

1 International Criminal Court

2 Appeals Chamber - Courtroom 1

3 President Sang-Hyun Song, Presiding

4 Situation: Democratic Republic of the Congo - ICC-01/04-01/06

5 In the case of The Prosecutor v. Thomas Lubanga Dyilo

6 Appeals Hearing

7 Friday, 8 October 2010

8 (The hearing starts at 2.31 p.m.)

9 (Open session)

10 THE COURT USHER: All rise. The International Criminal Court is
11 now in session. Please be seated.

12 JUDGE SONG: Good afternoon. Before beginning with the Appeals
13 Chamber's judgements, I have been requested and have granted photographers an
14 opportunity to take pictures in this courtroom.

15 Court officer, could you please invite the photographers to enter this
16 courtroom for one minute?

17 THE COURT OFFICER: Yes, your Honour.

18 (Pause in proceedings)

19 JUDGE SONG: Okay. Thank you very much. Court officer, please
20 call the case.

21 THE COURT OFFICER: Yes, your Honour. Situation in the
22 Democratic Republic of the Congo in the case of the Prosecutor versus Thomas
23 Lubanga Dyilo. Case reference ICC-01/04-01/06.

24 JUDGE SONG: May I then ask the parties and participants to
25 introduce themselves for the record, perhaps starting with Mr Lubanga Dyilo.

1 MS MABILLE: (Interpretation) The Defence have Thomas Lubanga
2 is represented today by Jean-Marie Biju Duval, Mr Marc Desalliers, Ms Caroline
3 Buteau, and myself, Catherine Mabilie.

4 JUDGE SONG: Thank you very much. Then the Office of the
5 Prosecutor, please.

6 MR MORENO-OCAMPO: Your Honour, the Office of the Prosecutor
7 is represented today by Sara Criscitelli, the Prosecutor coordinator; Fabricio Guariglia,
8 the senior appeal counsel; Manoj Sashdeva, trial attorney; Nicole Samson, trial
9 attorney; Reinhold Gallmetzer, appeal counsel; Meritxell Regue Blasi, appeal counsel;
10 and myself, the Prosecutor.

11 JUDGE SONG: Thank you, Mr Prosecutor. And then representative
12 of the Office for Public counsel for Victims.

13 MS PELLET: (Interpretation) Thank you, your Honour. I am Sarah
14 Pellet and I represent the Office of Public Counsel for Victims.

15 JUDGE SONG: Thank you very much. Any legal representatives of
16 victims, please, register yourselves.

17 MR WALLEYN: (Interpretation) Thank you, your Honour. I am
18 Luc Walley and I represent the first team of victims.

19 JUDGE SONG: Thank you.

20 MR KETA: (Interpretation) Your Honour, I am Joseph Keta and I
21 represent the second group of victims in this case.

22 JUDGE SONG: Thank you very much.

23 Today the Appeals Chamber is delivering its judgments on the Appeals
24 of the Prosecutor against, first, the decision of the Trial Chamber I of 8 July 2010
25 entitled "Decision on the Prosecution's Urgent Request for Variation of Time-Limit to

1 Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings
2 Pending Further Consultations with the Victims and Witnesses Unit" and, second, the
3 oral decision of Trial Chamber I of 15 July 2010 to release Mr Lubanga Dyilo.

4 I shall now summarise the Appeals Chamber's judgments. Please note
5 that the actual judgments, which will be filed and notified to the parties and
6 participants very shortly, not this particular summary, are authoritative.

7 The present appeals arose in the context of litigation over the
8 Prosecutor's use of so-called "intermediaries", persons who have introduced
9 witnesses to the Prosecutor or who have contacted witnesses on his behalf, including
10 allegations that some intermediaries had sought to induce witnesses to testify falsely
11 before the Court.

12 On 12 May 2010, the Trial Chamber ordered the Prosecutor to disclose
13 to Mr Lubanga Dyilo the identity of, among others, intermediary 143, once
14 appropriate measures to protect this intermediary were put in place. Following
15 delays in the implementation of these protective measures, the Trial
16 Chamber reviewed the terms of its order. On the morning of 7 July, the Trial
17 Chamber ordered the Prosecutor to disclose, within half-an-hour, the identity of
18 intermediary 143 under restrictive conditions which it deemed sufficient to protect
19 the intermediary. The Prosecutor did not disclose the identity of intermediary 143
20 within this time-limit.

21 The Prosecutor subsequently requested the Trial Chamber to reconsider
22 its order. The Trial Chamber entertained the Prosecutor's submissions and, upon
23 reconsideration, again ordered the Prosecutor to disclose the identity of intermediary
24 143 under the same restrictive conditions. The Prosecutor failed once more to
25 disclose the identity of this particular intermediary.

1 The Prosecutor submitted two filings after the expiration of the second
2 time-limit for disclosure. In the first filing, the Prosecutor stated that he was "bound
3 by autonomous statutory duties of protection that he had to honour at all times" and
4 that it was "indispensable that prior to any disclosure being effected, the Prosecution
5 be satisfied that it is acting in compliance with its specific duties under the Statute
6 and the Rules." In the second filing, the Prosecutor stated, "The Prosecution is
7 sensitive to its obligation to comply with the Chamber's instructions. However, it
8 also has an independent statutory obligation to protect persons put at risk on account
9 of the Prosecution's actions. It should not comply, or be asked to comply, with an
10 Order that may require it to violate its separate statutory obligation by subjecting the
11 person to a foreseeable risk.

12 On 8 July, the Trial Chamber ordered an immediate stay of the
13 proceedings "because of the Prosecutor's material non-compliance with the
14 Chamber's orders of 7 July 2010 and, more generally, because of the Prosecutor's
15 clearly-evinced intention not to implement the Chamber's orders that are made in an
16 Article 68 context, if he considers they conflict with his interpretation of the
17 Prosecution's other obligations." The Chamber found that, in these circumstances, it
18 had effectively lost control of the proceedings and could not ensure a fair trial.

19 On 15 July, the Trial Chamber granted the Prosecutor leave to appeal
20 the decision staying proceedings. It also ordered the release of Mr Lubanga Dyilo
21 and gave the Prosecutor and the Deputy Prosecutor an oral warning of sanctions for
22 misconduct under Article 71 of the Statute and the Rule 171 of the Rules of Procedure
23 and Evidence should there be any continuing breach of its orders. The
24 Chamber decided to await the outcome of the appeal against the decision staying
25 proceedings before taking any further action with respect to sanctions.

1 On 16 July, the Prosecutor filed a notice of appeal against the decision to
2 release Mr Lubanga Dyilo in which he requested that the appeal be given suspensive
3 effect pursuant to Article 82(3) of the Statute and the Rule 156(5) of the Rules of
4 Procedure and Evidence. The Appeals Chamber granted this request on 23 July.

5 With the authorisation of the Appeals Chamber, victims submitted
6 observations in both appeals and the parties responded thereto.

7 I would like to turn now to the Appeals Chamber's consideration of the
8 merits of the two appeals, starting with the appeal against the decision to stay
9 proceedings.

10 The Prosecutor has alleged that the Trial Chamber made three errors in
11 deciding to stay proceedings. I will address each alleged error together with the
12 portions of the Appeals Chamber's judgment which respond to the alleged error
13 before moving to the next error.

14 The Prosecutor's first alleged error is that the Trial Chamber erred when
15 it found that the Prosecutor refused to comply with the Chamber's orders to disclose
16 the identity of intermediary 143. He argues that he was entitled to pursue other
17 alternatives instead of complying strictly with the terms of the orders.

18 The Appeals Chamber is not persuaded by this argument. Orders of
19 the Chambers are binding and should be treated as such by all parties and
20 participants unless and until they are suspended by the Appeals Chamber pursuant
21 to Article 82(3) of the Statute or their legal effects are otherwise modified by an
22 appropriate judicial decision of a relevant Chamber. It is undisputed that the
23 Prosecutor did not comply with either of the two orders to disclose the identity of
24 intermediary 143. It is equally undisputed that the sole cause of this non-compliance
25 was the Prosecutor's wilful decision not to follow the orders. Whatever alternatives

1 the Prosecutor thought he could justifiably pursue, these could not suspend the
2 effects of these orders. The Appeals Chamber therefore rejects the Prosecutor's first
3 alleged error.

4 The Prosecutor's second argument is that Trial Chamber misconstrued
5 the Prosecutor's position with respect to his duties of protection and found as a result
6 that the Prosecutor's position constituted an unjustified intrusion into the role of the
7 judiciary and prevented the Chamber from being able to ensure a fair trial. The
8 Prosecutor argues that "the Statute does not focus the responsibility of protection on
9 one particular organ" but rather establishes a system in which "all organs share
10 responsibility and must consult and act in a coordinated fashion to provide adequate
11 protection." According to the Prosecutor, if a Chamber's order entails, in his view,
12 tangible risks to a person, rather than complying with the order, the Prosecutor "must
13 engage with the Chamber and exhaust all available means to seek adjustment or
14 variations to the Chamber's order to avert that risk."

15 The Appeals Chamber reaffirms that, under the Statute, the Trial
16 Chamber, subject only to the powers of the Appeals Chamber, is the ultimate
17 guardian of a fair and expeditious trial. Whatever powers and duties the Prosecutor
18 may have cannot supplant the ultimate authority of the Trial Chamber to determine
19 what constitutes a fair trial. If there is a conflict between the Prosecutor's perception
20 of his duties and the orders of the Trial Chamber, then it is the Trial Chamber's orders
21 which must prevail.

22 The Appeals Chamber finds that there is no exception to this general
23 principle in relation to matters of protection. To the contrary, whatever measures
24 the Prosecutor may take with respect to the protection of victims, witnesses and
25 others, it is the responsibility of the Trial Chamber to ensure that "these measures

1 shall not be prejudicial to or inconsistent with the rights of the accused and a fair and
2 impartial trial", and it is the Chamber which is the ultimate arbiter on matters of
3 protection.

4 The Appeals Chamber therefore rejects the Prosecutor's second alleged
5 error.

6 The Prosecutor's third argument is that a stay of proceedings was a
7 premature and excessive remedy. He argues that the Trial Chamber could have
8 imposed the sanctions to punish the Prosecutor and could have better explored
9 means to compensate Mr Lubanga Dyilo for any delay caused by the non-disclosure
10 of the identity of intermediary 143.

11 The Appeals Chamber recalls that a stay of proceedings is a drastic
12 remedy. As previously held by the Appeals Chamber, a stay may be justified where
13 it is "impossible to piece together the constituent elements of a fair trial."

14 The Appeals Chamber agrees with the Trial Chamber that "no criminal
15 court can operate on the basis that whenever it makes an order in a particular area, it
16 is for the Prosecutor to elect whether or not to implement it, depending on his
17 interpretation of his obligations."

18 The Appeals Chamber observes that the Trial Chamber did not impose
19 the stay of proceedings solely on the basis of the non-disclosure of the identity of
20 intermediary 143, but that it relied also and as a necessary part of its decision on the
21 Prosecutor's clearly evinced intention not to implement orders of the Trial
22 Chamber that are made in an Article 68 context if the Prosecutor considers they
23 conflict with his interpretation of his own duties in this regard.

24 The Appeals Chamber can find no error in the Trial Chamber's
25 conclusion that the Prosecutor's rejection of the Trial Chamber's authority extended to

1 "a very considerable part" of the trial and concerned issues related to the trial's
2 fundamental fairness. If a Trial Chamber loses control of such a significant and
3 fundamental part of proceedings because of the Prosecutor's refusal to comply with
4 its orders, it would indeed be impossible to ensure a fair trial, and a stay of
5 proceedings would then be justified.

6 However, the Appeals Chamber finds that the Trial Chamber erred in
7 concluding that it had lost control of proceedings in this case. The Appeals
8 Chamber notes that Article 71 of the Statute enables a Chamber to impose sanctions
9 in the case of refusal of a party to comply with its orders. The Appeals
10 Chamber finds that one of the purposes of such sanctions is to bring about
11 compliance when a party refuses to comply with the orders of a Chamber. Sanctions
12 are thus a key tool for Chambers to maintain control of proceedings within the trial
13 framework and to safeguard a fair trial without having recourse to the drastic remedy
14 of staying proceedings. The Appeals Chamber finds that, to the extent possible, a
15 Trial Chamber faced with a threat to the fairness of the trial in the form of the
16 deliberate refusal of a party to comply with its orders should seek to bring about that
17 party's compliance through the imposition of sanctions before resorting to a stay of
18 proceedings.

19 In the present circumstances, the Appeals Chamber finds that the Trial
20 Chamber erred by resorting immediately to a stay of proceedings without first
21 imposing sanctions and allowing such sanctions an opportunity to bring about the
22 Prosecutor's compliance with its orders. Accordingly, the decision to stay
23 proceedings must be reversed.

24 I would like to turn now, very briefly, to the Appeals Chamber's
25 judgment in the appeal against the decision to release Mr Lubanga Dyilo.

1 The Appeals Chamber finds that the decision to release Mr Lubanga
2 Dyilo was predicated on the decision to stay proceedings. As the latter decision is
3 reversed, so too the decision to release Mr Lubanga Dyilo must be reversed.

4 The Appeals Chamber notes that Mr Lubanga Dyilo has argued that he
5 should not be detained any longer due to the inexcusable delay of the Prosecutor.
6 However, the Trial Chamber did not make any finding that Mr Lubanga Dyilo was
7 detained for an unreasonable period due to the inexcusable delay of the Prosecutor
8 under Article 60(4) of the Statute, and it would be inappropriate for the Appeals
9 Chamber to enter findings of the Trial Chamber on this point.

10 For the reasons I have summarised, the Appeals Chamber reverses both
11 the decision to stay proceedings and the decision to release Mr Lubanga Dyilo.

12 This concludes my summary of judgment. It remains for me, I guess,
13 only to thank the interpreters and court reporters and the court officers. Thank you
14 very much. The session is now closed.

15 THE COURT USHER: All rise.

16 (The hearing ends at 3.01 p.m.)