

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

***SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Public

Redacted Version of "Decision on the Prosecution's Application to Lift the Stay of Proceedings"

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”) in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following decision on the application of the Office of the Prosecutor (“prosecution”) to lift the stay of the proceedings:

I. Procedural history

1. On 13 June 2008, the Chamber rendered its “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008” (“Decision”).¹ In its Decision the Chamber indefinitely stayed the proceedings against Mr Thomas Lubanga Dyilo as a result of the prosecution’s failure to disclose to the defence or make available to the Chamber certain potentially exculpatory materials which had been obtained pursuant to confidentiality agreements made under Article 54(3)(e) of the Rome Statute (“Statute”) (“Documents”). In its Decision, the Trial Chamber specified that the stay had the effect of halting the proceedings unless and until such time as the stay is lifted by a decision either of the Appeals Chamber or the Trial Chamber itself.²
2. On 23 June 2008, the Prosecution sought leave to appeal the Decision.³ The Legal Representatives for Victims a/0001/06 to a/0003/06 filed their response to the prosecution’s application for leave to appeal on 24 June 2008, stating

¹ Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04/01/06-1401.

² *Ibid*, paragraph 94

³ Prosecution's Application for Leave to Appeal "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 23 June 2008, ICC-01/04-01/06-1407.

that they supported the application.⁴ On 27 June 2008, the defence filed its response to the prosecution's application for leave to appeal, which it did not oppose.⁵ On 2 July 2008, the Trial Chamber granted the prosecution's application for leave to appeal.⁶ The decision with regard to this appeal is currently pending before the Appeals Chamber.

3. The prosecution filed on a confidential *ex parte* basis a "Prosecution's application to lift the stay of proceedings" on 10 July 2008, and a public redacted version of the application, which was notified to the defence and the legal representatives of the victims the next day ("Application").⁷ The prosecution provided supplementary information to the Application on 30 July 2008, 8 August 2008, and 22 August 2008 by way, respectively, of the "Prosecution's provision of information supplementing the 'Prosecution's application to lift the stay of proceedings'";⁸ the "Prosecution's provision of further information supplementing the 'Prosecution's application to lift the stay of proceedings'";⁹ and the "Prosecution's additional provision of further information supplementing the 'Prosecution's application to lift the stay of proceedings'"¹⁰ (collectively "Supplementary Information"). The legal representatives of the victims did not respond to the Application or

⁴ Réponse à la demande du Procureur de faire appel contre la décision du 13 juin 2008, 24 June 2008, ICC-01/04-01/06-1410.

⁵ Réponse de la Défense à la « Prosecution's Application for Leave to Appeal "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 » datée du 23 juin 2008, 27 June 2008, ICC-01/04-01/06-1416.

⁶ Decision on the Prosecution's Application for Leave to Appeal the "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused", 2 July 2008, ICC-01/04-01/06-1417.

⁷ Prosecution's application to lift the stay of proceedings, 10 July 2008 (notified on 11 July 2008), ICC-01/04-01/06-1430-Conf-Exp, with 59 confidential *ex parte* prosecution only annexes; Prosecution's application to lift the stay of proceedings, 11 July 2008, ICC-01/04-01/06-1431, with 3 public annexes and 56 confidential *ex parte* prosecution only annexes.

⁸ Prosecution's provision of information supplementing the 'Prosecution's application to lift the stay of proceedings', 30 July 2008, ICC-01/04-01/06-1451, with 2 public annexes and 2 confidential, *ex parte*, prosecution only annexes.

⁹ Prosecution's provision of further information supplementing the 'Prosecution's application to lift the stay of proceedings', 8 August 2008, ICC-01/04-01/06-1454, with 2 public annexes and 2 confidential, *ex parte*, prosecution only annexes.

¹⁰ Prosecution's additional provision of further information supplementing the 'Prosecution's application to lift the stay of proceedings', 22 August 2008, ICC-01/04-01/06-1462, with 2 public annexes and 2 confidential, *ex parte*, prosecution only annexes.

Supplementary Information. On 26 August 2008, the Chamber ordered the defence to file a consolidated response,¹¹ which was received on 1 September 2008.¹²

4. Without prejudice to the position on any future applications (for which hearings may be necessary), the issues were sufficiently clear on this application to obviate the need for a Status Conference.

II. Submissions of the parties

A. Prosecution

5. The prosecution indicated in its Application and Supplementary Information that there are currently 204 items that appear to be potentially exculpatory and are subject to Article 54(3)(e) agreements.¹³ Of these, 152 Documents were obtained by the prosecution from the United Nations, and the remainder were provided by six Non-Governmental Organisations (“NGOs”).¹⁴

Documents obtained from the United Nations

6. According to the prosecution’s Application and Supplementary Information, to date the United Nations has agreed to the following:¹⁵
 - a. A total of 53 Documents may be disclosed in full to the defence without any conditions;
 - b. A total of 83 Documents may be disclosed to the defence with redactions;

¹¹ Order for a defence response to the “Prosecution’s application to lift the stay of proceedings” and the subsequent related filings, 26 August 2008, ICC-01/04-01/06-1463.

¹² Réponse de la défense à la “Prosecution’s application to lift the stay of proceedings”, datée du 11 juillet 2008, 1 September 2008, ICC-01/04-01/06-1464.

¹³ ICC-01/04-01/06-1430-Conf-Exp and ICC-01/04-01/06-1431, paragraph 10.

¹⁴ *Ibid*, paragraph 13.

¹⁵ ICC-01/04-01/06-1430-Conf-Exp; ICC-01/04-01/06-1431; ICC-01/04-01/06-1451; ICC-01/04-01/06-1454; ICC-01/04-01/06-1462.

- c. One Document may be disclosed to the defence with redactions, subject to a defence undertaking not to disclose the information to any third party;¹⁶
 - d. 16 Documents are still under review by the United Nations and may not be disclosed to the defence (“Outstanding Documents”).¹⁷
7. As regards the 16 Outstanding Documents (paragraph 6 (d) above), the Application sets out a proposal whereby the United Nations would make available to the Chamber the Documents provided by it to the prosecution, subject to the Chamber undertaking not to disclose them to the defence without its consent. The Chamber notes that while it expressly gave this undertaking in court on 6 May 2008,¹⁸ the United Nations has requested that the undertaking is repeated in writing by the Chamber.¹⁹ The Chamber notes additionally that it is a necessary inference that these conditions apply equally to the parts of the 83 Documents (paragraph 6 (b) above) which are the subject of proposed redactions, along with the single Document (paragraph 6 (c) above) (unless and until the defence accepts the proposed condition suggested for that latter item).
8. It would appear that the United Nations’ proposal would allow the Chamber to review the 16 United Nations’ Outstanding Documents which, in their entirety, cannot currently be disclosed and the portions of the 83 Documents which are the subject of proposed redactions, along with the single Document, and to make notes thereupon. Upon completion of the review, the Chamber would be required to return the Documents or the redacted sections to the United Nations and the judges would be required to redact any portion of their individual notes insofar as they quote from or paraphrase the 16

¹⁶ ICC-01/04-01/06-1462, paragraphs 2-9.

¹⁷ *Ibid*, paragraphs 7-9.

¹⁸ Transcript of hearing on 6 May 2008, ICC-01/04-01/06-T-86-ENG, pages 35-36.

¹⁹ Public annex to Prosecution’s application to lift the stay of proceedings, 11 July 2008, ICC-01/04-01/06-1431-Anx2.

United Nations' Outstanding Documents, the redacted parts of the 83 Documents or the single Document, until such time as the Appeals Chamber agrees to be bound in its review of the Documents by an undertaking similar to that provided by the Chamber. If the Trial Chamber rules that any of the 16 United Nations' Outstanding Documents, the redacted sections of the 83 Documents or the single Document (absent defence consent to the conditions) should be disclosed to the defence in order to secure a fair trial, the United Nations would consent only to the disclosure of summaries of the relevant Document in the first instance, although the prosecution submitted that "the United Nations envisages the possibility of making such items or information contained therein available to the accused and his defence by other means, including subject to such protective measures that may be permissible under the Rome Statute..."²⁰

9. In light of this proposed procedure from the United Nations, the prosecution submitted that the Trial Chamber can be immediately provided with the 152 items of undisclosed evidence that originate from the United Nations.²¹ The prosecution confirmed that all Documents provided by the United Nations can be submitted to the Chamber in non-redacted form.²² It further submitted that the procedure proposed by the United Nations accommodates the concerns of the Chamber and will enable it to explain, by reference to the detail of the evidence it has seen, the reasons for any relevant decisions.²³

²⁰ ICC-01/04-01/06-1430-Conf-Exp and ICC-01/04-01/06-1431, paragraph 22(ii).

²¹ *Ibid*, paragraph 23.

²² *Ibid*, paragraph 45.

²³ *Ibid*, paragraphs 25 and 26.

Documents obtained from non-governmental organisations

10. The Chamber notes that there appears to be some inconsistencies in the figures provided by the prosecution.²⁴ In relation to the Documents obtained by NGOs, disclosure (albeit redacted) is currently contemplated in respect of only 3 Documents, with no undertaking in respect of disclosure of the remainder having been provided.²⁵
11. The first information provider is the NGO [REDACTED].²⁶ The 22 Documents provided by [REDACTED] were provided in non-redacted form to the Trial Chamber as annexes to the Application.²⁷ However, [REDACTED] has declined to consent to the disclosure of its identity to the defence and the accused.²⁸ The Application indicates that the prosecution will recommend to [REDACTED] the provision of summaries to the defence, including redactions of [REDACTED].²⁹ No indication has been given as to whether [REDACTED] will agree to this recommendation and, if not, whether other potential disclosure alternatives are available.
12. The second information provider is the NGO [REDACTED].³⁰ The one Document that originates from [REDACTED] was provided in non-redacted form to the Chamber as an annex to the Application.³¹ The prosecution submitted that [REDACTED] and indicated that [REDACTED] has declined to consent to the disclosure of its identity to the defence, the accused and the public.³² The Application does not indicate whether [REDACTED] will agree

²⁴ See for example, ICC-01/04-01/06-1430-Conf-Exp and ICC-01/04-01/06-1431, paragraphs 28, 30, 33, 34, 36, 37, 39, 40, 42 and 43 as compared to paragraph 47.

²⁵ *Ibid*

²⁶ *Ibid*, paragraph 28

²⁷ *Ibid*, paragraph 28, Annexes 5 to 26 – *ex parte*, prosecution only.

²⁸ *Ibid*, paragraph 29.

²⁹ *Ibid*, paragraph 30.

³⁰ *Ibid*, paragraph 31.

³¹ *Ibid.*, paragraph 31, Annex 27– *ex parte*, prosecution only.

³² *Ibid*, paragraph 32.

to any of the suggested disclosure “alternatives” and, if not, whether further disclosure possibilities are available.

13. The third information provider is the NGO [REDACTED].³³ The prosecution, on 3 June 2008, provided the Chamber with redacted versions of 3 Documents which, it informed the Chamber, had originated from [REDACTED]. These Documents were re-submitted as annexes to the Application, without redactions.³⁴ It was submitted by the prosecution that [REDACTED] is prepared to agree to the disclosure of summaries or redacted versions of the Documents to the defence and the accused, if necessary.³⁵ The NGO has declined to consent to the disclosure of its identity to the defence, the accused, and the public.³⁶

14. The fourth information provider is the NGO [REDACTED].³⁷ The prosecution submitted that [REDACTED] has agreed to the disclosure of its identity and the 22 Documents (in non-redacted form) which originated from this NGO, to the Trial Chamber.³⁸ However [REDACTED], it was submitted that [REDACTED] is not currently in a position to agree to the disclosure of summaries or redacted versions of the Documents to the defence and to the accused.³⁹ Potential methods for alternative disclosure are, however, apparently being explored by [REDACTED] but these are not detailed in the Application. The NGO has declined to consent to the disclosure of its identity to the defence, the accused, and the public.⁴⁰

³³ *Ibid*, paragraph 33.

³⁴ *Ibid*, paragraph 33. Annexes 28 to 30 – *ex parte*, prosecution only.

³⁵ *Ibid*, paragraph 34. The redactions would in particular be necessary in respect of [REDACTED].

³⁶ *Ibid*, paragraph 35.

³⁷ *Ibid*, paragraph 36.

³⁸ *Ibid*, paragraph 36, Annexes 31 to 52– *ex parte*, prosecution only.

³⁹ *Ibid*, paragraph 37.

⁴⁰ *Ibid*, paragraph 38.

15. The fifth information provider is the NGO [REDACTED].⁴¹ The prosecution re-submitted the 6 Documents originating from this NGO in non-redacted form to the Trial Chamber.⁴² It was submitted that, if necessary, [REDACTED] will explore means of alternative disclosure through summaries or redacted versions of the Documents to the defence and the accused.⁴³ The Application does not clarify either the form or likely duration of this exercise. This NGO has declined to consent to the disclosure of its identity to the defence, the accused, and the public.⁴⁴
16. The sixth and last information provider is the NGO [REDACTED].⁴⁵ The prosecution re-submitted the one Document originating from this NGO in non-redacted form to the Trial Chamber.⁴⁶ It was further submitted that [REDACTED] is currently [REDACTED] in order to seek [REDACTED] view on potential disclosure through alternative arrangements to the defence and the accused⁴⁷ but the Application is silent as to which disclosure alternatives, if any, are available. This NGO has declined to consent to the disclosure of its identity to the defence, the accused, and the public.⁴⁸
17. Therefore, of the non-United Nations information providers, only one of the six ([REDACTED], with 3 items) has indicated that, if the Trial Chamber deems it necessary, it will provide summaries or redacted versions of its Documents to the defence and the accused.⁴⁹ Three others have submitted that they are not currently in a position to facilitate disclosure. More specifically, one is "[REDACTED] to what extent, if at all, the Document concerned can be

⁴¹ *Ibid*, paragraph 39.

⁴² *Ibid*, paragraph 39, Annexes 53 to 58– *ex parte*, prosecution only.

⁴³ *Ibid*, paragraph 40.

⁴⁴ *Ibid*, paragraph 41.

⁴⁵ *Ibid*, paragraph 42.

⁴⁶ *Ibid*, paragraph 42, Annex 59 – *ex parte*, prosecution only.

⁴⁷ *Ibid*, paragraph 43.

⁴⁸ *Ibid*, paragraph 44.

⁴⁹ *Ibid*, paragraph 34.

disclosed to the defence and the accused" ([REDACTED], with 1 item);⁵⁰ another will "explore alternative arrangements" for partial disclosure to the defence ([REDACTED], with 6 items);⁵¹ and the other "continues [REDACTED] to provide for summaries or redacted versions of the Documents concerned to the Defence and the accused" ([REDACTED], with 22 items).⁵² For a fifth non-United Nations information provider ([REDACTED], with 22 items), the Application is ambiguous as to whether the NGO [REDACTED] will agree to the provision of (potentially redacted) summaries to the defence: the prosecution states that if the Chamber deems disclosure of those Documents to be necessary, it "will recommend the provision of summaries, where applicable in redacted form" without revealing what the position of the NGO will be in these circumstances.⁵³ Finally, for a sixth non-United Nations information provider ([REDACTED], with 1 item), the Application does not address the question of eventual disclosure to the defence at all.⁵⁴

B. *Defence*

18. In its observations, the defence contended that the Application did not meet the conditions established by the Trial Chamber in its 13 June 2008 Decision.⁵⁵ The defence observed that, contrary to the Chamber's orders, the prosecution has filed four separate documents, each portraying a developing situation, and each subject to future, hypothetical situations.⁵⁶ The defence further highlighted the prosecution's suggestion that summaries could be provided to the defence, and that alternatively the United Nations is ready to explore "other means" (which would entail further negotiations with the United

⁵⁰ *Ibid*, paragraph 43.

⁵¹ *Ibid*, paragraph 40.

⁵² *Ibid*, paragraph 37.

⁵³ *Ibid*, paragraph 30.

⁵⁴ *Ibid*, paragraphs 28-44.

⁵⁵ Réponse de la Défense à la "Prosecution's applicaiton to lift the stay of the proceedings", datée du 11 juillet 2008, 1 September, 2008, ICC-01/04-01/06-1464, paragraphs 10-22

⁵⁶ *Ibid*, paragraph 11.

Nations), submitting that they may both prove to be unacceptable to the Chamber.⁵⁷ The defence submitted that like objections apply to the other information providers.⁵⁸ Additionally, it observed that the latter, seemingly, refuse to disclose their identities to the defence.⁵⁹ Therefore, the defence contended that far from providing the Chamber with a precise and effective solution, the prosecution has demonstrated its inability to guarantee the implementation of an acceptable outcome following, in part, from its dependence on the principal information providers.⁶⁰ The defence emphasised that such uncertainty regarding possible solutions and the intentions of the information providers fails to provide any kind of acceptable remedy, and that it remains currently impossible for the defendant to receive a fair trial.⁶¹

19. The defence also submitted that the nature of the Documents and the identity of the information providers are imprecise, since the prosecution has not provided the defence with the annexes to its Application (wherein the evidence is set out). The defence contended that this is a manifestly unjustified use of *ex parte* proceedings, which, furthermore, is not required by any of the agreements concluded with the information providers. In the submission of the defence, a reference to the nature of a document does not materially affect the confidentiality of the title of the document or its contents.⁶² The defence highlighted that the prosecution has refused to identify the NGO providers, and that no justification has been offered for the proposed redactions; the defence highlighted, however, that the approach appears to afford general protection to the information providers. Whatever

⁵⁷ *Ibid*, paragraph 12.

⁵⁸ *Ibid*, paragraph 13.

⁵⁹ *Ibid*, paragraph 14.

⁶⁰ *Ibid*, paragraph 15.

⁶¹ *Ibid*, paragraph 16.

⁶² *Ibid*, paragraph 18.

the reasons, this has had the effect of limiting the scope and the utility of the defence response.⁶³

20. The defence further argued that the options advanced by the prosecution do not fulfil the requirements of a fair trial, since confidentiality should never prevail over the rights of the accused in this regard, and non-disclosure should only be authorised by the Chamber in exceptional circumstances.⁶⁴ The defence argued that the options proposed by the prosecution run counter to the principle of public, adversarial justice since disclosure of potentially exculpatory material is a pre-condition of a fair trial.⁶⁵ The defence submitted that although the Chamber may examine potentially exculpatory evidence when its nature is uncertain, this evaluation should be undertaken as part of a public, adversarial debate.⁶⁶ Moreover, the defence submitted that it is only the defence – as opposed to the Trial Chamber – who can properly determine what material is likely to assist the accused.⁶⁷ In the circumstances, the defence argued that all the potentially exculpatory documents in the prosecution's possession, without exception, should be disclosed to the defence before the proceedings resume.⁶⁸

21. The defence submitted that the prosecution's proposals do not guarantee full disclosure of exculpatory material, in accordance with the Statute, since most of the information providers refuse to lift the confidentiality restrictions, and the alternative solutions they propose do not guarantee the rights of the accused.⁶⁹ The defence noted that only 3 of the 52 Documents provided by the

⁶³ *Ibid*, paragraphs 20-22

⁶⁴ *Ibid*, paragraph 23.

⁶⁵ *Ibid*, paragraphs 25-26.

⁶⁶ *Ibid*, paragraphs 27-28.

⁶⁷ *Ibid*, paragraph 30.

⁶⁸ *Ibid*, paragraph 31.

⁶⁹ *Ibid*., paragraphs 32-34

NGOs can be disclosed to the defence and, as set out above, they each refuse to disclose their identities to the defence.⁷⁰

22. As regards the alternative solutions advanced by the prosecution, the defence suggested that the provision of summaries or redacted Documents fail to satisfy the requirements for a fair trial.⁷¹ The defence resisted the suggestion that the defence could review certain Documents *in camera* and *ex parte*: it was argued that this would not assist the defence since it would not be able to keep copies of the Documents or to use them in preparation of the accused's defence.⁷²

23. The defence submitted that:⁷³

- a) the prosecution has failed to provide the Chamber with reasons, and including any suggested exceptional circumstances, justifying the non-disclosure of potentially exculpatory material to the defence, or its abusive use of Article 54(3)(e);
- b) the prosecution has not advanced any remedy for the non-disclosure of exculpatory evidence to the defence; and
- c) under these circumstances, the obstacles to the continuation of the proceedings (as described by the Chamber in its 13 June 2008 Decision) remain in place.

24. The defence also observed that the prosecution's proposals impose conditions on the Chamber that are unacceptable and contravene the independence of

⁷⁰ *Ibid*, paragraphs 36-38

⁷¹ *Ibid*, paragraphs 40-41

⁷² *Ibid*, paragraph 42.

⁷³ *Ibid*, paragraph 44.

the judiciary.⁷⁴ The defence argued that it is unacceptable for an information provider such as the United Nations to dictate to a Chamber how it should proceed, or to attempt to supplant the judges in the exercise of their judicial role.⁷⁵

25. Finally, the defence argued that the violations to the integrity of the trial that currently exist are of such gravity that the judicial process is compromised, and the trial should not be resumed, because:⁷⁶

- a) the Prosecutor has compromised his own independence on a permanent basis;
- b) the Prosecutor, by his abuse of Article 54(3)(e), has prevented the investigation and production of exculpatory materials, and their use during the proceedings, in accordance with Article 64(6)(d) of the Statute ; and
- c) the conduct of the Prosecutor has led to a serious violation of the right of the accused to be prosecuted without undue delay.

26. In conclusion, the defence requested the Chamber to order the permanent cessation of the proceedings against the accused, and to confirm his immediate release.⁷⁷

⁷⁴ *Ibid*, paragraph 45.

⁷⁵ *Ibid*, paragraphs 46-47.

⁷⁶ *Ibid*, paragraphs 48-57.

⁷⁷ *Ibid*, page 18

III. Relevant Provisions

27. The following provisions from the Statute and Rules of Procedure and Evidence (“Rules”) are relevant to a consideration of the Application:

Article 40 of the Statute:

Independence of the judges

1. The judges shall be independent in the performance of their functions.
[...]

Article 54 of the Statute:

Duties and powers of the Prosecutor with respect to investigations

3. The Prosecutor may:
[. . .]
(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and
[...]

Article 64 of the Statute:

Functions and powers of the Trial Chamber

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:
[...]
(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

Article 67 of the Statute:

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
[...]
(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused’s choosing in confidence;
[...]

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Rule 82 of the Rules:

Restrictions on disclosure of material and information protected under article 54, paragraph 3 (e)

1. Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3 (e), the Prosecutor may not subsequently introduce such material or information into evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused.
2. If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence, a Chamber may not order the production of additional evidence received from the provider of the initial material or information, nor may a Chamber for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.
[..]

Rule 83 of the Rules:

Ruling on exculpatory evidence under article 67, paragraph 2

The Prosecutor may request as soon as practicable a hearing on an *ex parte* basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2.

IV. Analysis

28. At the outset, the Chamber stresses its keen awareness of the importance of this Decision to the peoples of the Democratic Republic of Congo, the victims and the accused, and in the result it has scrutinised the proposals and the various submissions with particular care. Furthermore, the Chamber underlines that on the information available, responsibility for the continuing problems, as analysed below, does not rest with the information-providers, who have sought to discharge their respective mandates. As the Trial

Chamber has previously observed,⁷⁸ the United Nations and the NGOs entered into the relevant agreements in good faith, and thereafter have sought to assist the court to the extent that is consistent with their individual responsibilities. The Chamber is grateful for the attempts they have made to resolve these difficulties. The Trial Chamber also notes that there have been some real developments in the position of the United Nations as a result of discussion between itself and the prosecution.

29. During the Status Conference of 24 June 2008, the Trial Chamber gave the following guidance should the prosecution apply for an order to lift the stay of proceedings. First, "the matter should be addressed comprehensively as part of a single application once the Prosecution's overall submissions regarding the relevant material have been formulated to the extent that that is possible."⁷⁹ Second, "the Chamber is unlikely to approve a system that depends on its ability to memorise large quantities of information which it is unable to retain and study and which, furthermore, it is unable to compare with the other evidence in the case so as to assess its relevance for Article 67(2) and Rule 77."⁸⁰ Third, as this issue potentially is an appealable decision, "any proposal that the Trial Chamber should view the 54(3)(e) material will need to include conditions which enable it to explain in a written decision by reference to the detail of the evidence it has seen, an analysis of why it has reached any relevant conclusions. Furthermore, any material shown to the Trial Chamber must be available, if necessary, for review by the Appeals Chamber."⁸¹ The Trial Chamber will not read any documentation which is to be withheld from the Appeals Chamber or which will be provided to the Appeals Chamber only on the basis of proposed conditions which have not

⁷⁸ Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04/01/06-1401, paragraph 64.

⁷⁹ Transcript of hearing on 24 June 2008, ICC-01/04-01/06-T-91-ENG, page 31, lines 23-25 and page 32, line 1.

⁸⁰ *Ibid*, page 32, lines 2-8

⁸¹ *Ibid*, page 32, lines 12-18.

yet been agreed by that Chamber.⁸² Fourth, “it should not be assumed that the Chamber will approve summaries. It all depends on the nature of the information and a detailed analysis of each piece of evidence against the background of the requirements of Article 67(2) and Rule 77.”⁸³

30. Therefore, before lifting the stay in the proceedings, the Trial Chamber must be satisfied, first, that it can adequately review – on a continuing basis – the Documents in question, in a way which is susceptible to a meaningful appeal, and, second, that there is some real prospect that the accused will be given sufficient access to any Documents which the Chamber considers to be exculpatory.

The United Nations Documents

31. The prosecution submitted that the Trial Chamber will be immediately provided with copies of the Documents from the United Nations which cannot be disclosed in order to review them, either in chambers or in an *ex parte* session. Additionally, the Trial Chamber may make notes as necessary during its review. These conditions meet the requirements of the Trial Chamber in respect of its own initial access to the Documents. However, the Chamber has an obligation to keep all potentially exculpatory, undisclosed Documents under review as the evidence and the issues in the case unfold, and it will, therefore, be necessary for the documentation to remain with the Chamber for the entirety of the trial. The prosecution’s proposals do not appear to facilitate this requirement.

32. Furthermore, as rehearsed above, the Trial Chamber set out the following in relation to the Appeals Chamber’s access to the Documents and to the Trial Chamber’s notes:

⁸² *Ibid*, page 32, lines 18-22.

⁸³ *Ibid*, page 32, lines 23-25 and page 33, line 1.

[...] any material shown to the Trial Chamber must be available, if necessary, for review by the Appeals Chamber. And it follows, therefore, that the Trial Chamber is likely to refuse to read any documentation which is to be withheld from the Appeals Chamber or which will only be provided to the Appeals Chamber on the basis of proposed conditions which have not yet been agreed by that Chamber.⁸⁴

33. Despite the Chamber's explicit directions in this regard, on the prosecution's proposal the Trial Chamber will be required to return all copies of the Documents, as well as to redact any notes which it may have taken with regard to the review of Documents insofar as such notes quote from or paraphrase the United Nations' Documents. By clear implication this stipulation will apply to any review of the Documents that may be set out in the decisions of the Chamber on this issue, with the consequence that the Trial Chamber will only be able to retain a redacted copy of its own decisions. The Trial Chamber will be obliged to comply with these conditions until such time as the Appeals Chamber consents to the same conditions of confidentiality imposed upon the Trial Chamber. Thus there remains the real possibility that decisions of the Trial Chamber on the Documents and their non-disclosure or partial disclosure may not be fully reviewable by the Appeals Chamber (who may be allowed to consider only a redacted version of decisions on this issue by the Trial Chamber). The prosecution's proposal, therefore, continues to infringe the fundamental principle that first instance decisions of this kind should be susceptible to appellate review.

34. As regards the Documents to be disclosed to the defence with redactions, the Application and Supplementary Information neither set out the nature and the extent of, and the suggested bases for, the proposed redactions, nor do they explain how the redactions may be authorised and kept under review by the Chamber. As set out above (paragraph 7), it seems likely that the redacted sections of Documents that will otherwise be disclosed are to be subject to the

⁸⁴ *Ibid*, page 32, lines 9-22

same conditions as the 16 Outstanding Documents that are currently to be withheld in their entirety. However, the Chamber stresses that if the core proposals had been acceptable, it would have investigated the circumstances of the suggested redactions.

35. With respect to the possible disclosure to the defence of currently undisclosed, potentially exculpatory materials provided by the United Nations, the Application proposes providing the defence with summaries of the Documents as its principal solution. In the alternative, the United Nations envisages 'other means' as provided for under the Statute and Rules. However, a clear indication as to what 'means' the United Nations would agree to has not been provided. This ambiguity wholly precludes the Trial Chamber from ascertaining the precise meaning and scope of the prosecution's suggestions, although if the core proposals were acceptable, the Chamber would have investigated the detail of the options.

NGO Documents

36. In relation to the other information providers, the prosecution's Application does not reveal any real prospect that some of them, such as [REDACTED] and [REDACTED], will agree to any form of disclosure of their Documents to the defence. This affects 21 Documents.⁸⁵ [REDACTED] and [REDACTED] are currently exploring certain alternative measures of disclosure internally, according to the prosecution's Application, leaving disclosure uncertain for a further 23 Documents. The prosecution submits that [REDACTED] and [REDACTED] have indicated a willingness to explore alternative measures of disclosure to the defence; however, the measures that may be acceptable are not specified in the Application, leaving uncertainty in respect of an

⁸⁵ The Chamber notes the prosecution submission that 2 documents not enumerated in this paragraph are in fact not subject to Article 54(3)(e) restrictions and may be disclosed immediately, see ICC-01/04-01/06-1430-Conf-Exp and ICC-01/04-01/06-1431, footnote 53

additional 9 Documents. However, as with the United Nations' Documents, if the core proposals were acceptable, the Chamber would have investigated the detail of the options.

37. Furthermore, as regards the Documents to be disclosed to the defence with redactions, the prosecution's Application neither sets out the nature and the extent of the proposed redactions nor do they explain how the redactions may be authorised and kept under review by the Chamber. However, as with the United Nations' Documents, the Chamber stresses that if the core proposals had been acceptable, it would have investigated the circumstances of the suggested redactions.

38. Under these conditions, there is no assurance that the prosecution will be able to afford adequate disclosure of all the exculpatory materials in the event that the Chamber concludes that Documents should be provided to the defence.

V. Conclusions

39. The proposals outlined in the Application demonstrably fail to meet the prerequisites set out hitherto by the Chamber to enable it to lift the stay of proceedings, and they infringe fundamental aspects of the accused's right to a fair trial. Indeed, unless and until the guidance outlined by the Chamber on 24 June 2008 is sufficiently addressed, it is necessary for the stay of proceedings to remain in place.

40. Addressing each of the four issues by way of summary, the Trial Chamber finds that:

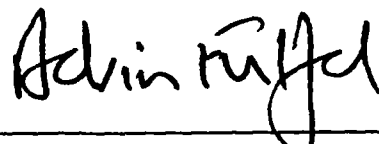
- i) The Application fails to address comprehensively and sufficiently all of the Documents held by the various information-providers, and

particularly the NGOs. There is inadequate clarity as to a significant proportion of the Documents along with the position, overall, of the information-providers, as regards disclosure and the opportunity for appellate review;

- ii) For the United Nations Documents (i.e. those which are currently to be withheld in their entirety, along with the redacted sections of other Documents), the proposals unacceptably appear to require the Chamber to return the Documents, or the redacted sections, after its initial review and to remove quotations or paraphrases from the judges' notes, unless and until the Appeals Chamber agrees to the same conditions as the Trial Chamber. These requirements will have the effect of preventing the Chamber from keeping the Documents sufficiently under review during the trial;
- iii) The proposals neither allow the Chamber to refer to the detail of the Documents in a written decision nor do they guarantee that any decision by the Chamber will be susceptible to full appellate review. Until the opportunity for the Chamber to issue a full and detailed written decision in respect of which a proper appeal is guaranteed (during which the Appeals Chamber is able to review all of the relevant documentation, along with a non-redacted version of any relevant decision of the Trial Chamber), one of the principal elements of a fair trial will be missing from the proceedings;
- iv) The proposals do not provide sufficiently comprehensive information on the redactions required by the providers, nor is a procedure for review of such redactions by both the Trial and – potentially – the Appeals Chambers set out;

- v) On the basis of the Application and Supplementary Information, there is a real prospect that the prosecution will not be in a position to effect adequate disclosure to the accused of a significant number of Documents (if the Chamber so orders) because, even at this late stage in the proceedings, there is currently no indication that some of the NGOs will be able to assist with the disclosure orders, whether by way of full disclosure, summaries or otherwise and for the United Nations, it is unclear whether sufficient disclosure, in an adequate form, will be possible. However, the Chamber stresses that if all of the Documents from all the information providers are submitted to the Chamber in a non-redacted form for the entirety of the trial and if the Appeals Chamber is able to consider in a similar, non-redacted form all of the relevant materials and any decision of the Trial Chamber on the issue, the Bench would be prepared to review all the Documents (prior to lifting the stay) to assess which Documents need to be disclosed and whether the proposed methods of disclosure accord with the accused's right to a fair trial.

Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 3 September 2008

At The Hague, The Netherlands