

1 International Criminal Court

2 Trial Chamber I

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

4 Status conference - Open Session

5 Tuesday, 18 November 2008

6 The hearing starts at 10.09 a.m.

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

9 PRESIDING JUDGE FULFORD: This is a status conference in the case
10 concerning Mr. Lubanga Dyilo. The Prosecution are represented by
11 Mr. Withopf and Mr. Sachdeva and other members of their team. The
12 Defence by Maitre Mabilille and Mr. Biju-Duval and, again, other members of
13 their team. The victims currently participating in the proceedings are
14 represented by the usual representatives, and there are present today
15 representatives of the various organisations that are concerned with the
16 position of victims and including Ms. Massidda and Ms. McKay.

17 It is helpful to put on the record that on the 13th of October of
18 2008, the Prosecution applied to the Trial Chamber for the Judges to
19 review all the undisclosed evidence obtained from the information
20 providers. The information in the form in which it has been held by the
21 Prosecution has been provided to the Chamber in full for the duration of
22 the trial and without limitation as regards the ability of the Judges to
23 analyse it, make notes about it and to set out any matters which we
24 consider appropriate in any oral or written decision.

25 In those circumstances, the Judges agreed to receive and analyse

1 the material having considered submissions from the Defence and the
2 participants. Thereafter, the Chamber has held two ex parte status
3 conferences in order for the Judges to explore with the Prosecution the
4 options for disclosure of the relevant documents and to ensure that the
5 Chamber has a complete understanding of the position for each and every
6 document.

7 The Judges are conscious that the accused is inevitably
8 significantly hampered as to what at this stage he is able to submit as
9 regards the documentation that the Court has now valuated but which he
10 has not seen. However, that said, in case there are matters that
11 Maitre Mabilille wishes to raise now before we proceed any further in this
12 hearing, I'm going to ask whether there are any submissions or
13 observations that the Defence wish to advance at this moment in time.

14 MS. MABILILLE (interpretation): The only thing, your Honour, and
15 thank you for giving me the floor, is what you said. The Defence at this
16 stage has not been able to see any of the documents and, therefore, does
17 not have much to say as we don't have the right information to make
18 observations or assess, and you have said it already. I can only
19 corroborate what you have said.

20 PRESIDING JUDGE FULFORD: Thank you very much, Maitre Mabilille.
21 We wish to give you the opportunity in case there were particular matters
22 that you had wanted to raise.

23 We originally imposed the stay of proceedings because the Chamber
24 was not to be permitted to assess for itself the impact of the fairness
25 of these proceedings if evidence was to remain undisclosed. See

1 paragraph 88 of the decision of the 13th of June, 2008, document 1401.

2 That obstacle has now been removed.

3 Thereafter, on the Prosecution's application of the 10th of July,
4 2008, for the Chamber to lift the stay of proceedings, the Judges
5 determined that, first, because the application failed to address all of
6 the documents; second, because the Chamber was not to be allowed to
7 retain the documentation or the greater part of it for the entirety of
8 the trial; third, because there was no guarantee that the Judges would be
9 able to write a decision that would be susceptible to review by the
10 Appeals Chamber; fourth, because the Judges had not received sufficiently
11 comprehensive information on the redactions; and fifth, because there was
12 no real prospect that the Prosecution would be in a position to effect
13 adequate disclosure the stay should not be lifted, and for that see
14 paragraph 40 of the decision of the 3rd of September, 2008, document
15 1467.

16 The Judges have now reviewed each document with care, along with
17 the extent of the proposed disclosure on the part of the Prosecution for
18 each of them and the suggested approach that should be taken if it is
19 strictly necessary for some redactions to be retained. It would be
20 inappropriate in this oral decision to set out in extenso the
21 circumstances of each document or our reasoning in full. A full written
22 decision will follow in the near future. But by way of summary only,
23 since each of the five matters that I have just referred to has now been
24 addressed satisfactorily, the reasons for imposing the stay and
25 thereafter for retaining it have fallen away. In consequence, the stay

1 of proceedings is now lifted.

2 It is immediately necessary to indicate that this decision,
3 namely that the stay of proceedings is lifted, does not in any way act as
4 a bar on the Prosecution raising any issues that arise out of the
5 disclosure which we immediately indicate will be effected by the
6 Prosecution by 4.00 p.m. this Thursday, that is the 20th of November, nor
7 is the Defence prevented from raising any other matters connected to the
8 result of today's hearing, namely that, certainly for the time being,
9 these proceedings are once again in train.

10 We emphasise that the stay of proceedings had the effect of
11 halting the trial process, and I quote, "in all respects." See paragraph
12 94 of the decision of the 13th of June, 2008, document 1401.

13 This decision merely enables the trial process to continue, and
14 that includes the ability on the part of the parties and the participants
15 to raise any relevant issue. Therefore, without prejudice to any issues
16 that may be raised by any party or participant hereafter, it is necessary
17 to establish a framework for future work in this case, and the timetable
18 which the Chamber has in mind and on which I will invite submissions in a
19 moment is as follows, and I will take this relatively slowly so that
20 everybody has an opportunity of making an adequate note: The first date
21 as I've already indicated, is 4.00 p.m. this Thursday, by which time the
22 Prosecution must have made complete disclosure of all of the
23 documentation which the Chamber has been reviewing during October and
24 November. And in that regard, Mr. Withopf, the disclosure must be done
25 in a, and I quote, "user-friendly" way. Many of the documents are linked

1 and can only be readily understood if the link between them is made
2 clear, and so can they please be disclosed in such a way as to ensure
3 that those which naturally come together are served together and it is
4 explained that they relate to each other. In other words, please do
5 everything you can to ensure that the Defence understand what the
6 disclosure is all about and how the documents are linked.

7 Friday, the 21st of November, 2008, that is next Friday, the
8 Victims Participation and Reparation Section may have further material to
9 provide to the Chamber on some of the current applications to
10 participate, and they may wish to file a further eight applications that
11 are fresh, and for that see filing 1380. We provisionally, subject to
12 any submissions, set the 21st of November, that's next Friday, for the
13 date of the provision of all of that information.

14 Tuesday, the 25th of November, 2008, we propose a status
15 conference for that day to deal with the following issue: First, the
16 issue of tu quoque evidence following the Appeals Chamber's decision on
17 the 11th of July, 2008, document 1433, on disclosure given that this
18 issue must now be revisited in that the Appeals Chamber adopted a
19 different approach to that which had been taken by the Judges in this
20 case. The parties and the participants need to be given an opportunity
21 to address us on that issue following the Appeals Chamber's decision, and
22 we propose that that issue is dealt with on Tuesday, the 25th.

23 Second, the position as regards expert witnesses concerning,
24 first, background evidence; and second, child soldiers, in particular,
25 should be addressed, in our view, at that status conference.

1 Third, Annexes 46 to 48 and 51 to 52 of the Prosecution's filing
2 of the 12th of December, 2007, document 1081, needs to be -- need to be
3 revisited. In relation to this, we suggest that the parties and the
4 participants look at our oral decision of the 18th of January of this
5 year and our written decision on the admissibility of four documents
6 dated the 14th of June, 2008, that is document 1399. Those decisions
7 need to be reviewed following the Appeals Chamber's decision on
8 disclosure.

9 And fourth, any other matters indicated either today or no later
10 than 4.00 p.m. on the 20th of November, that's this Thursday, by the
11 parties and the participants as issues that need to be considered or
12 should be considered conveniently at a status conference next week.

13 I turn next to Friday, the 28th of November. The Prosecution
14 will need to have time to respond to any additional material that is
15 provided by the Victims Participation And Reparation Section, and we
16 provisionally propose that these responses should be filed by 4.00 p.m.
17 on the 28th of November.

18 Apparently I missed out the Defence. Of course this covers the
19 Defence as well, 28th of November.

20 The Prosecution and the Defence filed their observations on the
21 victims' applications to participate on the 10th of June, 2008. Those
22 are documents 1386 and 1388 respectively. We provisionally set the
23 28th of November as the date for the victims to respond to -- or the
24 victim applicants to respond to these filings. Thereafter, the Chamber
25 will issue its decision, although once we have received the further

1 filing by the Victims Participation and Reparations Section, we will need
2 to set up a separate timetable for responses to that additional material.

3 The Office for Public Counsel for Victims has requested leave to
4 submit observations on the Defence request that is dated the 11th of
5 June, 2008, that is document 1393, for disclosure to the Defence of the
6 entirety of the applications by victims to participate when those
7 individuals are also Prosecution witnesses and in relation to those
8 individuals for full disclosure of any other relevant statements as yet
9 undisclosed to the Defence. We provisionally set the 28th of November
10 for the Office for Public Counsel for Victims to submit those
11 observations.

12 Similarly, we give the Prosecution and the participants until the
13 same date to respond to that filing by the Defence.

14 Finally, on the 10th of June, 2008, the Prosecution filed its
15 submission, that is document 1390, regarding additional material that it
16 seeks to rely on at trial. We provisionally set the same date, the
17 28th of November, 4.00 p.m., for the Defence and the participants to
18 respond to that filing.

19 It is our understanding that those orders, if they are convenient
20 to the parties and the participants, cover all of the outstanding time
21 frames that need to be set as regards the outstanding issues which have
22 been interrupted by the imposition of the stay in June of this year.

23 As regards trial date, we provisionally suggest the date of
24 Monday, the 26th of January of next year for the commencement of the
25 trial.

1 Now, those are a substantial number of dates. It may be that the
2 parties and the participants would benefit from ten minutes or quarter of
3 an hour to reflect on them rather than having to respond immediately.

4 What's your view on that, Mr. Withopf?

5 MR. WITHOPF: Mr. President, your Honours, I appreciate the
6 offer. However, I can advise the Honourable Bench that the Prosecution
7 will be in a position to file the respective filings as requested, and
8 the Prosecution will also be in a position to start trial as tentatively
9 set for the 26th of January. Thank you very much, Mr. President.

10 PRESIDING JUDGE FULFORD: Thank you, Mr. Withopf. You don't need
11 any time then.

12 Maitre Mabilille, would you like a little time to reflect on
13 the agenda --

14 MS. MABILLE (interpretation): Absolutely. I was going to ask
15 you for leave. I would like to discuss this with my team for 10 or 15
16 minutes so that we can discuss this. Thank you very much. Ten to 15
17 minutes, no more. Ten minutes.

18 PRESIDING JUDGE FULFORD: (Previous translation continues) ...
19 we'll rise and sit again in 15 minutes' time.

20 COURT USHER: All rise.

21 Recess taken at 10.36 a.m.

22 On resuming at 10.59 a.m.

23 COURT USHER: All rise. Please be seated.

24 PRESIDING JUDGE FULFORD: So, Maitre Mabilille, do you have any
25 submissions on the proposed timetable?

1 MS. MABILLE (interpretation): Thank you, your Honour. The
2 Defence notes the decision issued today that the proceedings are resumed.
3 The Defence would like to read your decision and at the same time assess
4 the communication of evidence that will have taken place. It would be
5 problematic if once we have read the decision and assessed the level of
6 disclosure to be disappointed, and therefore I know disclosure should
7 take place on Friday. We should be able to assess disclosure at that
8 stage, but what is upon for us to exercise our rights is to be able to
9 read your decision and assess disclosure at the same time.

10 As regards the schedule, our first observation is that from the
11 beginning we wanted the trial to proceed as fast as possible and to avoid
12 delays. We will try to work with your schedule. However, I would like
13 to make the following observation: The schedule and the starting, the
14 commencement of the trial will depend on the analysis we make of the
15 evidence disclosed to us, and the Defence will try to stick to the
16 schedule. However, if we feel we are unable to fulfil our mission after
17 receiving all the evidence, we will like -- we would like to be able to
18 come back to the Chamber about this.

19 Now, my second observation is the following: We would like to
20 have the right to respond to the observations that the victims might
21 make. I believe that in your schedule you had provided for a response on
22 the 28th of November. We would like a time, a date to be set for us to
23 respond to those observations. We might not avail ourselves of that
24 right, but we would like a date to be set, and we would like the deadline
25 to give us enough time to respond to the observations made by Victims or

1 by the OTP in an inter partes debate. We need, however, to have time to
2 examine the observations, review the observations made. So we will need
3 some time between the time the observations are made and the Prosecution
4 responds. That would make our task easier.

5 I would like to come back to your Chamber during a status
6 conference to respond, but at the last hearing on the release of the
7 person concerned, we did not have time to respond to the observations
8 made by the participants and made by the Office of the Prosecutor. So we
9 would like to have the possibility of responding during a status
10 conference, but we would like some time to enable us to respond inter
11 partes to the observations made by the parties.

12 Those are my observations, your Honour. Thank you.

13 (The Trial Chamber confers).

14 PRESIDING JUDGE FULFORD: Maitre Mabilille, can we say that we
15 consider that your approach to the timetable and to disclosure is
16 entirely appropriate in that you will need to have the opportunity of
17 reading the material before you're in a position to make any substantive
18 observations, first on whether the disclosure is adequate, as it were,
19 from your point of view; and second, whether the timetable we've proposed
20 is going to give you sufficient opportunity to prepare. So we endorse,
21 in effect, the submissions that you've made in that regard, and we
22 suggest that if it is possible for you to express a preliminary view at
23 the status conference next Tuesday that will be helpful, but we
24 understand that that gives you only a very short period of time given
25 that disclosure will not be effected until Thursday of this week, and so

1 see how -- see what the position is on Tuesday of next week, and
2 obviously if you need further opportunity to make your position clear on
3 disclosure and on the agenda then, of course, we will give you such time
4 as is reasonable.

5 In relation to an opportunity of responding to the submissions
6 and the observations that are made in relation to the Victims'
7 applications, we have to be careful to ensure that this doesn't turn into
8 a -- effectively a game of tennis, with the ball constantly going
9 backwards and forwards across the net, with submissions endlessly being
10 made on other submissions. And although this is going to extend the
11 procedure somewhat, we are aware of your rights in relation to this, and
12 in any event, looking at this from the point of view of fairness, given
13 the importance of this issue, it is right that you should have the full
14 opportunity of being able to respond to this. So we propose seven days
15 after the deadline of the 28th of November. And can I ask is -- is that
16 sufficient?

17 MS. MABILLE (interpretation): Yes, absolutely. No problem.

18 PRESIDING JUDGE FULFORD: As far as the Chamber is concerned, I
19 think, therefore, the one outstanding issue that should be dealt with
20 today, of course the parties and the participants can raise any other
21 issues that they feel are necessary, but the one outstanding issue that
22 we've identified is -- ah. Mr. Walley.

23 MR. WALLEYN (interpretation): If I may, your Honour, I would
24 like to come back to the timetable.

25 PRESIDING JUDGE FULFORD: Certainly. As Judge Odio-Benito

1 pointed out, we failed to give you the opportunity of a 15-minute break
2 along with the Prosecution and the Defence. I've also excluded you
3 entirely from agenda issues. Very bad manners on my part, in both
4 respects, Mr. Walley, and you have my full apology, both you and
5 Ms. Bapita.

6 MR. WALLEY (interpretation): That's no problem.

7 PRESIDING JUDGE FULFORD: (Previous translation continues)...
8 agenda.

9 MR. WALLEY (interpretation): The first problem we have is that
10 as regards the items on the agenda for the 25th, we believe there should
11 be an additional item concerning the disclosure of evidence, some of the
12 OTP's evidence to the Legal Representatives of Victims, and something new
13 is that Appeals Chamber confirmed clearly that victims representatives
14 will have an opportunity to challenge the -- the validity of the evidence
15 presented to the Court, and therefore we have to be able to review the
16 evidence to challenge it.

17 I think it's important to mention this, because we are still
18 talking about the extent of disclosure, and at some stage the Chamber may
19 have to intervene.

20 Concerning the timetable, we are split between our desire to see
21 the trial commence, and our clients' wish to see the trial commence,
22 however, we feel somewhat uneasy along with victims, because the
23 participation will be admitted after the date set on the 5th of December.
24 If during December you issue a decision to decide which victims will be
25 allowed to participate in the proceedings, we'll have to start a

1 procedure to form teams.

2 We have talked already with the VPRS about this, but we will need
3 to talk with the teams and with the legal representatives of new victims
4 where appropriate and when new victims will be authorised to participate,
5 and if we do not manage to find a solution, the Chamber may have to issue
6 a decision. But we will need full teams. And once the main
7 representatives have been designated, we'll still need to set up teams.
8 We will need a case manager to prepare the material, and we need time to
9 recruit such a person. The 26th of January for us, therefore, does not
10 give us much time unless the whole procedure could be expedited in some
11 way.

12 So those were our reservations. However, we would like a fixed
13 date for the same reasons as you.

14 PRESIDING JUDGE FULFORD: Mr. Walley, I'm not sure whether
15 you're saying you consider the 26th of January to be an impossibility or
16 something that may pose a problem.

17 MR. WALLEYN: It certainly -- (Interpretation) well, it might be
18 problematic, your Honour. We would like to be realistic. We had a
19 two-month period in mind from the time the teams are set up to enable
20 them to study the documents provided by the Prosecution and prepare the
21 trial. If the documents are disclosed before these teams are set up,
22 perhaps we could reduce the two months for those who are already
23 participating now, but it will be difficult for those who only become
24 involved in the case in December.

25 PRESIDING JUDGE FULFORD: Can I suggest that you reflect on this

1 between now and next Tuesday's status conference. There will be a
2 decision on victims' participation issued in advance of the Christmas
3 break, and so you will -- you will know the position relatively early, we
4 hope, in December. We would ask you to discuss with the Prosecution ways
5 of ensuring that speedy and adequate disclosure is made to the various
6 teams that are going to be set up, and we would ask you to take such
7 steps as you need to, really starting now, to secure an appropriate case
8 manager, if only provisionally, so that you're not starting that work, as
9 it were, from scratch once you've received the decision. I mean, there
10 are clearly going to be a number of victims participating in addition to
11 those who are currently participating. So some of this work can
12 undoubtedly be put in hand now.

13 Now, in relation to the additional matter that you've suggested
14 for next Tuesday's status conference, Mr. Walley, we will certainly
15 pencil that into the agenda, but could you, in any event, discuss this
16 matter with Mr. Withopf to see whether the -- the difficulty that you
17 currently apprehend can be resolved by sensible and mature discussions
18 between the two of you.

19 MR. WALLEY (interpretation): Your Honour, I agree, and I had
20 something I wanted to mention to the OPCV. Someone consulted us, someone
21 who had already been in touch with the OPCV. That person's legal
22 representation, therefore, is still suspended. Now, we still haven't
23 made a decision -- there still hasn't been a decision on our application.
24 We still don't know who should make observations on behalf of that person
25 as we have the 28th November delay. It's the victim 7806.

1 PRESIDING JUDGE FULFORD: (Previous translation continues) ...
2 from the Chamber, Mr. Walley, it does. Is there a filing currently
3 before us on this point?

4 MR. WALLEY (interpretation): I filed an application in which I
5 suggested I withdraw and do no longer represent that person. However, no
6 decision has been made on my request, and therefore the OPCV does not
7 have a mandate at present to represent that person. Nobody has a mandate
8 to represent that person.

9 PRESIDING JUDGE FULFORD: (Previous translation continues) ...
10 and brought to our attention for next Tuesday's status conference.

11 Ms. Massidda.

12 MS. MASSIDDA: Also for the -- I mean, actually, it's a little
13 bit more complicated than this.

14 PRESIDING JUDGE FULFORD: Well, do we need to deal -- is it best
15 for us to deal with it now or should we deal with it on Tuesday once
16 we've had the position set out in writing first of all?

17 MS. MASSIDDA: Yes.

18 PRESIDING JUDGE FULFORD: Would that be convenient, Ms. Massidda?

19 MS. MASSIDDA: Yes. Thank you.

20 PRESIDING JUDGE FULFORD: Thank you very much. Now, Ms. Bapita,
21 anything that you would wish to raise?

22 MS. BAPITA (interpretation): I don't have anything to say.
23 Mr. Walley has cover everything. Thank you.

24 PRESIDING JUDGE FULFORD: That, then, brings us to the issue of
25 the accused's detention, which was last reviewed by this Chamber on the

1 29th of May, shortly before we imposed the stay of proceedings in June.

2 Maitre Mabilille, are there any submissions that you would wish to
3 make in relation to a review today of your client's detention?

4 MS. MABILLE (interpretation): Your Honour, I will not repeat the
5 observations the Defence filed in writing but simply respond to the
6 observations made by the Prosecution in their written observations
7 concerning Mr. -- and this on behalf of Mr. Thomas Lubanga.

8 I am not really responding here to the observations made by the
9 Legal Representatives of Victims, and this for two reasons. First
10 because I think it is clear that any written or oral observations we make
11 are based on the statute, and therefore, we need to have a legal basis
12 for our writing. Secondly, even if in our writings we make assertions,
13 if these assertions aren't backed with evidence, they remain mere
14 assertions which I believe are irrelevant and for which there is no --
15 they do not need to be discussed before you -- be discussed before your
16 Chamber.

17 As regards the situation in North Kivu, we can write a lot about
18 it, but if we don't have evidence, I don't think there is any need for
19 the Defence to respond to the assertions if they are not backed by
20 evidence.

21 A second point, our observations are based on two analyses. Are
22 the observations made understood, and is Article 64 really applicable in
23 the case of Mr. Thomas Lubanga? I would not like to repeat our written
24 observations, but as regards 58(1), the Prosecution writes that the main
25 reason why they believe that Mr. Thomas Lubanga should remain in

1 detention is that there's a risk he would not come and be present at the
2 hearings when the trial would resume, and therefore it's based on 58(1),
3 the failure of the person concerned to appear in court, and that is why
4 it is believed at that Mr. Thomas Lubanga should remain in detention.

5 Now, three observations on this point. First, the appearance of
6 Mr. Thomas Lubanga before the Court depends on several factors, and
7 detention is not the only way the Chamber has to ensure that
8 Mr. Thomas Lubanga is present at trial. I would like to say from the
9 outset that Mr. Thomas Lubanga has always said that he wanted to appear
10 before your court and explain himself about the accusations that are
11 made. You might say that's a position of principle, but it's my client's
12 position.

13 Secondly, the relevance of the possibility of Mr. Thomas Lubanga
14 fleeing the trial, the Prosecution knows very well that
15 Mr. Thomas Lubanga does not at present have any passport and means of
16 transport as the Security Council issued a decision, and therefore that
17 his possible return to Congo is impossible, and we know -- without being
18 unpleasant, we know how he treats his political opponents, and therefore
19 I think it would be difficult for Mr. Thomas Lubanga himself to return to
20 the Congo. And there is a possibility for the Chamber to set or take
21 measures to ensure Mr. Thomas Lubanga is here, so he does not leave the
22 country, and come to the trial as a free man, taking on his
23 responsibilities before this Court.

24 Now, the second item developed by the Prosecutor is the proper
25 conduct of the trial. Well, I would like to tell the Prosecution that

1 you took a lot of time, but apparently your investigations are finished.

2 As regards the witnesses and the appearance of witnesses, I would
3 like to remind the Chamber which knows very well that the Defence has
4 access to the list of witnesses and has had access to it for over a year.
5 And as Mr. Thomas Lubanga would be released in The Hague only, I don't
6 see how this would change anything.

7 And as regards the third point, I won't repeat what I've already
8 mentioned in the written observations. The Prosecution didn't go into
9 great depth on this. I would like to repeat that the Chamber still has
10 the possibility of releasing Mr. Thomas Lubanga, and we believe that the
11 criteria to do so are fulfilled.

12 The other matter concerning this is that the decision of the
13 Chamber to release Mr. Thomas Lubanga would be based on Article 60(4).
14 We made a couple of observations in writing, and the Prosecution
15 stigmatised our position. They say that there were delays but that the
16 delays are justified, and that, moreover, that they are acting in good
17 faith and everything they do is based on the Rome Statute and the most
18 direct compliance with the Rome Statute, and therefore their difficulties
19 cannot be questioned. And then the Prosecution has therefore said that
20 their delays are justified and should be forgiven for the delays as they
21 are acting entirely in good faith.

22 Now, sorry for stigmatising your position, but that's how I read
23 your observations.

24 On this the Defence would like to recall that -- and clearly
25 recall that the unjustifiable delays by the Prosecutor are threefold.

1 The first delay was as concerns the disclosure of the incriminating
2 evidence. You were delayed because the former Defence team from
3 Mr. Thomas Lubanga resigned, and therefore it took some time for
4 Mr. Thomas Lubanga to assign a new counsel.

5 During that time, and I am sorry for my expression, but I believe
6 you should have been on the starting block, and the day the new counsel
7 arrived you should have told him, "Here is the exonerating and here is
8 the incriminating evidence," and we should have -- and let's be realistic
9 here. We should have started this trial over a year ago. And I would
10 even like to say that we should have finished this trial by now.

11 If we didn't see -- have the incriminating evidence, it was
12 because you, it is true, had difficulty in implementing the protection
13 measures. However, it's -- it was your responsibility to implement them
14 in good time.

15 That was my first point. Now, the second point concerning the
16 exonerating evidence. I'm tempted to refer to the decision that was
17 issued by our Chamber, the serious and widespread abuse. If that does
18 not constitute or justify delay, then I don't understand what the text
19 means.

20 And here this brings me to your good or bad faith. You, the
21 Prosecution, went in the field. You had 55 per cent of the records
22 subject to confidentiality agreements. When you adopted this approach
23 you must have known that you were going to lead the procedure in a
24 certain way, that we were going to face difficulties. You must have
25 known that you would be required at some stage to go back to the sources

1 to request disclosure. You are professionals, you know how you work, and
2 you should have known that your approach would lead to serious problems
3 in the proceedings. There's no doubt about this. And that's what we
4 mean by bad faith.

5 We don't say that you intentionally wanted to withhold some
6 evidence from the Defence, but what I'm saying is that your approach, the
7 way you worked and the fact that you signed these confidentiality
8 agreements meant that you ipso facto led to delays. That is quite clear
9 to me. And I would like to add, and I think you must agree with me here,
10 as this serious abuse, as written in the Chamber's decision, was also
11 related to the fact that you tried to not take responsibility, you
12 withdrew your appeal for this specific point, and therefore that means
13 that you accept you were in fault.

14 And the third point, which I also believe to be extremely
15 important, is that you continued in erring as I reviewed a decision by
16 Madam Steiner in 2006 already which indicated that your approach with --
17 to enter into these confidentiality agreements was problematic. But the
18 Office of the Prosecutor only reconsidered their approach in May 2008,
19 when we were in court. And it's only at that stage that you took the
20 appropriate measures to find the sources and go back to the people with
21 who you entered into these confidentiality agreements. So these are --
22 delays are inadmissible, but problem is that you didn't take any
23 measures, you didn't do anything to solve the problem any earlier.

24 And third point, you said, well, look at the case law of the ICTY
25 and the ICTR. You were complaining because almost two years have passed

1 by, but you believe that it is normal if you look at the case law of
2 other courts and tribunals, international courts and tribunals.

3 We believe that this excuse is unacceptable, because we think
4 that every case should be examined individually. And in the case of
5 Mr. Thomas Lubanga, could the Prosecution, in view of the difficulty of
6 the case and the fact that it was one of the first cases here at the
7 court, could the Prosecution have done anything to ensure that these two
8 years didn't go by at the pre-trial phase? You, in your observations,
9 make comments about the complexity of the case and about the fact that
10 you had a lot of hearings on a number of points, but that's not what
11 delayed the proceedings. Let's be clear. What delayed the proceedings
12 was the fact that these incriminating and exonerating evidence wasn't
13 disclosed. It wasn't due to the fact that the -- that issues were raised
14 in court about various matters.

15 I believe today that Mr. Thomas Lubanga should be released
16 because there's a strict application of Article 64 that can be made in
17 this case. In my mind, the Prosecution has led to unjustifiable delays
18 which could lead the Chamber to take such a decision which we would like
19 the Chamber to take. Thank you.

20 PRESIDING JUDGE FULFORD: I'm grateful to you, Maitre Mabilille.
21 Thank you.

22 Mr. Withopf.

23 MR. WITHOPF: Thank you very much, Mr. President, your Honours.
24 There are a few mention the Prosecution would like to respond to the
25 submissions of my learned colleagues from the Defence, but I would wish

1 to emphasise at the very outset what the starting point of our
2 submissions is. The starting point of our submission of the detention of
3 the accused or his release, with or without conditions, it's worth to
4 recall and it's obviously triggered by the Appeals Chamber judgement of
5 the 21st of October where the Appeals Chamber remanded the matter back to
6 the Trial Chamber for a new determination.

7 In this matter, Mr. President, your Honours, the Appeals Chamber
8 set out the parameters for the Trial Chamber's new determination in
9 stating that, and I quote from paragraph 37 of the judgement, "The
10 Trial Chamber will have to consider all relevant circumstances and base
11 its decision on release or detention on the criteria in Article 60 and
12 58(1) of the Statute."

13 The Appeals Chamber emphasised that the necessity for continued
14 detention pursuant to Article 51 -- 58, sorry, (1)(b) will have to be
15 assess carefully and continue to say, and I quote again from the Appeals
16 Chamber judgement that: "The Trial Chamber should take into account that
17 the trial has been conditionally stayed not permanently terminated."

18 In this context, Mr. President, your Honours, the Appeals Chamber
19 underlined that the Trial Chamber will have to consider whether further
20 developments since the imposition of the conditional stay make it likely,
21 and I quote again: "Make it likely that the stay may be lifted in the
22 not too distant future."

23 These are the parameters, Mr. President, your Honours, as
24 detailed by the Appeals Chamber, and this is the framework for the
25 Prosecution's submissions.

1 The Prosecution submits that the release of the accused, with or
2 without conditions, is unwarranted under Article 60 for the reasons I'm
3 going to address as follows, and here I will respond to the various
4 submissions my learned friend has made today. The question that needs to
5 be covered first is linked to Article 58(1) which details two conditions
6 for the continuation of the accused's detention; namely, first the
7 existence of reason grounds to believe that the accused has committed a
8 crime within the jurisdiction of the court; and second, that the arrest
9 of the accused appears necessary.

10 In respect of the first condition set out in Article 58(1), we
11 obviously can be short. After the confirmation of charges against the
12 accused by the Pre-Trial Chamber's decision on the confirmation of
13 charges, there are not only reasonable grounds, there are, pursuant to
14 Article 61(7), substantial grounds to believe that the accused has
15 committed the serious war crimes he is charged with: Enlistment of
16 children under 15 years, conscription of children under 15 years, and
17 using children under 15 years to participate actively in hostilities.

18 In respect of second condition in Article 58(1), the necessity of
19 the continued detention of the accused, the Prosecution emphasises from
20 the outset that the burden of proof lies with the accused, Mr. President,
21 your Honours. The accused has to satisfy the Trial Chamber that he will
22 appear for trial and that he will not pose a danger to any victim or
23 witness. So far, based on the submissions of the Defence, the
24 Prosecution is not satisfied that the assurances provided by the accused
25 will be sufficient.

1 Against this background, Mr. President, your Honours, the
2 Prosecution submits that the continued detention of the accused is indeed
3 necessary in order to ensure that the accused's appearance at trial.

4 Here the Trial Chamber in its decision of 29 May, the one that
5 has been referenced to by you, Mr. President, in that decision, and
6 that's the most recent decision addressing this point, the Trial Chamber
7 stated that, and I quote: "That it is persuaded by the Prosecution
8 argument that the defendant faces grave charges, and if released, is
9 likely to return to the Democratic Republic of the Congo with a probable
10 consequence that the court would no longer be able to ensure his
11 attendance at trial."

12 In its decision of 1st of February this year, the Trial Chamber
13 had even added that, and I quote again: "The Chamber considers that the
14 defendant is highly unlikely to attend his trial voluntarily," a
15 statement which the Trial Chamber had already made in its previous
16 decision on the detention of the accused, namely on the 9th of October,
17 2007.

18 Mr. President, your Honours, these determinations of the
19 Honourable Bench are still valid. There is no, there is no change in
20 facts that would result in any other assessment. This also, and in
21 particular, applies in light of the Defence's today's submissions which
22 covers three aspects, namely that the accused cannot go back to the
23 Democratic Republic of the Congo because, one, he has no travel
24 documents; two, he is subjected to the UN travel ban; and three, he would
25 be subjected to investigations in the Democratic Republic of the Congo

1 resulting, what is alleged, in severe human rights violations.

2 Before I will address the points the Defence made one by one, I
3 want to emphasise again that nothing has changed since the 29th of May
4 decision. In any event, Mr. President, your Honours, it is indeed
5 correct the accused has no travel documents, and it's also correct that
6 the accused is subjected, and for good reasons, to the UN travel ban,
7 meaning that the accused can indeed legally not travel to anywhere
8 without the UN Security Council's Sanctions Committee concerning the
9 Democratic Republic of the Congo having lifted the travel ban.

10 The emphasis, Mr. President, your Honours, lies on the term
11 "legally," however. For the purpose of the determination whether the
12 accused would try to flee or to hide, be it to the DRC or in the DRC, be
13 it to any other country or in any other country, the Trial Chamber, in
14 our submission, has to take into consideration all means available to the
15 accused, no matter whether they are legal or illegal.

16 In this context, Mr. President, your Honours, the Prosecution
17 emphasises that there is a large Congolese community in Belgium, mostly
18 in Brussels, obviously nearby, comprised of at least 13.000 members, and
19 we don't know, Mr. President, your Honours, whether the accused maintains
20 links to this community, and we don't know either whether the one or the
21 other member of this community would be prepared to offer the accused
22 support to hide or to flee. The same may apply, Mr. President, your
23 Honours, to the one or the other member of the Congolese communities in
24 Paris or in Berlin. The fact that this is within the range of
25 possibilities, in our submission, is to be considered by the Trial

1 Chamber.

2 In respect of the point that has been made by my learned
3 colleagues that the accused is facing investigations in the Democratic
4 Republic of the Congo, we want to draw the attention of the Trial Chamber
5 to Annex 5.6 to the filing of the Registry of 24 March 2006. Since this
6 annex was filed confidentially, I cannot go into any further detail in
7 this public hearing.

8 I'm moving on with your permission, Mr. President, to the
9 question of whether in light of the continued stay of proceedings the
10 continued detention of the accused can be justified in order to ensure
11 his appearance at trial. And here, of course, the situation has changed.
12 There is no stay of proceedings anymore. The Chamber has, today in its
13 oral decision, lifted the stay of proceedings; and the Chamber has, in
14 addition to the lifting of the stay of proceedings, also set a trial
15 date. And it's a tentative trial date, that's what we do realise, but
16 it's set for the 26th of January, basically in two months' time, and
17 certainly, coming back to the respective jurisprudence of the Appeals
18 Chamber, in the not too far distant future.

19 Mr. President, your Honours, it is sufficient for the Prosecution
20 to show that the case the Defence put forward is insufficient to satisfy
21 its burden of proof that the accused would appear for trial if released.
22 If the Trial Chamber is not prepared to follow the Prosecution's
23 argument, the Prosecution would be in a position to offer, in a
24 closed-session hearing, however, information that in its view shows that
25 the accused is also not in a position to satisfy this burden of proof

1 that he would not pose a danger to any victim or witnesses and is thus
2 not meeting the criteria of Article 58(1)(b)(ii). For the moment, I want
3 to only underline the fact that almost all Prosecution witnesses are
4 either in the ICC Protection Programme or are protected in any other way,
5 be it by the Prosecution, by the OTP, or by any other entity that can
6 provide for protection. And this is a fact, Mr. President, your Honours,
7 that in the Prosecution's submission speaks for itself.

8 Moving on with your permission, Mr. President, to the review of
9 the detention of the accused pursuant to Article 64. I do not need to
10 repeat what the Prosecution has put forward in its 31st of October
11 filing. The statutory grounds for considering release pursuant to
12 Article 64 are not met. The accused has not been detained for an
13 unreasonable period of time, and there has not been inexcusable delay by
14 the Prosecution.

15 Here, Mr. President, your Honours, the Appeals Chamber's
16 jurisprudence is again very instructive. In its 13th February judgement,
17 the Appeals Chamber has found that, and I quote: "The unreasonableness
18 of any period of detention cannot be determined in the abstract but has
19 to be determined on the basis of the circumstances of each case."

20 This is a common approach, and the Defence is very well aware of
21 it. This is a common approach that has been taken by the international
22 courts and tribunals, and this approach is widely accepted, be it the
23 European Court for Human Rights, the ICTY, the ICTR, or the Special Court
24 for Sierra Leone.

25 These courts have repeatedly ruled, and here I make reference to

1 the jurisprudence as cited by the Prosecution, that the duration of
2 pre-trial detention that exceeded, and I add sometimes significantly
3 exceeded, the two years and eight months the accused is in pre-trial
4 detention can still be justified and does not per se render the detention
5 unreasonable.

6 I make reference in particular, Mr. President, your Honours, to
7 the respective decisions of the ICTR. And as your Honours are aware,
8 there were instances where the accused person was detained for more than
9 five years. And interestingly enough, it turned out to be the case that
10 the reasons the Prosecution put forward are to a large extent mirroring
11 exactly the same reasons why the pre-trial detention of the accused in
12 the present case has extended so far to two years and eight months.
13 Namely, in that decision the ICTR considered issues that arose in the
14 context of witness protection and issues that arose due to the fact that
15 the Defence team has changed. And, Mr. President, your Honours, these
16 are exactly the two main reasons the Prosecution has put forward in its
17 written submission.

18 I re-emphasise the points that have been made. There are various
19 factors that need to be taken into account. Obviously the ones I already
20 mentioned, but in addition, one also needs to take into account the fact
21 that there was a confirmation hearing, obviously pursuant to the law of
22 the ICC. It was the first ICC's confirmation hearing spanning over
23 almost three to four weeks, and the litigation that preceded and followed
24 that confirmation hearing had an impact on the duration of these
25 proceedings, as your Honours and as the Defence are very well aware of.

1 And the change of the Defence team, the complete change of the Defence
2 team resulted, and if I may say it, resulted in a factual stay of the
3 proceedings for several months.

4 On top of it, there were novel and there were complex issues,
5 indeed very complex issues that naturally, Mr. President and your
6 Honours, arose in this first case before the ICC, such as victim
7 participation. And your Honours are very well aware that the Appeals
8 Chamber only in July 2008, this year, has rendered its final decision on
9 victims' participation. And I already mentioned, Mr. President,
10 your Honours, witness protection and witness formulisation is another
11 point one can put forward in this context.

12 Mr. President, your Honours, in sum, against the background of
13 the internationally established jurisprudence, the current duration of
14 the accused's detention hasn't reached the level of an unreasonable
15 period.

16 It is the position of the Prosecution, Mr. President, your
17 Honours, that the question whether or not there is an inexcusable delay
18 by the Prosecutor does only arise and does only need to be addressed by
19 the Trial Chamber once it made a positive statement that the accused is
20 in pre-trial detention for an unreasonable period. Accordingly,
21 Mr. President, your Honours, the following submissions are only made in
22 the event that the Trial Chamber does not follow this argument. And here
23 I wish to emphasise from the outset that any possible delays of the
24 Prosecution that the Trial Chamber addressed in its most recent decision
25 on the matter, namely on the 29th of May, cannot, and I wish to emphasise

1 this in particular in light of the oral submissions of the Defence today,
2 these reasons cannot be readdressed in the present situation.

3 This observation, Mr. President, your Honours, applies in
4 particular in respect of the disclosure of materials other than the
5 materials that give reason to the stay of proceedings, and here I
6 obviously refer to the inability of the Prosecution to disclose
7 statements of witnesses who at the time were not yet in a protection
8 programme, and in relation to the interlinked aspect of the
9 implementation of protective measures.

10 Important and key to emphasise is the following: The Trial
11 Chamber in its 29th of May decision came to the conclusion that these
12 delays which it found attributable to the Prosecution in addition to the
13 explicit and the very explicit statements that further delays were not
14 attributable to the Prosecution that these delays were not inexcusable.

15 Accordingly, Mr. President, your Honours, any Defence submissions
16 that covers -- that cover old ground, such as matters related to witness
17 protection, are, in our submission, in our respectful submission,
18 Mr. President, your Honours, irrelevant.

19 Relevant at this stage, following the 29th of May decision, is
20 solely the delay which was caused by the stay of proceedings. On this
21 point I want to be short since I can refer to the elaborate submissions
22 of the Prosecution in its public 31st of October filing which can be
23 summarised as follows: The Prosecution has always acted in a very
24 transparent manner and has apprised both the Trial Chamber and the
25 Defence on the issues arising out of detention between Articles 54(3)(e)

1 and 67(2). The Prosecution has always acted in good faith and had always
2 the expectation and had for good reasons, Mr. President, your Honours,
3 the expectation that the information providers would finally agree to
4 sufficiently lift the Article 54(3)(e) restrictions to make the trial
5 proceed.

6 And finally and most importantly, only with the judgement of the
7 Appeals Chamber on 21st of October, where the Appeals Chamber has
8 addressed the uncertainty in respect of the interplay between
9 Article 54(3)(e) and Article 67(2), only at that point in time the
10 uncertainty was addressed and was gone. And this uncertainty, up until
11 the time of the judgement of the Appeals Chamber' decision, and I repeat
12 it was on the 21st of October only, this uncertainty can, in the
13 circumstances of the present case, not be interpreted to the disadvantage
14 of the Prosecution.

15 And I want to use the opportunity to, at this stage, respond to
16 what my learned friend from the Defence has submitted to the Court. It
17 has portrayed -- she has portrayed -- sorry, she has portrayed the Office
18 of the Prosecutor having not done anything during the time that led to
19 the situation which finally resulted in the lifting -- in the
20 implementation of the stay of proceedings.

21 It appears, Mr. President, your Honours, that my learned friend
22 has forgotten, has obviously forgotten that over a significant period of
23 time the Prosecution was able to disclose previously Article 54(3)(e)
24 materials. It started to disclose such materials very early in the
25 proceedings, immediately after the surrender of the accused person in

1 March 2006. There were disclosure peaks of such materials in March 2006,
2 in May 2006, in July, August, and September 2006. The disclosure
3 continued quite significantly in January 2007, in June and July 2007, and
4 obviously in light of the deadlines that have been imposed at the time on
5 the Prosecution, huge peaks of such disclosure in January and February of
6 2008.

7 So it's factually just incorrect what my learned friend from the
8 Defence tries to portray or the way she tries to portray the way the
9 Office of the Prosecutor dealt with the disclosure of Article 54(3)(e)
10 materials. And obviously, if need arises, I would also be in a position
11 to provide for the -- for the corresponding lifting requests that
12 pre-dated these disclosures.

13 Mr. President, your Honours, to keep it short, the Prosecution is
14 of the view that the delay caused by the stay of proceedings cannot be
15 seen as inexcusable.

16 I stop here, Mr. President, your Honours, repeating the
17 Prosecution's conclusion that the release of the accused, with or without
18 conditions, is unwarranted. If, however, the Trial Chamber wishes me to
19 address possible conditions, I would be prepared to do so.

20 PRESIDING JUDGE FULFORD: Thank you, Mr. Withopf. We're grateful
21 to you.

22 Maitre Mabilie, do you wish to make any submissions by way of
23 response?

24 MS. MABILLE (interpretation): Perhaps after the victims'
25 representatives have spoken, Mr. President.

1 PRESIDING JUDGE FULFORD: If you want to go now, Mr. Walley, you
2 can. I was in fact going to leave the legal representatives until last,
3 but --

4 MR. WALLEY (interpretation): Ms. Bapita will speak for us.

5 MS. BAPITA (interpretation): Thank you, Mr. President.

6 I listened keenly to the submissions made by Ms. Mabilille and the
7 Prosecutor, and I would just like to talk about three points.

8 We have to say whether we agree with provisional release or
9 unconditional release for Mr. Thomas Lubanga. We are not in agreement
10 with conditional release or unconditional release for the following
11 reasons. One of the first reasons falls in line with Ms. Mabilille's
12 concern regarding the fact that she was -- the fact that she would not
13 dwell on responding to the arguments put forward by the legal
14 representatives of the victims because they have no legal basis following
15 the Rome Statute.

16 Mr. President, your Honours, Article 68 gives us the right to
17 express our views and concerns, and we think that views and concerns
18 cannot necessarily be based on legal arguments drawn from the Statute or
19 other basic text but that our views and concerns can also be based on the
20 realities on the ground. And it is in respect of these realities on the
21 ground that we made the submissions a few weeks ago in which we noted
22 that during the stay of proceedings, during the time when -- during the
23 time when release was sought, there was activity by armed groups in -- on
24 the ground, especially in Kivu.

25 I also mentioned armed groups in Ituri that came to light during

1 the stay. I refer to the FRPG and the Movement of Congolese Democrats.
2 This last group brings together all the former armed groups of -- groups
3 of the past rebellion which means that apart from the MDC you have the
4 FRPG which attacked Bogoro, and the population of this village has fled
5 again, which means that the security situation on the ground in Ituri is
6 a problem today.

7 We and the people have noted that this is encouragement, because
8 if there is a procedural bottleneck which might lead to release, why not
9 continue? We also noted that child soldiers are now being taken on.
10 These child soldiers had been demobilised before. They have taken up
11 arms again. So today we wonder in light of the circumstances on the
12 ground should release, conditional or not, be granted to Mr. Lubanga.

13 We think that it is not appropriate at this time to do so because
14 the situation on the ground does not allow for this.

15 Accordingly, Mr. President, I am going to emphasise one thing.
16 You will recall that our esteemed colleague Ms. Mabilille repeated a few
17 weeks ago that if there was a stay in proceedings the -- her client
18 should be released unconditionally. This morning we have been told that
19 the stay has been lifted. I think fairness and common sense should lead
20 us to think in other ways because this release should not be granted.

21 To conclude, I would like to emphasise that on the ground new
22 armed groups have sprung to light, and they are sowing death and
23 distress. Such a release would only encourage them, and it would
24 emphasise not only impunity, it would also emphasise that if proceedings
25 are blocked, then it would encourage impunity. Thank you.

1 MR. WALLEYN (interpretation): No thank you, Mr. President.

2 PRESIDING JUDGE FULFORD: (Previous translation continues) ...

3 MS. MABILLE (interpretation): Mr. Biju-Duval will conclude on
4 our behalf, Mr. President.

5 PRESIDING JUDGE FULFORD: Mr. Biju-Duval, I'm sure that you won't
6 take this as an opportunity to make the principal submissions all over
7 again because you are now going to make submissions as a fresh advocate.

8 MR. BIJU-DUVAL (interpretation): I will make a few brief
9 observations on three points. The first is a matter of principle. The
10 Court has the difficult task of ruling on the release of Mr. Lubanga. It
11 cannot examine this issue except on the basis of the fundamental
12 principle that freedom is the rule and detention is the exception. I
13 shall not dwell on international agreements and jurisprudence which
14 discuss this principle. And it is based on this principle that we should
15 address the question of maintaining detention.

16 This is an observation to respond to an argument put forward by
17 the Prosecutor. It is perfectly clear that the burden of proof, the
18 absolute need or the proof pertaining to the absolute need to maintain
19 Mr. Lubanga in detention is on the Office of the Prosecutor. It is up to
20 the Prosecutor to prove that the detention is the only way to guarantee
21 the appearance at trial, to protect investigations or to avoid a repeat
22 of the crime. And in its decision, as the Chamber knows, the Chamber
23 will have to examine this issue: Was the proof provided that detention
24 is the only means to ensure that the trial is conducted as appropriate?
25 This is not the only way.

1 I will not return to arguments that were developed before by
2 Ms. Mabilille. I shall now move on to my second observation.

3 In direct response to the submissions of my colleague Ms. Bapita
4 about the realities on the ground, Ms. Bapita, who is representing one of
5 the victims, has said to the Chamber that the current situation in Ituri
6 does not argue for the release of the accused and that this release
7 might, well, further entrench the disorder that reigns on the ground.

8 It seems perfectly clear to us that such an argument cannot,
9 legally speaking, be considered by the Chamber. The basic texts are
10 clear. The Chamber can only consider the criteria as set forth in
11 Article 58(1), which do not include the question of whether national or
12 international public order or a situation on the ground could serve as
13 justification for detention. The observation is therefore not relevant
14 in the legal debate that this Chamber is dealing with.

15 Furthermore, it must be recalled that Mr. Lubanga has been in
16 detention for more than five years, first at the initiative of the
17 Congolese authorities, and next at the initiative of the authorities of
18 the court. And it does not appear reasonable. It seems unconscionable
19 to come today and make submissions or representations to support that --
20 the fact that he would be playing a role in what is going on in Ituri and
21 that his release would influence the current situation in Ituri.

22 Ms. Mabilille has said - I shall not repeat what she said - the
23 Chamber can only rule on matters that are -- or facts that are supported
24 by evidence. It cannot be said that Mr. Lubanga must not be released by
25 the Chamber because, as the Prosecutor said, there is a risk pertaining

1 to the witnesses. The Chamber cannot adopt such an argument because the
2 witnesses are protected, as the Prosecutor recalled. That's one point.
3 The other reason is that this is a debate which does not invite
4 submissions from the Defence because of the evidence to support such
5 accusations or threats is not there.

6 The last observation, Mr. President, your Honours. I shall of
7 course not return to what Ms. Mabilille said. I shall be responding to
8 Mr. Prosecutor's additions with regard to the unconscionable delay and
9 the reasonableness of the detention.

10 It is perfectly clear that the unreasonable or reasonable nature
11 of the duration of detention should be weighed in respect of the causes
12 of such duration. And if it is observed that the causes for the length
13 of detention, whatever they are, are not legitimate, are not
14 justifiable - and I shall not return to their unjustifiability - they
15 have been established as such, but if it is observed, then, that more
16 than 20 months, 20 months -- that it is more than 20 months since the
17 confirmation decision, and that during these 20 months these 20 months
18 were not devoted to investigations or to settle such thorny matters of
19 law, but that they are due, these 20 months, to a situation wrongly
20 created by the Prosecutor, then if such an observation is made, one must
21 necessarily consider that these 20 months are too long because of the
22 unjustifiable nature of the causes of the delay. This is why when the
23 Chamber will consider the reasonableness or otherwise of detention, it
24 may -- or it should consider that this detention is unreasonable in the
25 case of Mr. Lubanga in these proceedings, because nothing legitimate

1 justifies the length of 20 months, or a lot more than 20 months, between
2 the confirmation decision and the commencement of trial which we are now
3 considering today. Thank you.

4 PRESIDING JUDGE FULFORD: Well, Mr. Biju-Duval, that was not in
5 any way repetitive and extremely helpful. Thank you very much.

6 These are clearly important issues. We have received some fresh
7 and substantive submissions during the course of the last hour or so, and
8 we are going to reflect on our decision which we will hand down at
9 2.00 p.m.

10 We will rise until then.

11 COURT USHER: All rise.

12 Recess taken at 12.11 p.m.

13 On resuming at 2.08 p.m.

14 COURT USHER: All rise. Please be seated.

15 PRESIDING JUDGE FULFORD: (Microphone not activated) I'll start
16 again. The last review of the accused's detention by this Chamber prior
17 to imposing the stay of proceedings was on the 29th of May, 2008. See
18 document 1359.

19 In oral submissions before us, Maitre Mabilille referred to her
20 written observations which we have considered with care in advance of
21 today's hearing. She amplified her argument by addressing the
22 Prosecution's written filing, and although she made reference briefly to
23 the position in North Kivu in the DRC, which was amplified by way of
24 reply by Mr. Biju-Duval, Maitre Mabilille essentially focused on the
25 argument that if released, the accused will not attend his trial. She

1 advanced four particular points.

2 First, detention is not the only means of securing the attendance
3 of an accused, and there are other possible solutions to any concern that
4 he will not attend.

5 Second, the accused wishes to attend his trial, and in any event,
6 he does not have a passport or means of transport. Moreover, he is
7 subject to a United Nations travel ban. Currently, it was argued, a
8 return by him to the Democratic Republic of Congo is an impossibility.

9 Third, the delays in this case, which are -- and we are now 22
10 months since the confirmation of charges and the accused has been in the
11 custody of the court for two years and eight months, are essentially the
12 fault of the Prosecution, certainly since the replacement of
13 Mr. Lubanga's first legal team.

14 Maitre Mabilille submits that the Prosecution's actions have been
15 unjustified, and particularly she highlighted what she submits has been
16 the wholesale lack of timely service of the Prosecution's incriminating
17 evidence along with the exculpatory material which is in its possession.
18 She stressed the deleterious effect that the Article 54(3)(e) agreements
19 have had on these proceedings.

20 Fourth and finally, Maitre Mabilille argued that the jurisprudence
21 of the ad hoc tribunals and other international courts supports the
22 argument that the length of time the accused has been in custody is, ipso
23 facto, unconscionable.

24 Mr. Biju-Duval expanded on this argument during the course of his
25 reply. He also submitted that the reasonableness of the period of

1 detention must be weighed against its causes, and in that regard, he
2 focused on the 22 months since the confirmation of charges and the causes
3 of that significant period of incarceration. He also set out that it is
4 for the Prosecution to establish that detention is the only viable
5 alternative, and in this regard, it was argued that no valid or
6 sufficient justification has been put forward.

7 We have also closely read the Prosecution's written submissions.
8 By way of oral argument, Mr. Withopf submitted that the statutory
9 criteria for continued detention are all met. In summary, he suggested
10 that there is a reasonable basis for the charges, and there is a
11 realistic prospect that the accused will not attend his trial.
12 Furthermore, the Prosecution took issue with the suggestion that the
13 accused is unable to avoid justice because he does not have a passport,
14 is subject to a travel ban, and is without means of transportation.
15 Mr. Withopf reminded us that an accused can escape by unlawful as well as
16 lawful means, and there is a large Congolese community in Belgium where
17 he might find assistance.

18 The Prosecution rely on the complexities and the difficulties
19 that are occasioned by this trial, and he reminds the Chamber that many
20 new issues have been addressed before us which have been hitherto
21 untested in the context of the Rome Statute framework. He argued that
22 the delays have, overall, not been unreasonable in light of the
23 complexity and the extent of the matters that we have addressed thus far,
24 a number of which have been the subject of interlocutory appeals.

25 Addressing the Chamber on behalf of all the participating

1 victims, Ms. Bapita opposed provisional or unconditional release. In
2 particular, she argued that the release of the accused could seriously
3 inflame the currently very unstable situation in Kivu where the
4 conditions appear to be deteriorating.

5 The statutory position is that by Article 58 the Prosecutor may
6 submit an application for a warrant of arrest if there are reasonable
7 grounds to believe that the person has committed a crime within the
8 jurisdiction of the court. And if his arrest is necessary, to ensure his
9 appearance at trial, to ensure he does not obstruct or endanger the court
10 proceedings, or to prevent him from continuing to commit or from
11 committing a crime within the jurisdiction of the court which arises out
12 of the same circumstances. See Articles -- see Article 58(1)(a) and (b).

13 The person arrested in this way can apply for interim release
14 pending trial. He shall be held in custody if the matters set out in
15 Article 58(1) are still met; if the Chamber is not so satisfied, he is to
16 be released. See Article 60(2).

17 As a further protection by way of Article 60(4), the accused is
18 to be released if his detention is of unreasonable length prior to trial
19 as a result of inexcusable delay by the Prosecutor. If such a delay
20 occurs, the Court shall consider his release, with or without conditions.
21 It is to be noted that inexcusable delay does not result in automatic
22 release but instead it triggers a review ("the Court shall consider") as
23 to whether release should occur. See the Appeals Chamber decision of the
24 13th of February, 2007, at paragraph 120.

25 Addressing that statutory position, there remain reasonable

1 grounds for believing that Mr. Lubanga committed, as a co-perpetrator,
2 the crimes of enlisting and conscripting children under the age of 15
3 years into the FPLC and using them to participate actively in
4 hostilities. We emphasise immediately that this finding is irrelevant to
5 any final determination that we will make on the issue of his guilt or
6 innocence.

7 We remain of the view that the overall circumstances have not
8 changed as regards detention being a necessary step to ensure that
9 Mr. Lubanga will attend his trial. As with all the accused before this
10 court, he faces grave charges, and consistently with our earlier
11 decisions, we are of the view that if released he is likely to attempt to
12 avoid standing his trial. It is to be stressed that our concerns about
13 Mr. Lubanga not attending his trial are not limited to the opportunities
14 that may exist for him to return to the DRC, which on any view is
15 currently not a stable country, certainly in some areas. There are other
16 places where an accused may hide, and there are means of travelling other
17 than lawful ones. Experience shows that a lack of travel documents can
18 be rectified, and travelling bans can be avoided.

19 We are now, in all likelihood, very close to the date of trial,
20 and the pressure on the defendant may be at its greatest over the next
21 few weeks. If that is the position, it heightens the incentive for him
22 to avoid these impending proceedings.

23 The possibility of other solutions falling short of detention
24 have been raised. If alternatives to custody are to be relied on, the
25 Chamber will need to be addressed in detail on the available options.

1 That has not occurred in this case thus far. We stress that in making
2 this observation we are not indicating either way how we may react to
3 such a proposal if one is made.

4 Addressing the protection provided by Article 60(4), although the
5 Prosecution originally entered into the Article 54(3)(e) agreements which
6 have significantly contributed to the overall delay in this trial, since
7 the last review in May 2008, it has been the information providers rather
8 than the Prosecution who have dictated whether or not adequate disclosure
9 can be afforded to the accused in a timely manner, or at all, following a
10 proper review procedure by the Chamber. In real terms, the slow progress
11 since June has been the -- has been the result of the delicate
12 negotiations that have been necessary with the information providers.
13 Therefore, the delays since the last review essentially have been the
14 result of matters outside the Prosecution's control. We have not,
15 however, limited our consideration of this issue to this most recent
16 period, but we have reflected on the overall time scales set out earlier,
17 namely that Mr. Lubanga has been in the custody of the court for two
18 years, eight months, and 22 months have passed since the confirmation of
19 charges.

20 Whilst the Prosecution undoubtedly are responsible for
21 significant periods of delay in this case, which we have addressed
22 extensively in our decisions on disclosure and when adjourning the trial
23 date on more than one occasion, given the unique circumstances of this
24 case when many wholly new issues have required resolution and including
25 by way of interlocutory appeal, and whilst the accused has arguably been

1 detained for an unreasonable period, we are unpersuaded that the delays
2 that have occurred are due to inexcusable, and we stress that word,
3 activity or lack of it by the Prosecution, notwithstanding the fact that
4 the Prosecution has made, undoubted, mistakes.

5 We are acutely aware of the length of time that Mr. Lubanga has
6 been in custody, and that has led us to identify the earliest possible

7 trial date, namely the 26th of January, 2009. In any event, it seems to
8 us that given the proximity of the trial, the arguments in favour of
9 ensuring the accused's attendance at trial outweigh the additional
10 relatively short period of further pre-trial detention.

11 Finally, we observe that in -- that important though they are in
12 a general sense, we have not been influenced by Ms. Bapita's submissions
13 on this particular issue, because, in our view, they are not relevant to
14 the statutory criteria that we need to address on a review of this kind.

15 For all the reasons that we have just set out, the accused will
16 remain in custody.

17 That, therefore, brings to a close this status conference, and we
18 will adjourn, therefore, until Tuesday of next week when we will sit at
19 10.00 in the morning. We thank you all for your attendance and for your
20 assistance.

21 We will rise.

22 COURT USHER: All rise.

23 The hearing ends at 2.25 p.m.

24

25