



STAY OF TRIAL PROCEEDINGS IN THE THOMAS LUBANGA DYILO CASE

On 13 June 2008, Trial Chamber I of the International Criminal Court (ICC) imposed a stay on the proceedings in the case of *The Prosecutor vs. Thomas Lubanga Dyilo*. The stay of what was to be the Court's first trial has halted all aspects of the trial process. It can only be lifted by the ICC Trial or Appeals Chamber.

Thomas Lubanga Dyilo is a militia leader from the Democratic Republic of the Congo who has been accused of the war crimes of enlisting and conscripting children under the age of 15 years as soldiers and using them to actively participate in hostilities between 2002 and 2003. He is a member of the Hema community and the alleged former leader of the Union of Congolese Patriots (UPC).

The judges decided to stay the trial proceedings in the Lubanga case because the prosecution was unable to make available more than 200 documents containing potentially exculpatory materials. These materials show or tend to show the innocence of the accused, mitigate the guilt of the accused or call into question the credibility of the prosecution's evidence.

The materials in the possession of the prosecution were obtained on the condition of confidentiality from a number of information providers, including the United Nations. Under Article 54(3) (e) of the Rome Statute, the prosecution can agree to receive documents or information on a confidential basis solely for the purpose of generating new evidence which could then be used at trial. If the prosecution wants to use the information obtained under confidentiality at trial, it must first obtain the permission of the information-provider.

In their decision to stay the proceedings of the Lubanga trial, the ICC judges have called into question the prosecution's use of Article 54(3)(e). According to the Judges, the prosecution's general approach has been to use the article to obtain a wide range of materials under the cloak of confidentiality, and then to identify from those materials evidence to be used at trial. This has required the prosecution to seek consent from the information providers for each piece of evidence they wish to use or must disclose, and has proved a cumbersome and unworkable system. In the view of the chamber, this is the exact opposite of the proper use of the provision, which is to allow the prosecution to receive such confidential information or documents on an exceptional and not routine basis.

The chamber has maintained that, in accordance with Article 67(2) of the Statute, the disclosure of exculpatory evidence in the possession of the prosecution is a fundamental aspect of the accused's right to a fair trial. At the time of the decision to stay the proceedings, there was no agreement with the UN to allow disclosure of confidential documents to the chamber or the defence. Therefore the chamber halted the trial proceedings because it deemed the possibility of a fair trial to be in jeopardy. In a subsequent filing, the prosecution has informed the chamber of ongoing negotiations with the UN, and that they have an agreement with the UN whereby the chamber will be able to review the documents in order to further assess the situation.

A hearing will take place on Tuesday 24 June 2008 to consider, among other issues, the release of the accused. However, no decision will be rendered on 24 June. The judges will issue a written decision in due course.

The Coalition for the International Criminal Court is a global network of over 2,000 civil society organizations supporting a fair, effective and independent International Criminal Court.

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The ICC judges are duty-bound to guarantee the rights of the accused to a fair and impartial trial in accordance with the Rome Statute and in a way that is consistent with internationally recognized human rights standards.

The independence of the ICC judges from the parties to the proceedings provides a system of checks-and-balances on the Office of the Prosecutor, the defence and victim participants that helps ensure that the Court functions in a fair, effective and independent manner.

Glossary of Key Terms

- **Confidentiality of the Information under Article 54(3)(e) of the Rome Statute**

Under article 54(3)(e) of the Rome Statute, the prosecution can agree to receive documents or information on a confidential basis “solely for the purpose of generating new evidence” that can be used at trial. If the prosecution wants to use the confidential information as evidence, it must first obtain the permission of the information-provider. Because of the prosecution’s obligation to disclose all exculpatory or mitigating materials to the defence, in principle, these materials should not be obtained by the prosecution on a confidential basis. If the prosecution deems any of the confidential information in its possession exculpatory or mitigating, it must secure the permission of the information provider in order to disclose the materials.

- **Confirmation of the Charges**

At the ICC, a pre-trial chamber conducts a “confirmation of the charges” hearing to determine whether or not there is sufficient evidence to establish substantial grounds to believe that the person committed each of the alleged crimes.

- **Decision of Acquittal**

An acquittal is a verdict through which the Court establishes that an accused was not found guilty of the charges brought against him or her. When an accused has been acquitted by the Court the proceedings are generally terminated and the accused must be immediately released. A decision of acquittal can be appealed subject to the provisions of the ICC Statute.

- **Decision of Conviction**

A conviction is the verdict issued after a trial that deems a defendant guilty of the crimes of which he or she has been accused. In the event of a conviction, the Trial Chamber shall determine an appropriate sentence for the accused, taking into account the evidence presented along with any submissions made during the trial that are relevant to sentencing. The maximum sentence the ICC can impose is life in prison.

- **Disclosure**

Generally speaking, disclosure refers to the process by which the prosecution and defence share their evidence. Failure to disclose evidence can prevent the use of that evidence at trial. To ensure an equality of arms between the defence and the prosecution, the ICC prosecutor has the obligation to investigate incriminating and exonerating circumstances for a defendant equally and disclose to the defence any material in possession or control of the Office of the Prosecutor that the prosecution believes to be exculpatory.

- **Exculpatory or exonerating material**

The Court defines “exculpatory” material as documentation that shows or tends to show the innocence of the accused, that mitigates the guilt of the accused or that may affect the credibility of the prosecution’s evidence. According to the Court, once the prosecution believes that materials in its possession are potentially exculpatory, in accordance with Article 67(2) of the Statute, they are to be disclosed to the defence, or put before the Court in case of doubt.

- **Incriminating material**

Incriminating material refers to documentation that shows or tends to show the guilt of the accused with respect to the charges brought against him or her. In order for the prosecution to use incriminating materials as evidence during trial they must first be disclosed to defence.

- **Judicial Independence**

Judicial independence is the principle that decisions of the judges should not be subject to external influence. At the ICC, judicial independence is also institutional in that judges are independent from other organs of the Court and from the parties and participants to the proceedings. The ICC judges are also mandated to make decisions solely based on the law and facts, without consideration of media, political or other concerns.

- **Release of the accused**

According to Articles 60(4) and 61(11) of the Rome Statute, the Pre-Trial Chamber and by extension the Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

- **Request for Leave to Appeal**

The ICC Statute and the Rules of Procedure and Evidence differentiate between appeals that do not require the leave or permission of the Court and may be submitted directly to the Appeals Chamber, and appeals that require the permission of the Court. In the case of the latter, according to Article 82(1)(d) of the Statute, a party may request the Pre-Trial or Trial Chamber leave to appeal a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. The leave to appeal shall be requested by the party within five days of being notified of that decision, making a written application to the chamber that gave the decision, setting out the reasons for the request for leave to appeal.

- **Right to a fair trial**

The right to a fair trial is an essential right in all countries respecting the rule of law. It is explicitly proclaimed in Article Ten of the Universal Declaration of Human Rights, Article Six of the European Convention of Human Rights, as well as in numerous other constitutions, declarations and treaties throughout the world. In the case of the ICC, Article 67(1) of the Rome Statute provides that the accused is entitled to a public and fair hearing conducted impartially and in full equality. It is generally understood that some of the essential elements for a fair trial must include a competent, neutral and independent judge; the absence of any intimidation of witnesses; and equality of arms between the defence and prosecution.



- **Stay of the proceedings**

The stay imposed on the proceedings in the Lubanga trial requires the trial process to come to a halt in all respects unless the stay is lifted by the Trial or the Appeals Chamber. This does not mean that the accused has been acquitted. An accused cannot be acquitted without a trial, and in the case against Thomas Lubanga Dyilo, a trial has not taken place. If particular circumstances exist, the Court has the duty to halt or 'stay' the proceedings." The Judges refer to an ICC Appeal's Chamber decision* stating that *"Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. [...]"*