

1 International Criminal Court

2 Trial Chamber I

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

4 Status conference - Open Session

5 Tuesday, 24 June 2008

6 The hearing starts at 2.05 p.m.

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

9 PRESIDING JUDGE FULFORD: Good afternoon. The Prosecution are
10 represented by Mr. Withopf and Mr. Guariglia, the Defence by
11 Maitre Mabilille and Mr. Biju-Duval, and in both instances there are other
12 members of their teams present in court this afternoon. Mr. Walley and
13 Ms. Bapita represent the participating victims, Ms. Pellet together with
14 a colleague for the Office of Public Counsel for Victims, and
15 Mr. Dubuisson and Ms. Becerra for the Registry.

16 Mr. Withopf, I'm going to address the bar through you to make
17 this preliminary observation in relation to the two issues of the
18 application seeking leave to appeal and the review of the detention of
19 the accused.

20 Yesterday, the Prosecution filed its application seeking leave to
21 appeal. Now that that has happened, it seems to us that it is correct to
22 observe, certainly on a preliminary basis, that the two issues of leave
23 to appeal and any review of the accused's detention are linked in the
24 sense that our decision on leave to appeal may well have real relevance
25 as regards our decision on whether at this moment in time the accused

1 should be released from detention.

2 We will invite submissions on that suggestion. Before we do, we
3 want to indicate by way of procedural matters that subject to any
4 submissions that are made that we propose to grant the Defence and the
5 participants until 4.00 p.m. on Friday of this week to file their
6 submissions on the Prosecution's application for leave to appeal. And
7 again subject to any further submissions on the issue this afternoon, our
8 present proposal is to issue a decision in writing on the proposed
9 appeal -- or, rather, the application for it during the course of next
10 week.

11 It follows, therefore, that if our suggestion is right, it means
12 that it would be premature this afternoon for us to consider with any
13 finality any suggestion that the accused should be released, and the
14 proposal that we make in this regard, on which, of course, we are open to
15 submission, is that submissions in writing should be filed with the court
16 in accordance with the same timetable that we have just outlined in which
17 we invite all those who wish to make submissions to address the issue of
18 the accused's detention or release against the background of the two
19 possibilities: On the one hand that we grant leave to appeal to the
20 Prosecution, and on the other hand, that permission is refused. And so
21 the proposal we make is that substantively the issue of Mr. Lubanga's
22 continued incarceration should be dealt with in writing.

23 However, there may be certain practical issues which it would be
24 more convenient to discuss orally this afternoon, and we are particularly
25 conscious of the presence of Mr. Dubuisson who has been asked to attend

1 at the request of the Defence to address particular issues.

2 Now, I don't know what Maitre Mabilie particularly had in mind in
3 this regard, but there may be certain factors which it would be easier
4 for her to deal with whilst Mr. Dubuisson is here rather than dealing
5 with the matters on which he can contribute in writing.

6 Summarising, therefore, we are suggesting that written
7 submissions should be made on both of these issues and -- in the main,
8 and we will in due course address both of* them in a written decision which
9 we would hope to promulgate during the course of next week. I stress
10 these are only proposals, and if anybody has any contrary suggestions we
11 have an open mind always and will listen to any competing submissions.

12 We'll hear from you first, Mr. Withopf. Do you have anything
13 that you'd wish to say?

14 MR. WITHOPF: Mr. President, your Honours, the Prosecution
15 concurs with the views as they have just been voiced by the
16 Presiding Judge. The issue of the decision on the application seeking
17 leave to appeal and the issue on the release of Mr. Thomas Lubanga are
18 closely interlinked. For that reason the Office of the Prosecutor
19 supports the suggestion that has been made by the Honourable Bench.
20 Thank you very much.

21 PRESIDING JUDGE FULFORD: Ms. Mabilie.

22 MS. MABILLE (interpretation): Mr. President, the Defence agrees
23 to the idea of making written submissions, but is the Chamber aware that
24 we will not have a public hearing after these submissions are made in
25 writing?

1 PRESIDING JUDGE FULFORD: Maitre Mabilille, the suggestion that
2 we're making in essence is that if there are any particular submissions
3 that you want to advance orally, that that should happen today and that
4 they should be supplemented by 4.00 p.m. on Friday with submissions in
5 writing. It had seemed to us on a preliminary basis that it was
6 unnecessary to have oral submissions this afternoon, written submissions
7 by Friday, and then oral submissions again during the following week.

8 Now, I stress that's a preliminary proposal, and if you want to
9 suggest otherwise you're free to do so.

10 MS. MABILLE (interpretation): Not at all. I should like to make
11 the submissions about the release of Mr. Lubanga today. Do you wish me
12 to make them now?

13 PRESIDING JUDGE FULFORD: We would be grateful if you would.

14 MS. MABILLE: Okay. (Interpretation) The submissions we can make
15 today regarding the release of Thomas Lubanga are based obviously,
16 Mr. President, your Honours, on your decision which was rendered on the
17 13th of June, 2008. In our view, it is obvious that the stay of
18 proceedings leads to the release of the accused. The warrant of arrest,
19 which is the legal basis for the decision, is therefore void.

20 We are not in a situation that is referred to in Article 60 or
21 Rule 78 regarding provisional release. In our view, the release of
22 Thomas Lubanga is a result of the decision to stay the proceedings.

23 In the view of the Defence there are two problems. The first you
24 have raised, Mr. President. The second, which you have not raised but
25 which I shall raise now, that is the effect of the appeal lodged by the

1 Prosecution on Friday at 15.53, the appeal against the decision you
2 rendered on the 13th of June. What is the effect of that appeal on the
3 provisional detention? It seems to us that the legal response to this is
4 simple. All we need do is to refer to Rule 82(3) of the Statute, which
5 states that the appeal does not have suspensive effect and that if the
6 Appeals Chamber so orders following an application -- following an
7 application in compliance with the Rules of Procedure and Evidence. So
8 what the Prosecutor is asking is leave to appeal. If you grant him leave
9 to appeal, he may ask the Appeals Chamber to render a decision that would
10 have suspensive effect. But today as we speak, the Prosecutor does not
11 have a decision with suspensive effect.

12 In our view, therefore, from a strictly legal standpoint, and
13 when you say "today," I refer -- or I take account of the fact that there
14 is no decision that will allow Mr. Thomas Lubanga to be kept in
15 detention. There is no legal decision. So in our view the principle is
16 simple. The stay of proceedings has as a direct consequence the release
17 of Thomas Lubanga. In spite of the appeal, there has not been an order
18 with suspensive effect, and Thomas Lubanga, I correct myself, should be
19 released.

20 Second point. I said that I'm anticipating somewhat. I am
21 referring to your decision of the 13th of June, 2008, which provided for
22 a possible review by your Chamber of the situation, and I might
23 understand, the Defence might understand, that as the Chamber has decided
24 to review its own decision, it would wish to keep Thomas Lubanga so that
25 the trial could be held as soon as possible.

1 So I wish to develop three arguments with regard to the
2 possibility of the Bench examining as quickly as possible, or reviewing
3 as soon as possible its decision of the 13th of June, 2008. I shall
4 start with the conclusion.

5 In the current state of affairs the review seems to be
6 impossible, and I shall base these on three arguments. The decision that
7 you rendered, which in my view appears to be fundamental to international
8 criminal law, and not only for the Defence of Thomas Lubanga, is in my
9 view a way of establishing two principles. The first is that all
10 exculpatory materials must be disclosed to the Defence. This is -- this
11 goes to the fairness of trial. Another aspect of the decision is that
12 the Prosecutor used or abused the confidentiality agreements that he
13 signed, and in particular, with the United Nations.

14 For this decision to be reviewed, we would have had, as quickly
15 as possible, access to the exculpatory materials that had not been
16 disclosed to us, but we must admit today that Mr. -- the Prosecutor is
17 persisting in error. How so? We have all received a document
18 indicating - and this is the first point - that in a related case the
19 Prosecutor had just unearthed 1.200 documents and that he had realized
20 when he saw these documents that some of them, which might be related to
21 the Lubanga case, and that for four years he had somehow forgotten to
22 inventorise the documents and that he had now done so which meant that we
23 were faced with a situation which is possibly worse than that of the 13th
24 of June, 2008, because the Prosecutor is now saying, "I have some more
25 exculpatory materials that I have just unearthed and I shall give them to

1 you soon."

2 My first argument is that review becomes difficult in such
3 circumstances. The second argument in your decision of the 13th of June,
4 2008, you indicate that the documents should be disclosed to us, but we
5 were told that there were two sources. There were two sources which had
6 19 documents and another which was the United Nations with 150 documents.
7 We do not know about the other source with 19 documents with whom the
8 Prosecutor signed a confidentiality agreement.

9 Thirdly, I shall now return to what I think is the most important
10 of the principles, and I'm speaking here advisedly. I am referring to
11 the letter that was disclosed to us yesterday as coming from the United
12 Nations. This requires some observations from the Defence.

13 This letter is particularly difficult. I agree that it places
14 the Judges, first of all, in a situation where they are told that in
15 order to peruse the documents, which are on the 10th floor of this
16 building, mind you, they must then go to the Peace Palace, go into a room
17 where they will be shown these documents, and they will be forbidden to
18 take notes, and they may get out of those room -- that room and they may
19 take a few notes if they wish, and they will be under the surveillance of
20 a person from the United Nations. When they will have finished perusing
21 these documents, and they would be extraordinary Judges to do so without
22 taking any notes, then they will tell the Prosecutor -- and we're
23 referring here to 250 documents, and I'm not even referring to the
24 Katanga case where there are many more documents. So as I was saying,
25 once they will have considered all these documents, then they will be

1 asked to return to the Peace Palace and make sure or find out how the
2 Prosecutor could make summaries. And at the end of this extraordinary
3 letter we are told that perhaps, perhaps, the United Nations would then
4 agree to disclose some documents.

5 This document placed us in a situation of considerable
6 difficulty. We have made lengthy submissions in writing to the effect
7 that the Defence would not accept summaries because summaries cannot
8 perform the function that would enable us to do our duty; that is,
9 exercise our own control and ascertain how we may best put this
10 information to use, and in any case, summaries cannot be used as
11 evidence.

12 In any case, this has implications for the very functioning of
13 international justice. What does this mean? It means that the
14 Prosecutor signs confidentiality agreements with the United Nations, and
15 the United Nations will dictate both to us and to the Judges or justice
16 generally what should be said or not said in a case file. What is the
17 purpose of international justice? What is its meaning? Is it to search
18 for the truth, or is it to search for what the United Nations wants us to
19 think about what -- how it perceives the conflict in Ituri?

20 And I wish to tell you that the problem is a lot more serious
21 than in the case of Thomas Lubanga Dyilo, because if sources can dictate
22 to us the policy that they wish us to pursue, then what is the principle
23 of Article 40 of the Statute which sets out that Judges are independent?
24 What is the meaning of the Article 42 which says that the Prosecution is
25 independent? It means that we will all depend on sources, which will

1 enable us, which will enable you to make a case record completely
2 useless. What is the search for truth? What is the search for truth if
3 sources can tell us, "I'll give you these elements or these materials,
4 but I will not give you these ones"?

5 Then we come to a situation which is very serious, and this is
6 not limited to Thomas Lubanga. This work of justice that we're trying to
7 perfect, we cannot perfect in such conditions.

8 Mr. Jean-Marie Biju-Duval, my colleague, said during the last
9 hearing, he said they're trying to hide from us materials that the UN has
10 in its possession. The United Nations has been in Congo for years. It
11 is the key source of information that was provided.

12 What are these superior interests that it is protecting, and
13 which in so doing it is preventing us from having access to documents.
14 These are the key questions. Today is the United Nations, and it will be
15 another source in another case.

16 Mr. Prosecutor, I know I --

17 PRESIDING JUDGE FULFORD: Pause for a moment.

18 Yes, Mr. Withopf.

19 MR. WITHOPF: Thank you, Mr. President, your Honours. Thank you
20 for giving me the opportunity to raise a concern.

21 We kept quiet for some minutes, but I think we reached the point
22 in time where we want to intervene. My learned friend from the Defence
23 is discussing the merits of the appeal, and this is not the right place
24 and not the right time, Mr. President, your Honours, in our view, to
25 discuss this in such a detail. The Prosecution therefore objects to the

1 continuation of the submission of my learned friend if it covers aspects
2 that go straight to the merits of the appeal.

3 PRESIDING JUDGE FULFORD: Yes, Mr. Withopf. I had refrained from
4 interrupting Maitre Mabilille because the issue of the letter, which we saw
5 yesterday, is something that I proposed to raise a little later this
6 afternoon, and given that the subject matter is going to be raised, it
7 seemed to me that, generally speaking, it's appropriate for
8 Maitre Mabilille to be able to contribute to that subject. However, you
9 are right that we're discussing essentially at the moment the issue of
10 the release of the accused rather than the merits of your application for
11 leave to appeal, and I'm sure that Maitre Mabilille will keep that in mind
12 during the course of the remainder of her submissions, but thank you for
13 the observation, Mr. Withopf.

14 And I'd ask you to bear that in mind, Maitre Mabilille.

15 MS. MABILILLE (interpretation): I shall bear this in mind,
16 especially as I was almost at the end.

17 Mr. Prosecutor, I addressed this issue because I thought that in
18 your written submissions you say you were going to ask the Chamber for a
19 review of its decision, and I was anticipating by providing a clear
20 response from the Defence to say that there is no possibility for review
21 at the current stage in the proceedings from our viewpoint, and
22 accordingly you could not argue and try to use this argument to request
23 that Thomas Lubanga be kept in detention. That is why I addressed this
24 issue.

25 I have concluded my submissions. In our view there is no legal

1 basis today for Thomas Lubanga to be kept in detention, and of course we
2 are requesting his immediate release.

3 PRESIDING JUDGE FULFORD: Maitre Mabilille, we're grateful to you.

4 Mr. Dubuisson has been asked to attend this afternoon, I assume,
5 to assist you with certain matters that may be of relevance to you and
6 your lay client. Are there in fact any particular points that you would
7 ask us to request the assistance of Mr. Dubuisson on?

8 MS. MABILILLE (interpretation): Perhaps we could do so. The idea
9 of having Mr. Dubuisson here is related to the fact that the release of
10 Thomas Lubanga has consequences, and it might be necessary to keep him in
11 The Hague for a while, and therefore we would need the cooperation of the
12 Dutch authorities, and this is why we requested the presence of Marc
13 Dubuisson to consider with the Dutch authorities, if your Chamber should
14 decide to release Thomas Lubanga, to discuss the practicalities of his
15 stay in the Netherlands. That's why, your Honour, we've requested
16 Mr. Dubuisson to be here. But before we give him the floor, from what
17 I've understood, the Dutch authorities are waiting for your decision
18 before they envisage practical modalities.

19 PRESIDING JUDGE FULFORD: Maitre Mabilille, what we would propose
20 is that we consider the issue in principle first of all, whether or not
21 the accused should remain in detention or be released, and if it is in
22 favour of release, then there will need to be a separate hearing in order
23 to discuss the kind of practical arrangements that you've just alluded
24 to, but I think at the moment, unless there are any contrary submissions,
25 it's premature to ask Mr. Dubuisson to contribute to this subject and I

1 see that you agree.

2 Mr. Withopf, you're on your feet. I had proposed to give
3 Mr. Walleyne and Ms. Bapita the opportunity to make submissions should
4 they wish to do so unless you wish to speak now, Mr. Withopf, and you're
5 still on your feet, so I assume you do.

6 MR. WITHOPF: Indeed, Mr. President. I do wish to speak now
7 after my colleague has made the choice to make her submission today, and
8 I want to outline what our submissions are to be and will be that will be
9 filed in writing.

10 PRESIDING JUDGE FULFORD: Right, Mr. Withopf. You can -- you can
11 reply, but in a moment. As a matter of courtesy, I'm going to give those
12 others who are present in court the opportunity to go first.

13 Now, Mr. Walleyne, is there anything you would wish to say on this
14 issue?

15 MR. WALLEYNE (interpretation): Thank you, President, your
16 Honours. Indeed, I think it's the right time to state here the views and
17 concerns of victims. Also in light of the fact it might be the last time
18 we are given an opportunity to do so in the court in this case.

19 We're at a crossroads, and as Maitre Mabilille has said, it's the
20 court and international criminal justice that are at a crossroad. In the
21 next days and weeks you will be taking decisions of crucial importance.
22 Their importance is not only crucial for the law and the principles that
23 we will be establishing and the relations we are laying down between the
24 Prosecution and the Chamber. Your decision will also have consequences
25 in the field, consequences for victims.

1 On very few occasions have we had legal debates in international
2 criminal courts and tribunals which are related to what is actually
3 happening in the field, but today in churches in Bunia people are praying
4 and have been doing so for days and will keep on doing so until the
5 decision is taken. People are sympathisers of Lubanga. Some people have
6 been celebrating, but the victims are remaining silent.

7 Victims have been disappointed with justice, the justice system,
8 and the victims were and have always been disappointed by the justice
9 system. They had hoped that the international justice system would give
10 them the -- the hope that the domestic systems haven't given them, but
11 today they are frightened about the consequences of the release of
12 Mr. Lubanga, which we are discussing today, and frightened about the
13 consequences of a conflict which in theory is finished but which in
14 practice is still ongoing.

15 We still do not have an agreement in the field, and the
16 communities still are not reconciled. There are still -- conflicts are
17 still present. There are still children in the bush, and for them this
18 case gave them hope. And I was reading in the paper this morning Le Cri
19 conclusions I agree with. If Thomas Lubanga were released, the 30.000
20 child soldiers in the Congo would see that their leader was released and
21 that there would be a possibility for Mr. Jean-Pierre Bemba to invoke the
22 confidentiality of the statements.

23 This also has consequences on a legal level. You may have seen
24 that this morning already we filed a response to the Prosecution's
25 application. Although we don't entirely support all the points raised by

1 the Prosecutor, we believe that decision. The decision is of such
2 importance that it must be submitted to the Appeals Chamber for a ruling.
3 We believe that this question was already raised a couple of days ago,
4 and it is an issue that will arise in all the ongoing cases. It's an
5 issue for which the Statute has remained silent.

6 It appears that there might be a contradiction between the
7 Prosecutor's right that are guaranteed by Article 54(3)(e) and the rights
8 of the accused. It is not easy to reconcile both Articles.

9 Discussions took place during the preparatory work on drafting
10 the Rules of Procedure and Evidence, and the parties came to the
11 conclusion that it was the court that should solve the problem, but now
12 listening to the Defence's submission, they seem to believe that all
13 exonerating should always be disclosed to the Defence. However, Article
14 54(3)(e), in that case, would never -- could never be used, because all
15 documents may contain exonerating information, and therefore the issue is
16 extremely complicated.

17 And what is very frustrating for our clients is that such a
18 discussion, a very intellectual, interesting discussion on which a
19 doctoral thesis may be written between protagonists of the international
20 community in which the community -- the international community can't
21 always make the difference between the Chamber, the Prosecutor, the
22 United Nations, and other protagonists.

23 It is are a whole series of factors. There have been deaths,
24 rapes, et cetera, for years ongoing in the conflict, and this is why we
25 would like to express our client's desire for the international community

1 to be given not only a scientific discussion but to realise that an
2 excess of justice can lead to injustice. And I'm not only voicing fears
3 here. We should not only discuss how to interpret an article, who is
4 right, who is wrong. Are the United Nations right and adopting the right
5 attitude, but we need to also bear in mind the consequences of all this,
6 and everybody here and outside this room has a responsibility, has the
7 responsibility to ensure that the excessive justice here doesn't lead to
8 injustice, and that is the victims' request to you.

9 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Walley.

10 Ms. Bapita, a degree of indulgence has been extended so far. We
11 are, I have to reinforce, really addressing at the moment whether or not
12 the accused should be released. I think Mr. Walley, in his submissions,
13 went rather considerably wider than, perhaps for reasons that are
14 understandable.

15 Without wishing artificially to limit you in your submissions,
16 can I ask you particularly to concentrate on the subject matter at hand
17 at the moment, which is release or continued detention.

18 MS. BAPITA (interpretation): Thank you, President, for the
19 floor. I agree with everything said by Mr. Luc Walley.

20 As regards the question of whether or not Mr. Lubanga should be
21 given interim release, I believe that he should be given interim release,
22 but I would like us to think about what the consequences of such a
23 release would be, or just release, not interim -- not necessarily interim
24 release.

25 Yes. He has a right to be released, and the Prosecutor has the

1 right to submit the arguments he did to justify the interests of
2 remaining -- of keeping the documents provided by the United Nations
3 confidential, but my victims have asked me to say that they don't seem to
4 have any interest any more in the court's policies.

5 This discussion today is about the text of the court, Article 54
6 and Article 67, but at the end of the day certain persons and victims,
7 105 in particular, are saying that this is a diplomatic arranged way of
8 enabling a release, whereas this decision could set fire again to the
9 situation in Ituri and put or be very embarrassing for the situation in
10 Ituri and that's why we're asking you to think carefully about it.

11 We need to think about what could happen. Without infringing
12 upon the Prosecution's or Defence's right and without infringing upon the
13 victims' rights either, but I'm realising that victims do not have any
14 role here. Why? We have been asking ourselves questions. Since the
15 13th we have been asked questions from Ituri, from Kinshasa, and
16 everywhere. Why does the United Nations want to remain some
17 information -- keep some information confidential?

18 Well, I would like you to think about what the victims are
19 thinking. What is the content of these files under 54(3)(e) which the
20 Prosecutor wants to keep confidential? Who are the persons, the military
21 authorities of countries and neighbouring countries which are protected
22 by the United Nations? How can we explain that it's the United Nations
23 through their Resolutions that have turned the region of Ituri into a
24 place under Article -- Chapter 7 in which the serious crimes have been
25 committed for which the international community is mobilised? And now

1 it's the very United Nations that are expressing restorations. So what
2 role do victims have to play in all of this?

3 I would like to go further, but I think I'll limit myself to
4 saying that I fear that in the case of interim release that people will
5 be seeking revenge in the community of Thomas Lubanga. You saw what
6 happened in -- on the 17th in Bunia, and you followed what happened on
7 Radio Okapi. His confidence in him was reiterated despite the fact he
8 was detained. Although he has a right to be released, how will you
9 manage the consequences of his release? That's my question, that legal
10 representatives will be at risk, the intermediaries will be at risk, and
11 the victims too. You don't know since you don't know realise what
12 security problems we've had since the 17th. And the population, who
13 knows nothing about the law, does not understand. We shouldn't forget
14 that interim release, provisional release, has consequences. Victims
15 don't know anything about the law. For them he will just be released,
16 that's all.

17 So the victims didn't trust the DRC's justice system, and they
18 hoped that at least over there justice would be done, and they hoped that
19 anybody who had committed this type of crime would be held accountable,
20 but how will we tell the victims, "Well, this is the court's decision,"
21 if the court decided to release Thomas Lubanga?

22 And let me say something. One thing is sure: The DRC's
23 government will say, "I made mistakes by referring him to the ICC. I
24 could have judged him myself.

25 If a state decides it is unable to do justice and send somebody

1 to an international court, it's true that the detainee has rights, but we
2 have to think about the consequences in the field and will be held
3 accountable for them in the history. And I would like to say that since
4 the 17th there are unexplainable tensions.

5 We are all at risk, and we need to know what these United Nations
6 documents contain.

7 And we shouldn't forget that Ituri is two armed groups. People
8 always focus on the Hema and the Lendu, but you can't overcome this
9 reality. But how to understand that it's to do with the law? It's
10 nothing to do with the community? How will you manage the social
11 consequences of such a decision?

12 Katanga -- if somebody is freed -- or Ntaganda is freed, how will
13 you capture him? So according to the texts -- if according to the texts
14 of the court Lubanga could be released too, what will that mean? How can
15 you manage this realisation in the field?

16 We are all adults here. We have waited 20 months to participate
17 in the proceedings, but since the 13th all our hopes have been dashed,
18 and the consequences of this release would lead to triumphalism, and
19 prayers have been made, and his community is waiting until you have
20 issued the decision. Meanwhile, the intermediaries are at risk. What
21 measures will the court take regarding the risk incurred by victims? And
22 have you thought about this in case of his release? We thought about the
23 rights of detainee, the rights of the Prosecution, but the victims never
24 seem to have rights. We should think about the victims. How can we help
25 them understand what is going on through these complex legal texts, these

1 texts that could grant release to the detainee?

2 You can be -- you can be assured that there will be vengeance and
3 that the government will review its policy to give the court detainees if
4 there is release.

5 Your Honours, as my -- my colleagues have said, this question has
6 been raised, and it has often been asked whether detainees can be
7 released, but what does the purpose of the court serve if that's what we
8 do through the texts, because Jean-Pierre Bemba will also be here and ask
9 for the Article 54(3)(e) to be applied. And I think you know the
10 realities of the field. I think in all our decisions we should try to
11 keep the maximum peace in the field as possible, because we need to avoid
12 solutions to be found through internal vengeance. We need the court, and
13 we need the court to do justice, and if we don't do so through the texts
14 it will be a fireball in Ituri and we will all be held accountable
15 throughout history for this.

16 PRESIDING JUDGE FULFORD: Yes, Mr. Withopf.

17 MR. WITHOPF: Mr. President, your Honours, again the Prosecution
18 is very grateful that we have the opportunity to respond to the
19 submissions that have been made by my learned colleague from the Defence,
20 and I will be brief, Mr. President, your Honours.

21 We submit, and it has been raised earlier on today by your
22 Honour, the Presiding Judge, we submit that it is premature to discuss
23 the release of the accused person, Mr. Thomas Lubanga, for two reasons,
24 for two main reasons, Mr. President, your Honours. First, the
25 Prosecution's application seeking leave to appeal challenges the decision

1 to stay proceedings, and it challenges it in its entirety.

2 The second reason, Mr. President, your Honours, and there I
3 disagree fundamentally with the observations that have been made by my
4 learned colleague from the Defence. The second is the UN letter of 20
5 June 2008, as it has been annexed to the Prosecution's yesterday's public
6 filing. This letter sets the framework that removes any basis, and I
7 repeat, it removes any basis for the stay.

8 The Prosecution therefore requests today that the stay be lifted
9 in order for the Trial Chamber to decide on the road map that has been
10 suggested by the United Nations.

11 PRESIDING JUDGE FULFORD: Mr. Withopf, let's pause for a moment.
12 Are you suggesting that on the basis of a filing that relates to only one
13 of the information providers and that touches upon only some of the
14 documents, and in the absence of any written request that this afternoon
15 we should lift the stay that we imposed just over a week ago? Is that
16 seriously being proposed by the Prosecution?

17 MR. WITHOPF: Mr. President, your Honours, it is seriously being
18 proposed, and I wish to add the following --

19 PRESIDING JUDGE FULFORD: Well, Mr. Withopf, I'm not going to
20 allow you to develop this submission. If there is to be a proposal by
21 the Prosecution that the stay should be lifted, that proposal should be
22 backed up with a written application in the first instance. That will be
23 followed by written replies by the Defence and the participants, and that
24 in turn will almost undoubtedly be followed by a* status conference.

25 We will not entertain this afternoon an off-the-cuff application

1 to lift the stay. What we are addressing at the moment is whether or not
2 the accused should be* released, and you are replying to Maitre Mabilille's
3 submissions in that regard, and I will ask you, please, to focus on that
4 subject.

5 MR. WITHOPF: Thank you, Mr. President, your Honours. We will as
6 suggested by Mr. President and your Honours then make our respective
7 submissions in writing.

8 I come back to the very issue of the present hearing. The
9 Prosecution holds that the decision reviewing the Trial Chamber's ruling
10 on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2),
11 and I make reference to the decision of 29 May, 2008, stating that Thomas
12 Lubanga shall continue to be detained, this decision is still a valued
13 one. For that reason, Mr. President, your Honours, the Prosecution
14 opposes any ruling on the release of the accused and in our submission,
15 and we will expand on it in writing later on, there is no basis for
16 considering release and there is no delay attributable to the Office of
17 the Prosecutor.

18 The qualification of the Trial Chamber, and I make this
19 observation in particular in light of the fact that the Defence has
20 relied on it, the qualification that the Prosecution improperly inhibited
21 the opportunities for the accused to present his defence, this in our
22 submission, Mr. President, and your Honours, is unfounded in the facts,
23 and it's unfounded in the law. And the use of such unwarranted, in our
24 view, and unnecessarily harsh language, Mr. President, your Honours,
25 questions the integrity of the Prosecution, and the Office of the

1 Prosecutor objects to such a suggestion.

2 I'm going to address a few points my learned colleague has made.
3 The first one I'm going to address is what my learned friend from the
4 Defence calls unearthed materials. The Office of the Prosecutor in that
5 respect has filed a submission, a public submission today. Courtesy
6 copies have been provided to the Chamber, and I wish to add, and to the
7 Defence prior to this hearing.

8 The Defence has made its submission against the background that
9 the Defence believes there may be very many additional materials that
10 fall within the qualification of potentially exculpatory information. I
11 wish to use the opportunity to clarify at this stage that the scope of
12 the problem, and I'm not even sure whether one should call it as such, is
13 a very, very small one.

14 The Office of the Prosecutor has completed the review of these
15 documents, and at this stage only 35 appear to fall within the
16 Prosecution's disclosure obligations either pursuant Article 67(2) or
17 Rule 77. Fifteen of these items appear to contain potentially
18 exculpatory information and 20 appear to contain information that falls
19 within the ambit of Rule 77. 13 of these 35 items were provided with no
20 restrictions. If the Defence would be prepared to receive these
21 materials today, the Office of the Prosecutor would be in a position to
22 disclose them immediately.

23 In respect of the other 22 items, 19 were provided under 54(3)(e)
24 restrictions by the United Nations. A request for lifting is being made,
25 and I draw the attention of the Honourable Bench to the last paragraph of

1 the letter of the 20th of June, 2008, which indicates that the UN is also
2 prepared to consider to follow its own suggestion in relation to these
3 additional documents.

4 I think based on this information that any suggestion the Defence
5 has tried to make today that there would be a significant problem has
6 now -- has no basis, and I wish to use this opportunity to clarify this.

7 Mr. President, your Honours, since we have the opportunity to
8 provide further argument and points in writing, I will stop here.

9 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Withopf.

10 It follows, therefore, that as regards the twin issues of the
11 application for leave to appeal and the release or detention of the
12 accused, the parties and the participants have until 4.00 p.m. on Friday
13 to file any written submissions. Thereafter, there will be a decision in
14 writing handed down by the Bench.

15 Do I see your hand going towards the microphone, Mr. Biju-Duval?

16 MR. BIJU-DUVAL (interpretation): With your leave, Mr. President.

17 PRESIDING JUDGE FULFORD: I want to know the subject matter first
18 of all, Mr. Biju-Duval, because Maitre Mabilille has already made the
19 submissions for the Defence on this issue. Now, what's the additional
20 matter that you want to raise?

21 MR. BIJU-DUVAL (interpretation): As a representative of the
22 Defence who has a right to speak last on these serious issues, I would
23 like to make a few brief observations in reply to what the Prosecutor and
24 the Legal Representatives of Victims said. It's not very long.

25 PRESIDING JUDGE FULFORD: All right, Mr. Biju-Duval, given the

1 importance of the subject matter, but sometimes sitting here it feels
2 like being at Wimbledon watching the ball go from one side of the net to
3 the other repeatedly, but you may have the last word on this subject,
4 yes.

5 MR. BIJU-DUVAL (interpretation): Thank you, Mr. President, your
6 Honours.

7 Your Honours, I would like to reply to what my learned colleagues
8 on the other side, the Prosecutor and the Legal Representatives of the
9 Victims, have said. The Defence is -- respects those who are praying in
10 Bunia and elsewhere, either for the freedom or release of Thomas Lubanga
11 or his continued detention. Whether they belong to one community or
12 another, they are entitled to respect. However, we expect nothing from
13 the will of God today before this court. What we expect is the justice
14 rendered by men, by a Bench. That is what we expect is the justice of
15 the law, because we've just heard something extraordinary today. We have
16 been told that justice comes to encourage war. We have been told that
17 the law jeopardises peace. These are the submissions that have been made
18 here on the part of the legal representatives of the victims.

19 It is a mistake. It is a mistake. We can understand the
20 concerns, but it is a serious error, and it runs counter to the
21 principles that underpin the establishment of the International Criminal
22 Court. There is no peace without justice, and of course there cannot be
23 any justice without the rule of law being respected. So we would like to
24 ask the Court to apply the law. We need not even need to ask the Court
25 to do so. It does so and it did so on the 13th of June 2008 when it

1 ordered a stay of proceedings.

2 So with regard to the precise subject of the continued detention
3 or the release of the accused, it's very simple. Today the legal
4 instruments that govern the law and, therefore, what justice should be,
5 that is that govern what those who have been involved in the Ituri
6 tragedy should expect, the instruments say that the decision to stay the
7 proceedings automatically leads to the release of the accused, except the
8 Appeals Chamber orders that the appeal that has been launched will have
9 suspensive effect.

10 We have, luckily, Article 82 of the Statute, which is very clear
11 on the subject, and it governs precisely decisions regarding
12 admissibility and competence and decisions on release. These decisions
13 are not so far removed from the stay of proceedings, and rightly so in
14 case of abuse of process.

15 In all of these cases, there is no suspensive effect affecting a
16 Trial Chamber decision unless the Appeals Chamber so orders. That is not
17 the case today, and that is why the Defence considers that the current
18 detention of Mr. Lubanga has no legal basis.

19 That is what I wish to add. That is what I wish to confirm, and
20 I should like to end simply by saying, still with reference to what has
21 been stated so firmly on the other side, I am not referring to danger
22 here. The danger here is not that the law will be applied. The danger
23 is that it will not be applied. And we are told today that Ituri will go
24 up in flames in Mr. Lubanga were to be released. What we know clearly
25 today, what we know, what is obvious, what everyone knows is that all

1 around the world the international press and the Congolese press have
2 said, on the contrary, the following: How can justice be rendered so
3 independently? There is pressure being brought to bear today. Not
4 against the victims of Bunia, but basically again the International
5 Criminal Court and its decisions that it renders independently.

6 I have concluded my submissions, Mr. President. Justice is not
7 against peace. There can be no justice without peace, and there cannot
8 be no justice without a strict application of the law.

9 PRESIDING JUDGE FULFORD: Mr. Withopf, I now want to turn to the
10 letter from the United Nations dated the 20th of June, which I hasten to
11 add is a public document.

12 It has been made clear beyond doubt by your observation a few
13 minutes ago that the Prosecution is contemplating making an application
14 to the Trial Chamber that we should lift the stay that has been imposed
15 on these proceedings, and we wish to address that letter so that we can
16 make some observations and suggestions which we hope will be of
17 assistance should the Prosecution make an application of the kind that
18 I've just referred to.

19 Now, before we make those suggestions and observations, I want to
20 make sure that the position, certainly insofar as this letter is
21 concerned, is clear. What is contemplated is that the three Judges
22 alone, unaccompanied by anyone, should enter a room at the Peace Palace
23 where we will be supervised.

24 First of all, is that correct, Mr. Withopf?

25 MR. WITHOPF: Mr. President, your Honours, the first part of your

1 observation is definitely correct. It is expected or anticipated by the
2 United Nations that the three Judges of this Honourable Bench, on the
3 premises of the Peace Palace, are given the opportunity to view the
4 documents without anybody else being present but a representative of the
5 United Nations. I would not go that far as to describe this as being
6 supervised, Mr. President.

7 And I wish to add already at this opportunity --

8 PRESIDING JUDGE FULFORD: Well, let us do the history first,
9 Mr. Withopf, and you can add anything you want later. All right?

10 So the three of us in a -- in a room. Let's remove the slightly
11 loaded word "supervised," but in the presence of a representative of the
12 United Nations.

13 Whether or not we carry pen and paper, the condition would be
14 that we don't use them unless and until we leave the room; correct?

15 MR. WITHOPF: That's correct, Mr. President.

16 PRESIDING JUDGE FULFORD: Any notes that we make, having left the
17 room, must not at any stage, quote* verbatim from what we have seen, but at
18 best or at most must be our own personal thoughts and notes about the
19 documentation that we've reviewed; correct?

20 MR. WITHOPF: That's indeed correct. It reflects correctly what
21 the letter says.

22 PRESIDING JUDGE FULFORD: Right. Therefore, for the substantive
23 process of assessing what we have seen in that room and establishing
24 whether or not it provides Article 67(2) or Rule 77 material, we must
25 perforce rely on our memories once we have returned to this building and

1 engage in the substantive exercise of considering the evidence in the
2 case and whether or not the material has an impact on it. Is that right?

3 MR. WITHOPF: Here, Mr. President and your Honours, would I not
4 entirely agree.

5 PRESIDING JUDGE FULFORD: All right. Now, where is -- where is
6 the summary wrong?

7 MR. WITHOPF: I think the summary got wrong at the juncture of
8 the notes the three Judges of this Honourable Bench can take. The Judges
9 can take notes, and they do not solely have to rely on their memory.

10 PRESIDING JUDGE FULFORD: Well, I think it has to be,
11 Mr. Withopf. We're not permitted -- the proposal is that we shouldn't
12 take notes in the room, so we would have to go outside, having read the
13 documents, then make our notes on the basis of what we could remember
14 from them. They couldn't be direct quotations, but in the terms of the
15 letter we can put our own thoughts down in writing. Correct?

16 MR. WITHOPF: That's the literal interpretation of that letter,
17 but bottom line remains, Mr. President, that they are notes. And I wish
18 to add that these are standard proceedings the Office of the Prosecutor
19 is also subjected to whenever it reviews or views UN materials.

20 PRESIDING JUDGE FULFORD: Well, that may be the position with
21 you, Mr. Withopf. We're looking at what the position is as far as the
22 Judges are concerned this afternoon. So we're not to take any notes in
23 the room, but we are entitled to put down our thoughts in writing
24 afterwards.

25 Right. Without asking you to reveal anything at all about the

1 substance of the material, would it be right to say that some, possibly
2 the majority, of this documentation, is in French.

3 MR. WITHOPF: I want to make a very preliminary observation. Of
4 course a substantive part of it will be in French. I will not go that
5 far to say that a substantive portion of it.

6 PRESIDING JUDGE FULFORD: Right. And those of us who do not
7 speak French with great fluency will not have the benefit of any kind of
8 translations or somebody there to translate the documents for us; is that
9 right?

10 MR. WITHOPF: That's right, Mr. President, your Honours. This is
11 an issue that has not yet contemplated, but I'm sure that this issue can
12 be solved to the extent necessary.

13 PRESIDING JUDGE FULFORD: Finally this: Do you agree with the
14 general proposition that the right to a -- that the right to a fair trial
15 includes the right to a fair appeal? And if you do agree with that
16 proposition, how is it suggested by the Prosecution, on the basis of this
17 suggestion, that the Bench should record in any kind of substantive way
18 what we have seen, what its evidential value is when compared with the
19 other evidence in the case, and how will the Appeals Chamber, if called
20 upon in due course, review the process that we've undertaken when we have
21 been dependent entirely on our memories and when the core material that
22 we have seen, as I understand it, is not to be made available either to
23 us or the Appeals Chamber?

24 MR. WITHOPF: Mr. President, your Honours, I do know exactly
25 where you're coming from, and I agree with the observation that also the

1 Judges of the Appeals Chamber should be given an opportunity to view the
2 documents. The issue is currently being discussed with the United
3 Nations. I'm at this stage not yet in a position to provide for an
4 answer to it, but the issue is known. We are aware of it. We have
5 raised it with the United Nations. It's currently being contemplated.
6 And I do not want to be overly optimistic, but I'm sure that a response
7 to this question to be provided within a reasonable time.

8 Coming back, Mr. President, with your leave. On the question you
9 asked how many documents are in French, I just got information from my
10 team and I'm grateful for it, that 95 documents are indeed in French or
11 partial in French -- partially in French; meaning 95 out of the 206
12 documents concerned. We can provide - this could be a potential
13 solution - we can provide for translations into English.

14 PRESIDING JUDGE FULFORD: Now, Mr. Withopf, earlier during the
15 questions I was putting to you, you indicated that there was something
16 that you wished to add. This is now your opportunity.

17 MR. WITHOPF: I wished to add, and I have already done so,
18 Mr. President and your Honours, this is standard procedure that is
19 applied by the United Nations, including for the Office of the
20 Prosecutor.

21 PRESIDING JUDGE FULFORD: Thank you very much indeed.

22 We now propose to make certain suggestions and observations in
23 relation to any application that may be made in due course to lift the
24 stay only the proceedings that was imposed by this Chamber just over a
25 week ago.

1 Our preliminary view is that any application of this kind should
2 occur and only occur when the Prosecution is in a position to address to
3 the extent that is feasible the totality of the evidence that is covered
4 by the Article 54(3)(e) agreements from all of the information providers
5 of whom, as I understand it, there are some seven or eight.

6 For these purposes, the Chamber and the Defence will need to
7 receive, prior to a status conference listed to consider this issue, a
8 comprehensive document that deals with all of the Article 67(2) and
9 Rule 77 material that is covered by the Article 54(3)(e) agreements and
10 which cannot be disclosed to the Defence. This document should set out
11 to the fullest extent possible, but only to the extent permitted by the
12 agreements, the following:

13 One, whether the restrictions on disclosure to the Defence are to
14 be lifted in respect of particular documents.

15 Two, the nature of the documents that are not to be disclosed to
16 the Defence and who provided them.

17 Three, the precise detail of any alternative arrangements that
18 are proposed, such as the proposal that has been set out by the United
19 Nations in its letter of the 20th of June, 2008.

20 Otherwise, in order to assist the Prosecution, the Chamber makes
21 the following four observations: First, any proposal that the stay
22 should be lifted is not to be dealt with in a piecemeal fashion, and the
23 Chamber will not entertain serial applications. Instead, the matter
24 should be addressed comprehensively as part of a single application once
25 the Prosecution's overall submissions regarding the relevant material

1 have been formulated to the extent that that is possible.

2 Second, notwithstanding the carefully considered terms of the
3 letter of the 20th of June and Mr. Withopf's submissions this afternoon,
4 the Chamber is unlikely to approve a system that depends on its ability
5 to memorise large quantities of information which it is unable to retain
6 and study and which, furthermore, it is unable to compare with the other
7 evidence in the case so as to assess its relevance for Article 67(2) and
8 Rule 77.

9 Three, it is arguable that an essential ingredient of a fair
10 trial is that any appealable decision of the first instance tribunal can
11 be properly reviewed on appeal. This issue is potentially an appealable
12 decision. Accordingly, it may be said that any proposal that the Trial
13 Chamber should view the 54(3)(e) material will need to include conditions
14 which enable it to explain in a* written decision by reference to the
15 detail of the evidence it has seen, an analysis of why it has reached any
16 relevant conclusions. Furthermore, any material shown to the Trial
17 Chamber must be available, if necessary, for review by the Appeals
18 Chamber. And it follows, therefore, that the Trial Chamber is likely to
19 refuse to read any documentation which is to be withheld from the Appeals
20 Chamber or which will only be provided to the Appeals Chamber on the
21 basis of proposed conditions which have not yet been agreed by that
22 Chamber.

23 Fourth, it should not be assumed that the Chamber will approve
24 summaries. It all depends on the nature of the information and a
25 detailed analysis of each piece of evidence against the background of the

1 requirements of Article 67(2) and Rule 77.

2 We make those observations for consideration by the Prosecution
3 when they make, should they do so, any application to lift the stay that
4 we have imposed.

5 We are grateful to you all for your attendance. Once we've
6 considered the written submissions we will hand down our decision in
7 writing, I hope during the course of next week. That concludes this
8 status conference.

9 COURT USHER: All rise.

10 The hearing ends at 3.27 p.m.

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1 CORRECTIONS REPORT

2 In order to make the transcript correspond to the audio-recording, the
3 following corrections have been made:

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6 *p 3 line 8 “ of” has been added between “both”and “them”

7 *p 20 line 24 “a” has been added before “status conference”

8 *p 21 line 2 “be”has been added between “should”and “released”

9 *p 27 line 17 “quote”has been added.

10 *p32 line 14 “and written decision”is replaced by “a written decision”