 non-return to the Democratic Republic of the Congo.

6 For the reasons given in the separate opinion in the parallel
7 appeal, stay of proceedings was absolute and unconditional. The
8 unavoidable consequence of it is the release of the accused, being no
9 longer answerable to the charges.

10 Even if it is assumed, contrary to the views espoused that the
11 lifting of the stay of the proceedings was possible, again the release of
12 the accused would be the unavoidable outcome of stay of proceedings.

13 The Statute confers no power to order detention for any purpose
14 other than for the purpose of assuring that the accused stands his trial,
15 nor can such power be implied from any of the provisions of the Statute.
16 To order the detention of the accused in such circumstances would be
17 tantamount to restricting his liberty for reasons that one could not
18 predict that they would materialise and, if so, when. Elsewhere it is
19 underlined that there is no authority to order the detention of a person
20 as a preventive or as a precautionary measure.

21 The following is said in conclusion: I do not overlook that the
22 accused is facing extremely serious crimes or the necessitous situation
23 prevailing in the Democratic Republic of the Congo, nor do I overlook the
24 mission of the International Criminal Court or the need that its writ in
25 this ultra-sensitive area of human rights should run unimpeded.

1 Human rights, on the other hand, aim to sustain the core of
2 humanity and the right to a fair trial is amongst the most consequential
3 ones. Laxity in their protection beholds, as history teaches, great
4 dangers for humanity such that no court of law should countenance. In
5 this connection, it is worth reminding of the passage cited below from
6 the judgement of the Appeals Chamber of the 14th December 2006.
7 "Unfairness in the treatment of the suspect or the accused may rupture
8 the process to an extent making it impossible to piece together the
9 constituent elements of a fair trial. In those circumstances, the
10 interests of the world community to put persons accused of the most
11 heinous crimes against humanity on trial, great as it is, is outweighed
12 by the need to sustain the efficacy of the judicial process as a potent
13 agent of justice. Necessitous circumstances, grave as they may be, do
14 not overshadow human rights including, no doubt, the right to liberty.
15 Liberty cannot be subordinated to anything other than the need of
16 assuring the attendance of the accused at his or her trial due to be fair
17 and to run its course according to law.

18 Stay of proceedings for impossibility to hold a fair trial brings
19 the proceedings to an end. The accused is no longer answerable to the
20 charges. He is discharged therefrom. His release is the inevitable
21 consequence.

22 For my part I would confirm the decision of the Trial Chamber to
23 release the accused.

24 This concludes the summary of the Judge Pikis dissenting opinion
25 in the appeal of the Prosecutor against the decision to release

1 Mr. Lubanga Dyilo.

2 Thank you very much. The hearing is adjourned. And thank you,
3 the interpreters, for your wonderful job. Thank you.

4 COURT USHER: All rise.

5 The hearing ends at 4.26 p.m.

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