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2 INTERNATIONAL CRIMINAL COURT

3 SITUATION DEMOCRATIC REPUBLIC OF CONGO

4 Case No: ICC-01/04-01/06

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Transcription No: ICC-APP-01/04-01/06-T-2-EN

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7 Thursday, 14 December 2006 at 12.05 p.m.

8 OPEN SESSION

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Before: His Honour Judge Georghios M. Pikis (Presiding Judge)

10 His Honour Judge Erkki Kourula

His Honour Judge Philippe Kirsch

11 Her Honour Judge Navanethem Pillay

His Honour Judge Sang-Hyun Song

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13 APPEALS CHAMBER

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1 [12.00 p.m.] ICC-APP-01-04-01-06-T-2-EN

2 OPEN SESSION

12:02:37 3 [Mr Thomas Lubanga Dyilo present]

12:05:02 4 [12:05 p.m.]

12:05:02 5 THE USHER: All rise. The International Criminal Court is

12:05:35 6 now in session. Please be seated.

12:06:11 7 JUDGE PIKIS: Can we have the case called, please.

12:06:15 8 COURT OFFICER: Thank you, Mr President. Situation in the

12:06:20 9 Democratic Republic of the Congo, case of the Prosecutor

12:06:24 10 versus Thomas Lubanga Dyilo, ICC-01/04-01/06.

12:06:32 11 PRESIDING JUDGE PIKIS: Can we have the appearances.

12:06:37 12 MR GUARIGLIA: Good afternoon, your Honours.

12:06:41 13 Fabricio Guariglia, Senior Appeals Counsel from the Office of

12:06:43 14 the Prosecutor, appearing jointly with Michael Adenuga,

12:06:47 15 Appeals Counsel, and Ben Batros, Associated Appeals Counsel.

12:06:52 16 MR ROBERTS: Good afternoon, Mr President, your Honours. My

12:06:54 17 name is Geoff Roberts, appearing for the Defence of Thomas

12:06:57 18 Lubanga Dyilo.

12:07:02 19 MS MASSIDDA: Good afternoon, Mr President, your Honours. I'm

12:07:04 20 Paolina Massidda, Principal Counsel of the Office of Public

12:07:08 21 Counsel for Victims. I am appearing today on behalf of

12:07:11 22 Mr Walley, legal representative of victims a/0010, a/0002 and

12:07:18 23 a/0003.

12:07:31 24 PRESIDING JUDGE PIKIS: I shall proceed with the delivery of

12:07:33 25 the judgment of the Appeals Chamber. I shall give a brief

12:07:43 1 summary of the content of our judgment, which will be handed
12:07:51 2 down with the conclusion of the proceedings.
12:07:54 3 [12:07 p.m.]
12:07:56 4 On 10 February, 2006, a warrant was issued for the arrest of
12:08:04 5 Mr Lubanga Dyilo. Prior to its issuance, the Court had ruled
12:08:13 6 on its own motion that it had jurisdiction to deal with the
12:08:18 7 case and that the course was admissible before the court.
12:08:24 8 [12:08 p.m.]
12:08:30 9 After his arrest, Mr Lubanga challenged this decision -- a
12:08:40 10 challenge that was not pursued, and the case was eventually
12:08:44 11 dismissed as abandoned.
12:08:49 12 [12:08 p.m.]
12:08:50 13 In the meantime, he had initiated another proceeding designed
12:08:55 14 to secure, as put in his -- as put in his application, his
12:09:02 15 release, subsequently explained this before the Pre-Trial
12:09:09 16 Chamber as an application for his -- for compensation leading
12:09:15 17 to his release.
12:09:15 18 [12:09 p.m.]
12:09:18 19 Following remarks and observations of the Pre-Trial Chamber,
12:09:21 20 the application was refashioned and presented ultimately as
12:09:31 21 an -- as a challenge to the jurisdiction of the Court pursuant
12:09:34 22 to the provisions of Article 19(2).
12:09:37 23 [12:09 p.m.]
12:09:39 24 The factual background to this application is to the following
12:09:44 25 effect. Because of breaches of the rights of the appellant,

12:09:54 1 Mr Dyilo, the process before the Court should be stayed or
12:10:02 2 stopped. The breaches of his rights consisted of
12:10:09 3 ill-treatment, primarily, before his arrest for the purpose of
12:10:15 4 surrender to the Court authorities, by the Congolese
12:10:19 5 authorities. To that arrest it was his contention that the
12:10:24 6 Prosecutor was privy to, guilty himself of surreptitious
12:10:33 7 dealings in order to prepare the ground for his unimpeded or
12:10:35 8 unhindered arrest in due course.

12:10:39 9 [12:10 p.m.]

12:10:43 10 To hold a trial in those circumstances, it was the claim of
12:10:47 11 the appellant, would be an abuse of the process of the Court,
12:10:53 12 and blatant violation, as I summarise what we have in our
12:10:57 13 judgment, of his rights.

12:10:58 14 [12:10 p.m.]

12:11:00 15 The Prosecutor denied any allegation of ill-doing, or that he
12:11:09 16 was a party to any underhanded arrangement with regard to his
12:11:13 17 prior arrest. The applicant himself had contended that his
12:11:21 18 stay while in house arrest was equivalent to acts of torture
12:11:28 19 or grave mistreatment. The Appeals Chamber did not doubt the
12:11:39 20 jurisdiction of the Court to deal with the case, nor did it
12:11:47 21 address the fashioning of the application, which is an
12:11:51 22 application essentially for stay under the provisions of
12:11:55 23 Article 19(2).

12:11:55 24 [12:11 p.m.]

12:12:00 25 In our judgment, there was no jurisdiction, as such, to deal

12:12:06 1 with the application under the provisions of 19(2). This was
12:12:11 2 not an application going to jurisdiction, as the position of
12:12:16 3 jurisdiction by the Court was the premise of the
12:12:18 4 application -- that is, the Court had jurisdiction, but the
12:12:21 5 Court was invited not to assume or exercise its jurisdiction
12:12:31 6 on grounds, essentially, of abuse of process.

12:12:31 7 [12:12 p.m.]

12:12:35 8 Nonetheless, the proceeding can survive, and so we hold, as a
12:12:44 9 sui generis process, intended to invite the Court, or move the
12:12:51 10 Court to do justice in a situation affecting -- affecting the
12:12:58 11 rights of the suspect, the arrestee, or the accused.

12:12:58 12 [12:12 p.m.]

12:13:07 13 The Pre-Trial Chamber did not address the issue, as such, or
12:13:10 14 specifically, but they dealt with it as an issue of
12:13:13 15 jurisdiction, therefore, the semblance of the
12:13:18 16 right -- jurisdiction under 19(2). Therefore, the semblance
12:13:22 17 of the right is visible, reinforced by the decision following.

12:13:22 18 [12:13 p.m.]

12:13:28 19 The Pre-Trial Chamber acknowledged jurisdiction to stop
12:13:31 20 proceedings on grounds of abuse of process and, at the same
12:13:36 21 time, jurisdiction to impede the process pursuant to the
12:13:40 22 provisions of Article 21(3) of this Statute.

12:13:40 23 [12:13 p.m.]

12:13:47 24 They determined that no -- they determined that the conditions
12:13:57 25 of the detention, or the act of detention, or the

12:14:01 1 circumstances of detention in custody could have no bearing on
12:14:08 2 the proceedings in the absence of the validity of the
12:14:14 3 allegations of the appellant that there was, as it was termed
12:14:18 4 in the first Pre-Trial Court's judgment, concerted action
12:14:24 5 between the Congolese authorities and -- on the one hand, and
12:14:27 6 the Prosecutor on the other. The Court determined there was
12:14:30 7 no such evidence, nor, in fact, was there any evidence
12:14:38 8 tainting the process of the arrest and surrender of the
12:14:42 9 appellant to the Court authorities.

12:14:44 10 [12:14 p.m.]

12:14:49 11 Hence, the application was dismissed. The five counts of
12:14:57 12 appeal have been put forward before us by virtue of the
12:15:04 13 document in support of the appeal that essentially concern the
12:15:09 14 jurisdiction of the -- the jurisdiction of the Court to stay
12:15:13 15 proceedings, on the one hand, the validity of the findings of
12:15:18 16 the trial Court respecting breaches of the rights of the
12:15:22 17 appellant, as well as derailment from the process of review as
12:15:31 18 termed under the provisions of Article 59(2) of the Statute.

12:15:35 19 [12:15 p.m.]

12:15:36 20 The Prosecutor adopted a like stance, as before the trial
12:15:44 21 Court, refuting these allegations and supporting in every
12:15:48 22 respect the position adopted by the Pre-Trial Chamber in every
12:15:54 23 one of these issues.

12:15:55 24 [12:15 p.m.]

12:15:57 25 We refer in our judgment in detail to the submissions made by

12:16:04 1 either side, including the Democratic Republic of the Congo,
12:16:09 2 but denied any ill-doing, asserting that the appellant was
12:16:16 3 brought before the appropriate judicial authority, as he was
12:16:20 4 under detention, subject to the military authorities, and that
12:16:24 5 the process followed was the one ordained by the Congolese
12:16:31 6 law.

12:16:31 7 [12:16 p.m.]

12:16:32 8 The Pre-Trial Chamber -- one of the grounds of appeal is that
12:16:35 9 the Trial Chamber paid -- well, that the deference of the
12:16:44 10 Trial Chamber to the processes before the Congolese military
12:16:48 11 judicial authority was undue.

12:16:50 12 [12:16 p.m.]

12:16:56 13 In -- there are the following issues that we have itemised as
12:17:00 14 arising, and as proper subjects for consideration at the
12:17:11 15 appellate process: A. The doctrine or principle of abuse of
12:17:13 16 process, its ambit and applicability in proceedings before the
12:17:17 17 International Criminal Court; Article 21(3) of the Statute and
12:17:19 18 its relevance to the assumption of jurisdiction by the Court
12:17:22 19 in any given case; the validity of the findings of the
12:17:27 20 Pre-Trial Chamber respecting the absence of wrongdoing on the
12:17:30 21 part of the Prosecutor in the detention and sequential
12:17:35 22 treatment of the appellant by the Congolese authorities,
12:17:37 23 evidence of mistreatment, gave or otherwise, of the appellant,
12:17:41 24 and also the correct appreciation of the implications of
12:17:47 25 Article 59(2).

12:17:47 1 [12:17 p.m.]

12:17:53 2 With regard to the parameters of our jurisdiction, we
12:18:00 3 determined that questions of jurisdiction as well as
12:18:09 4 admissibility -- that is, the circumstances entitling the
12:18:12 5 Court to assume or exercise jurisdiction in any given
12:18:14 6 matter -- are provided for thoroughly in -- by the Statute,
12:18:23 7 and the reference is made to the provisions of Article 99 and
12:18:28 8 19 and 17, in particular, in this connection.

12:18:33 9 [12:18 p.m.]

12:18:33 10 Abuse of process is a doctrine evolved by English case law
12:18:41 11 designed to ensure that the process of the court, as such, is
12:18:46 12 not abused. It's a discretionary power, rarely exercised, in
12:18:55 13 order to stop what would thwart, as I can say, the process
12:19:01 14 from its proper or desired course.

12:19:01 15 [12:19 p.m.]

12:19:06 16 It finds expression in many countries having the common law
12:19:11 17 system of justice, and ultimately can be encapsulated in the
12:19:18 18 following proposition: that if -- if the exercise of this
12:19:24 19 jurisdiction -- of the jurisdiction is sought for a purpose
12:19:28 20 other than the one for which it is designed, or for a purpose
12:19:33 21 unknown to the causes of justice, proceedings can be stopped,
12:19:37 22 essentially, at the outset, but even in the process.

12:19:37 23 [12:19 p.m.]

12:19:41 24 And reference is made, of course, in our judgment to
12:19:44 25 authorities clearing the ground on the ambit and compass of

12:19:50 1 the doctrine in various jurisdictions where it finds
12:19:54 2 application.
12:19:55 3 [12:19 p.m.]
12:19:56 4 No corresponding principle has been evolved under the
12:20:01 5 Romano-Germanic system of law, where the Latin maxim *male*
12:20:09 6 *captus bene detentus* finds, to a large measure, expression.
12:20:13 7 Of course, there are some recent decisions to the effect that
12:20:19 8 gross violations of rights may impede the process. I have in
12:20:23 9 mind, in particular -- we have in mind, in particular, a
12:20:26 10 recent decision of the German Constitutional Court.
12:20:30 11 [12:20 p.m.]
12:20:31 12 But even under the doctrine of abuse of process, not every
12:20:38 13 infraction of the law or abuse of the rights of the subject
12:20:43 14 will justify a stay of proceeding. The conduct must be such
12:20:46 15 as to make it appear antagonistic to the ends of justice to
12:20:53 16 embark on the process of trying the particular case.
12:20:56 17 [12:20 p.m.]
12:20:58 18 The doctrine of abuse of process can have -- find no
12:21:04 19 application -- doctrine of abuse of process, as such, can find
12:21:09 20 no application under our Statute. Nonetheless, it must be
12:21:12 21 noticed that *ab initio* the doctrine of abuse of process had,
12:21:19 22 among other things, designs to support and protect in specific
12:21:24 23 areas the right of the individual, such as the right to trial
12:21:30 24 within a reasonable time, or the appearance of the accused
12:21:36 25 before the Court by due process of the law.

12:21:41 1 [12:21 p.m.]

12:21:44 2 The -- it is our conclusion that the Court does not have
12:21:51 3 inherent power to stop proceedings by virtue of the doctrine
12:21:55 4 of abuse of process. On the other hand, we are obliged under
12:22:00 5 the provisions of Article 21(3) of the Statute not only
12:22:05 6 to -- not only to interpret, but apply this Statute in
12:22:10 7 accordance with recognised human rights norms.

12:22:10 8 [12:22 p.m.]

12:22:14 9 In the Statute itself, the right of the person arrested, the
12:22:20 10 person charged, as well as the accused, are defined in
12:22:23 11 accordance with such recognised norms, that -- well, the
12:22:29 12 reference mark for the application of every provision of this
12:22:35 13 Statute.

12:22:35 14 [12:22 p.m.]

12:22:37 15 And I shall continue reading some passages from the judgment:
12:22:41 16 "Breach of the right to freedom by legal arrest or detention
12:22:45 17 confers a right to compensation to the victim. Does the
12:22:47 18 victim have any other remedy for or protection against
12:22:51 19 breaches of his basic rights? The answer depends on the
12:22:55 20 interpretation of Article 21(3) of the Statute, its compass
12:23:01 21 and ambit. It stipulates that the law applicable under the
12:23:05 22 Statute must be interpreted as well as applied in accordance
12:23:07 23 with internationally recognised human rights. Human rights
12:23:12 24 underpin the Statute; every aspect of it, including the
12:23:14 25 exercise of the jurisdiction of the Court. Its provision must

12:23:18 1 be interpreted and, more importantly, applied in accordance
12:23:21 2 with internationally -- sorry -- recognised human rights;
12:23:26 3 first and foremost, in the context of the Statute, the right
12:23:30 4 to a fair trial, a concept broadly perceived and applied,
12:23:35 5 embracing the judicial process in its entirety. The Statute
12:23:39 6 itself makes evidence obtained in breach of internationally
12:23:44 7 recognised human rights inadmissible in the circumstances
12:23:47 8 specified by Article 69(7), where a fair trial becomes
12:23:52 9 impossible because of breaches of the fundamental rights of
12:23:55 10 the suspect or the accused by his accusers, it would be a
12:23:59 11 contradiction in terms to put the person on trial. Justice
12:24:03 12 could not be done. A fair trial is the only means to do
12:24:07 13 justice. If no fair trial can be held, the object of the
12:24:11 14 judicial process is frustrated and the process must be
12:24:15 15 stopped."
12:24:15 16 [12:24 p.m.]
12:24:19 17 "Where the breaches of the accused" -- I read from another
12:24:23 18 paragraph -- "are such as to make it impossible for him or her
12:24:26 19 to make a defence within the framework of his rights, no fair
12:24:29 20 trial can take place and the proceedings can be stayed. To
12:24:34 21 borrow from the decision of the English Court -- an expression
12:24:37 22 from a decision of an English Court that we cite, it is the
12:24:41 23 duty of the Court to see to the protection of individual
12:24:46 24 fundamental rights, which is the particular territory of the
12:24:48 25 courts. Unfairness in the treatment of the suspect or the

12:24:51 1 accused may rupture the process to an extent, making it
12:24:56 2 impossible to piece together the constituent elements of fair
12:24:59 3 trial. In those circumstances, the interest of the world
12:25:03 4 community to put persons accused of the most heinous crimes
12:25:11 5 against humanity on trial, great as it is, is outweighed by
12:25:12 6 the need to sustain the efficacy of the judicial process as
12:25:15 7 the potent agent of justice."

12:25:17 8 [12:25 p.m.]

12:25:18 9 In light of the above, and subject to this framework, we
12:25:22 10 examined the validity of the findings of the Pre-Trial Chamber
12:25:25 11 to conclude that there is -- nothing has been adduced before
12:25:31 12 us, for the reasons that we explained in some detail in our
12:25:34 13 judgment, to suggest, firstly, that there was any ill-doing on
12:25:39 14 behalf of the -- on the part of the Prosecutor in securing by
12:25:43 15 surreptitious means the arrest of Mr Lubanga, or that the
12:25:51 16 process before the -- or that the proceedings before the
12:25:56 17 Congolese judicial authorities are in any way flawed.

12:26:00 18 [12:26 p.m.]

12:26:01 19 We also agree with the Pre-Trial Chamber that there is
12:26:09 20 nothing -- nothing was set down or produced to justify the
12:26:14 21 suggestion that the finding of the Pre-Trial Court, that no
12:26:22 22 violence or ill-treatment, or any act derogatory to the rights
12:26:28 23 of the appellant was used in the process of his arrest
12:26:35 24 and -- by the Congolese authorities, and his surrender to the
12:26:39 25 Court.

12:26:39 1 [12:26 p.m.]

12:26:39 2 Therefore, we confirm the decision of the Pre-Trial Chamber,
12:26:49 3 whose standard of review in relation -- as we explain in our
12:26:55 4 judgment, is the relation to violation of the rights of the
12:27:00 5 appellant -- was, if anything, as we explain, broader than the
12:27:06 6 one adopted in this judgment.

12:27:08 7 [12:27 p.m.]

12:27:10 8 At issue is the process of bringing the appellant to justice
12:27:12 9 for the crimes that form the subject matter of the proceedings
12:27:15 10 before the Court. The Pre-Trial Chamber determined that it is
12:27:20 11 in relation to this process that breaches of the rights of the
12:27:22 12 suspect or the accused may provide ground for halting the
12:27:26 13 process. And none was shown. For these reasons -- for the
12:27:31 14 reasons aforegiven, the appeal is dismissed and the decision
12:27:36 15 under appeal confirmed.

12:27:39 16 The session is over.

12:27:46 17 [12:27 p.m.]

12:27:48 18 [At 12.27 p.m. the Appeals Chamber adjourned accordingly]

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