

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/04-01/06

Date: 11 July 2008

**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  
With public Annexes 2 to 4 and confidential – *ex parte* – Prosecution only Annexes  
1 and 5 to 59**

**Prosecution's application to lift the stay of proceedings**

**Source:** Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

**The Office of the Prosecutor**

**Counsel for the Defence**

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

**Legal Representatives of Victims**

Mr Luc Walley

Mr Franck Mulenda

Ms Carine Bapita Buyangandu

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## Background

### *Decision on the stay of proceedings*

1. On 13 June 2008, the Trial Chamber issued 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, together with certain other issues raised at the Status Conference on 10 June 2008”<sup>1</sup> (“Decision on the stay of proceedings”). In that decision, the Trial Chamber ordered a stay on the proceedings<sup>2</sup> and scheduled a hearing for 24 June 2008 in order to consider the release of the accused.<sup>3</sup>
  
2. On 23 June 2008, the Prosecution filed the “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’”<sup>4</sup> (“Prosecution’s Request”). The Legal Representatives for the Victims a/0001/06 to a/0003/06 on 24 June 2008 filed the “Réponse à la demande du procureur de faire appel contre la décision du 13 Juin 2008”, supporting the Prosecution’s Request.<sup>5</sup> On 27 June 2008, the Defence submitted the “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’, date du 23 juin 2008”.<sup>6</sup> The Defence made no substantive submissions on the Prosecution’s Request.

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<sup>1</sup> ICC-01/04-01/06-1401.

<sup>2</sup> *Ibid.*, at para. 94

<sup>3</sup> *Ibid.*, at para. 94.

<sup>4</sup> ICC-01/04-01/06-1407.

<sup>5</sup> ICC-01/04-01/06-1410.

<sup>6</sup> ICC-01/04-01/06-1416.

3. On 2 July 2008, the Trial Chamber rendered the “Decision on the 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’”,<sup>7</sup> granting the Prosecution’s Request.<sup>8</sup>

*Order on the release of the accused*

4. Following oral submissions on the release of the accused during the hearing of 24 June 2008 by the Defence,<sup>9</sup> the Legal Representatives of the Victims,<sup>10</sup> and the Prosecution,<sup>11</sup> the Prosecution on 27 June 2008 filed the “Prosecution’s Submission on the Effect of the Application for Leave to Appeal the Decision of the Trial Chamber to Stay the Proceedings on the Detention of Thomas Lubanga Dyilo”.<sup>12</sup> On the same day, the Defence submitted the “Observations de la Défense sur la mise en liberté de M Thomas Lubanga”,<sup>13</sup> and the Legal Representatives for the Victims filed the “Observations communes des représentants légaux des victimes sur la demande de mise en liberté de L’Accusé”.<sup>14</sup>
5. On 2 July 2008, the Trial Chamber issued the “Decision on the release of Thomas Lubanga Dyilo”<sup>15</sup> and ordered the unconditional and immediate release of the accused.<sup>16</sup> The Trial Chamber furthermore decided that “...this order shall not be enforced until the expiry of the 5 day time-limit, and, furthermore, if an appeal is filed within the 5 day time-limit against the order granting release and if a request is made in the appeal for suspensive effect, the accused shall not leave detention until the

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<sup>7</sup> ICC-01/04-01/06-1417.

<sup>8</sup> *Ibid*, at para. 32.

<sup>9</sup> Transcript of the hearing on 24 June 2008, ICC-01/04-01/06-T-91-ENG, at pages 4 to 11, and 23 to 26.

<sup>10</sup> *Ibid*, at pages 12 to 19.

<sup>11</sup> *Ibid*, at pages 12 to 22.

<sup>12</sup> ICC-01/04-01/06-1414.

<sup>13</sup> ICC-01/04-01/06-1415.

<sup>14</sup> ICC-01/04-01/06-1413.

<sup>15</sup> ICC-01/04-01/06-1418.

<sup>16</sup> *Ibid*, at para. 35.

*Appeals Chamber has resolved whether or not the effect of the order granting release is to be suspended.”<sup>17</sup>*

6. The same day, the Prosecution filed the “Prosecution’s Appeal against ‘Decision on the release of Thomas Lubanga Dyilo’”,<sup>18</sup> and requested the Appeals Chamber to grant suspensive effect to the appeal.<sup>19</sup>
7. On 7 July 2008, the Appeals Chamber granted the request for suspensive effect of the Prosecution’s Appeal against the Decision on the release of Thomas Lubanga Dyilo.<sup>20</sup>

*The Trial Chamber’s suggestions and observations in relation to any application seeking lifting of the stay of proceedings*

8. During the hearing of 24 June 2008, the Trial Chamber proposed certain suggestions and observations in relation to any application that may be made in due course to lift the stay of the proceedings.<sup>21</sup> In particular, the Trial Chamber stated that “...any application of this kind should occur and only occur when the Prosecution is in a position to address to the extent that is feasible the totality of the evidence that is covered by the Article 54(3)(e) agreements from all the information providers ...”,<sup>22</sup> and outlined, *inter alia*, the following four observations:

- (i) that any application to lift the stay should be addressed comprehensively as part of a single application;<sup>23</sup>

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<sup>17</sup> *Ibid.*, at para. 35.

<sup>18</sup> ICC-01/04-01/06.

<sup>19</sup> *Ibid.*, at para. 14.

<sup>20</sup> ICC-01/04-01/06-1423.

<sup>21</sup> Transcript of the hearing on 24 June 2008, ICC-01/04-01/06-T-91-ENG, at pages 30 to 33.

<sup>22</sup> *Ibid.*, at page 31, lines 2 to 4.

<sup>23</sup> *Ibid.*, at page 31, lines 21 to 25, and page 32, line 1.

- (ii) that the Trial Chamber is unlikely to approve a system on the review of the materials concerned that depends on its ability to memorise large quantities of information which it is unable to retain and study and thereby compare with the other evidence in the case;<sup>24</sup>
- (iii) that any proposal that the Trial Chamber should view the materials that are protected by Article 54(3)(e) of the Rome Statute ("Statute") 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, and that any material shown to the Trial Chamber must be available, if necessary, for review by the Appeals Chamber;<sup>25</sup> and
- (iv) that it should not be assumed that the Trial Chamber will approve summaries of the materials concerned.<sup>26</sup>

### **Filing on the discovery and examination of additional material**

9. The Prosecution recalls that, on 24 June 2008, it filed the public version<sup>27</sup> of the "Prosecution's further information regarding the discovery and examination of additional material in the possession of the Prosecutor"<sup>28</sup> (24 June 2008 Filing). In that filing, the Prosecution informed the Trial Chamber:

- (i) that an additional 19 documents obtained from the United Nations ("UN") were identified as falling within the scope of materials that the Office of the Prosecutor (OTP) must disclose pursuant to Article 67(2) and Rule 77;<sup>29</sup> and

<sup>24</sup> *Ibid*, at page 32, lines 2 to 8.

<sup>25</sup> *Ibid*, at page 32, lines 9 to 22.

<sup>26</sup> *Ibid*, at page 32, lines 23 to 25 and page 33, line 1.

<sup>27</sup> A confidential version - ICC-01/04-01/06-Conf - was filed on 20 June 2008.

<sup>28</sup> ICC-01/04-01/06-1411.

<sup>29</sup> *Ibid*, at paras. 4 and 6.

- (ii) that 3 documents obtained from another information provider under the condition that necessary measures will be taken to ensure the confidentiality of the information were also identified as falling within the OTP's disclosure obligations.<sup>30</sup>

### Updated information on the scope of the Undisclosed Evidence

10. The Prosecution informs the Trial Chamber that the number of items forming part of the Undisclosed<sup>31</sup> Evidence currently amounts to 204 items, as further detailed below.

#### *Undisclosed evidence obtained from the UN*

11. As of its latest report to the Trial Chamber at the 10 June 2008 hearing, the Prosecution was in possession of 154 items obtained from the UN pursuant to Article 54(3)(e).<sup>32</sup> Since then, the UN have agreed to lift the Article 54(3)(e) restrictions with respect of three documents.<sup>33</sup> These three documents can be disclosed - in redacted form as requested by the UN<sup>34</sup> - to the Defence. One further document has been found in the public domain and can be disclosed. The number of UN items that fall within the range of Undisclosed Evidence now amounts to 150 items.

12. In respect of the 19 documents that form part of the material recently discovered by the OTP, the UN informed the Prosecution that 17 documents

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<sup>30</sup> *Ibid.*, at paras. 4 and 7.

<sup>31</sup> Or evidence that cannot be disclosed once the Defence has agreed to again receive disclosure materials.

<sup>32</sup> See ICC-01/04-01/06-T-89-ENG ET, page 5, lines 7 to 15. The two documents which the Prosecution mentioned having disclosed on 9 June 2008 at the 10 June 2008 hearing are DRC-OTP-0043-0201 and DRC-OTP-0058-0587.

<sup>33</sup> The documents concerned are DRC-OTP-0065-0030, DRC-OTP-0065-0063, and DRC-OTP-0065-0192.

<sup>34</sup> The Prosecution notes that the redactions to the documents DRC-OTP-0065-0063 and DRC-OTP-0065-0192 partially concern Rule 77 values of these documents. Whilst the Prosecution will continue to consult with the UN to consent to unredact these portions, it provides the documents to the Trial Chamber in unredacted form.

can be disclosed to the Defence.<sup>35</sup> Two documents fall within the range of Undisclosed Evidence.<sup>36</sup>

13. Accordingly, the total number of UN materials that fall within the range of the Undisclosed Evidence amounts to 152 items.<sup>37</sup>

*Undisclosed evidence from information providers other than the United Nations*

14. As of 24 June 2008,<sup>38</sup> the Prosecution informed the Trial Chamber that it had in its possession 52 documents that were obtained from six information providers other than the UN, and that three documents from one of those information providers, recently discovered, needed to be added.<sup>39</sup>
15. From this range of 55 documents, the Prosecution can disclose two documents to the Defence.<sup>40</sup> These documents formed part of the UPC website<sup>41</sup> and may thus already be available to the Defence.

<sup>35</sup> 16 out of these 17 documents would include minor redactions.

<sup>36</sup> Reference is made to Annex 4.

<sup>37</sup> Following a further internal review of the Undisclosed Evidence, the Prosecution draws the attention of the Trial Chamber and the Defence to the fact that from the range of the initial 154 items, two documents (DRC-OTP-0152-1487 and DRC-OTP-0112-0194) listed as undisclosed evidence are duplicates of each other and were obtained from the same source. Additionally, upon closer scrutiny, the Prosecution has determined that six other items (DRC-OTP-0005-0012, DRC-OTP-0005-0033, DRC-OTP-0006-0070, DRC-OTP-0016-0135, DRC-OTP-0038-0909, and DRC-OTP-0152-0848) do not fall within the scope of either Article 67(2) or Rule 77. The Prosecution will provide these materials to the Trial Chamber. Accordingly, if the Trial Chamber concurs with the Prosecution's view that these seven items do not need to be disclosed to the Defence, the current number of undisclosed items from the UN will actually be 146. Finally, the Prosecution is continuing consultations with the UN, with a view to enabling disclosure of all documents directly to the Defence. The Prosecution will keep the Trial Chamber informed of any further developments in this regard.

<sup>38</sup> See "Prosecution's provision of 32 documents and further information on documents that were obtained by the Office of the Prosecutor pursuant to Article 54(3)(e) on the condition of confidentiality and solely for the purpose of generating new evidence and that potentially contain evidence that falls under Article 67(2)", ICC-01/04-01/06-1373, at para. 4, and para. 9(ii) above.

<sup>39</sup> Reference is made to paragraph 7 of the 24 June 2008 Filing.

<sup>40</sup> The undisclosed items are DRC-OTP-0037-0293 and DRC-OTP-0037-0285. The Prosecution is in possession of copies stemming from the UPC website which are not subject to Article 54(3)(e) restrictions. These copies (DRC-OTP-0193-0212 and DRC-OTP-0193-0457) have exactly the same content as the two items of undisclosed evidence, and can be disclosed immediately. Accordingly, the two items do not, in the Prosecution's view, need to be disclosed to the Defence, and the current number of undisclosed items from information providers other than the UN is actually 53.

<sup>41</sup> Reference is made to paragraph 8 of the 24 June 2008 Filing.

16. Additionally, the Prosecution has established that it already<sup>42</sup> disclosed a copy of the relevant Rule 77 portion of one of the items forming part of the Undisclosed Evidence.<sup>43</sup> However, for the sake of full transparency, the Prosecution will still proceed to provide this item to the Trial Chamber.
17. Accordingly, the total number of non-UN materials that fall within the range of the Undisclosed Evidence amounts as of the date of this filing to 52 items.

### **Information on the providers and the nature of the documents**

18. As requested by the Trial Chamber,<sup>44</sup> the Prosecution provides the Trial Chamber with information on the providers and the nature of the documents concerned.
19. The information is detailed in the attached confidential – *ex parte* – Prosecution only Annex.<sup>45</sup> The Prosecution informs the Trial Chamber that the information providers have for reasons spelled out below limited the disclosure of this information to the Trial Chamber only.<sup>46</sup>

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<sup>42</sup> On 14 September 2006.

<sup>43</sup> The document concerned is DRC-OTP-0021-0685. The document which was disclosed on 14 September 2006 is DRC-OTP-0107-0223. See ICC-01/04-01/06-444-Conf-Anx. Whilst the Prosecution will provide this item to the Trial Chamber, it in the Prosecution's view does not require review by the Trial Chamber nor disclosure to the Defence.

<sup>44</sup> Transcript of the hearing on 24 June 2008, ICC-01/04-01/06-T-91-ENG, at page 31, lines 10 to 12 and 15 and 16.

<sup>45</sup> Confidential – *ex parte* – Prosecution only Annex 1.

<sup>46</sup> Reference is made to the transcript of the hearing on 24 June 2008, ICC-01/04-01/06-T-91-ENG, at page 31, lines 11 and 12.

## Arrangements for the review of items by the Judges

### *Proposal by the UN*

20. Following the hearing of 24 June 2008, the OTP explored with the UN procedures that accommodate the concerns that the Trial Chamber expressed during that hearing and adhere to its observations.
21. The result of these consultations is contained in three letters of the UN, two letters dated 3 July 2008, and one letter dated 8 July 2008.<sup>47</sup> Annex 2 concerns 33 items, Annex 3 concerns another 122 items and Annex 4 concerns the 19 items as referred to in paragraph 9(i) above. The letters cover *all* UN items that form part of the Undisclosed Evidence.
22. Summarised, and without prejudice to the exact terms of the UN letters, the UN proposes the following procedure:
  - (i) The Trial Chamber can be provided copies *immediately* of all UN items forming part of the Undisclosed Evidence which it can retain for its review in chambers or otherwise in closed session and *ex parte*. The Trial Chamber can review the items concerned in chambers, and can make notes if it so wishes as it reviews the items.<sup>48</sup>
  - (ii) In the event that the Trial Chamber considers that any information contained in the UN items must be made available to the accused and the Defence, the proposal foresees a range of possible remedies: In the first instance, the provision of summaries, which the Trial Chamber will be able to assess against the items shown to it so as to verify their accuracy and adequacy. Alternatively, should

<sup>47</sup> The UN letters are attached as Annexes 2 to 4.

<sup>48</sup> In addition, the Prosecution reiterates its undertaking that it will provide for English translations of the relevant portions of the French documents, as soon as possible and once they are available.

the provision of such summaries be deemed inadequate, the UN 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 and the Rules of Procedure and Evidence.

(iii) Upon completion of the entire process, given the lack of procedural certainty at this stage as to the procedure that may be followed on appeal, the letters foresee two possibilities:

- (a) If the Appeals Chamber has the opportunity to decide on the matter before the Trial Chamber reviews the items and it is able to provide for procedural clarity, including acceptance of the same conditions, then the copies of the items concerned together with any notes created by the Trial Chamber could be retained indefinitely by the Trial Chamber for eventual review by the Appeals Chamber, as and when this may be required.
- (b) Alternatively, if the Appeals Chamber does not have the opportunity to decide on the matter before the Trial Chamber completes its review of the items, the UN asks that, upon completion of the review, the Judges of the Trial Chamber return all copies of the items and that redactions are applied to any portion of their notes that contain verbatim extracts of the items or which paraphrase the contents thereof. At the same time, assurance is provided in the letter that the UN would thereafter consent to the

Appeals Chamber reviewing the items under the same conditions.<sup>49</sup>

23. Accordingly, the Prosecution is in a position to *immediately* provide *all* UN documents that form part of the Undisclosed Evidence to the Trial Chamber.
24. The Prosecution submits that this suggested procedure accommodates the concerns that the Trial Chamber expressed during the hearing on 24 June 2008. In case of doubt, the letters emphasise the preparedness of the UN to provide any clarification or explanation as may be required with a view to constructively resolving the matter.
25. The Prosecution submits, in particular, that the proposal includes conditions which will enable the Trial Chamber 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. The Prosecution submits that the Trial Chamber could in its written decision provide, pursuant to Article 64(6)(c), for the protection of confidential information.<sup>50</sup>

#### *Other information providers*

26. The Prosecution refers to paragraphs 6 to 11 of the 3 June 2008 "Prosecution's provision of 32 documents and further information on documents that were obtained by the Office of the Prosecutor pursuant to Article 54(3)(e) on the condition of confidentiality and solely for the purpose of generating new evidence and that potentially contain evidence that falls under Article 67(2)"<sup>51</sup>

<sup>49</sup> It should be noted that under option 22. (iii)(b) the Appeals Chamber would equally have all the elements of the information before it and would be able to proceed to review the items as well as the notes of the Judges of the Trial Chamber, with any accompanying cross-references they may contain to sections of the items that had been previously cited verbatim or paraphrased.

<sup>50</sup> E.g. such decision could identify the aspects of the case the documents relate to, the exonerating category or Rule 77 information within which the information fell and any appropriate remedy to be provided to the accused.

<sup>51</sup> ICC-01/04-01/06-1373.

(3 June 2008 Filing). Since then, and in light of the concerns raised by the Trial Chamber in the course of the 24 June 2008 hearing, the OTP has explored further alternative arrangements with the respective information providers.

27. The Prosecution provides the Trial Chamber with the following updated information:

*NGO "REDACTED" – "REDACTED"*

28. The first information provider<sup>52</sup> is the Non-Governmental Organisation ("NGO") "REDACTED" – "REDACTED". 22 documents<sup>53</sup> forming part of the Undisclosed Evidence originate from that NGO. The Prosecution is now in a position to provide these 22 documents unredacted to the Trial Chamber.<sup>54</sup>

29. However, because REDACTED is REDACTED, revealing to the Defence and/or the accused REDACTED, REDACTED. REDACTED has in fact, for those reasons, REDACTED. Accordingly, it is requested that REDACTED is not provided to the Defence and/or the accused.

30. Should the Trial Chamber decide that the REDACTED documents need to be disclosed to the Defence, the Prosecution will recommend the provision of summaries, where applicable in redacted form, REDACTED.

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<sup>52</sup> Reference is made to para. 6 of the 3 June 2008 Filing.

<sup>53</sup> The two documents reference to in paragraph 15 above form part of these 22 documents. In theory, the copies of these items which are not subject to Article 54(3)(e) restrictions, can be disclosed immediately. The Defence, however, has informed the Prosecution that it currently is not prepared to receive any materials from the Prosecution.

<sup>54</sup> Annexed as confidential – *ex parte* – Prosecution only Annexes 5 to 26.

NGO “REDACTED” – “REDACTED”

31. The second information provider<sup>55</sup> is the NGO “REDACTED” – “REDACTED”. One document forming part of the Undisclosed Evidence originates from that NGO. On 9 June 2008, the Prosecution provided the Trial Chamber with the document concerned, in redacted form,<sup>56</sup> REDACTED. The Prosecution now provides the unredacted document to the Trial Chamber.<sup>57</sup>

32. However, REDACTED.<sup>58</sup> For that reason and also REDACTED, REDACTED has declined to disclose its identity to the Defence and/or the accused, and thus also to the public.

NGO “REDACTED” - “REDACTED”

33. The third information provider<sup>59</sup> is the NGO “REDACTED” - “REDACTED”. Three documents forming part of the Undisclosed Evidence originate from this NGO. On 3 June 2008, the Prosecution provided the Trial Chamber with documents concerned in redacted form,<sup>60</sup> REDACTED. REDACTED in the meantime has agreed that the Prosecution may disclose its identity to the Trial Chamber; it has also agreed that the three documents can be provided to the Trial Chamber unredacted. Accordingly, the Prosecution now re-submits the three documents to the Trial Chamber unredacted.<sup>61</sup>

34. REDACTED has informed the OTP that it is prepared to agree to the disclosure of summaries or redacted versions of the documents concerned to

<sup>55</sup> Reference is made to para. 7 of the 3 June 2008 Filing.

<sup>56</sup> Reference is made to the Confidential – *ex parte* – Prosecution only Annex 33, as attached to the 9 June 2008 “Prosecution’s corrigendum and supplementary information to the ‘Prosecution’s provision of 32 documents and further information on documents that were obtained by the Office of the Prosecutor pursuant to Article 54(3)(e) on the condition of confidentiality and solely for the purpose of generating new evidence and that potentially contain evidence that falls under Article 67(2)’”, ICC-01/04-01/06-1387-Conf.

<sup>57</sup> Annexed as confidential – *ex parte* – Prosecution only Annex 27.

<sup>58</sup> REDACTED.

<sup>59</sup> Reference is made to para. 8 of the 3 June 2008 Filing.

<sup>60</sup> Reference is made to Confidential – *ex parte* – Prosecution only Annexes 1 to 3, as attached to the 3 June 2008 Filing.

<sup>61</sup> The documents are attached as Confidential – *ex parte* – Prosecution only Annexes 28 to 30.

the Defence and the accused, in the event that the Trial Chamber concludes that such a disclosure is necessary for the trial to proceed. Redactions would in particular be necessary in respect of REDACTED.

35. Fearing, however, that it would have REDACTED, REDACTED has declined to disclose its identity to the Defence and/or the accused, and thus also to the public.

#### NGO "REDACTED" - "REDACTED"

36. The forth information provider<sup>62</sup> is the NGO "REDACTED" - "REDACTED". 22 documents forming part of the Undisclosed Evidence originate from that NGO. On 3 June 2008, the Prosecution provided the Trial Chamber with the documents concerned in redacted form,<sup>63</sup> REDACTED. REDACTED in the meantime has agreed that the Prosecution may disclose its identity to the Trial Chamber; it has also agreed that the 22 documents can be provided to the Trial Chamber unredacted.<sup>64</sup>

37. REDACTED has informed the OTP REDACTED are faced REDACTED. Accordingly, REDACTED is not in a position currently to agree to the disclosure of summaries or redacted versions of the documents concerned to the Defence and the accused. REDACTED, however, continues REDACTED to provide for summaries or redacted versions of the documents concerned to the Defence and the accused.

38. Fearing, however, that it would have REDACTED, REDACTED has declined to disclose its identity to the Defence and/or the accused, and thus also to the public.

<sup>62</sup> Reference is made to para. 9 of the 3 June 2008 Filing.

<sup>63</sup> Reference is made to Confidential – *ex parte* – Prosecution only Annexes 4 to 25, as attached to the 3 June 2008 Filing.

<sup>64</sup> The documents are attached as Confidential – *ex parte* – Prosecution only Annexes 31 to 52.

NGO "REDACTED" – "REDACTED"

39. The fifth information provider<sup>65</sup> is the NGO "REDACTED" – "REDACTED".

Six documents forming part of the Undisclosed Evidence originate from that NGO. On 3 June 2008, the Prosecution provided the Trial Chamber with the documents concerned in redacted form,<sup>66</sup> REDACTED. REDACTED in the meantime has agreed that the Prosecution may disclose its identity to the Trial Chamber; it has also agreed that the six documents can be provided to the Trial Chamber unredacted. Accordingly, the Prosecution now re-submits the six documents to the Trial Chamber unredacted.<sup>67</sup>

40. REDACTED has informed the OTP that if deemed necessary by the Trial Chamber, REDACTED will explore alternative arrangements, including the provision of summaries and redacted versions of the documents concerned to the Defence and the accused.

41. Fearing, however, that it would have REDACTED, REDACTED has declined to disclose its identity to the Defence and/or the accused, and thus also to the public. In this context, REDACTED has emphasised that in case of the disclosure of its identity to the Defence and the accused, it is REDACTED.

NGO "REDACTED" - "REDACTED"

42. The sixth information provider<sup>68</sup> is the NGO "REDACTED" - "REDACTED".

One document forming part of the Undisclosed Evidence originates from that NGO. On 3 June 2008, the Prosecution provided the Trial Chamber with the

<sup>65</sup> Reference is made to para. 10 of the 3 June 2008 Filing.

<sup>66</sup> Reference is made to Confidential – *ex parte* – Prosecution only Annexes 26 to 31, as attached to the 3 June 2008 Filing.

<sup>67</sup> The documents are attached as Confidential – *ex parte* – Prosecution only Annexes 53 to 58.

<sup>68</sup> Reference is made to para. 11 of the 3 June 2008 Filing.

document concerned in redacted form,<sup>69</sup> REDACTED. REDACTED in the meantime has agreed that the Prosecution may disclose its identity to the Trial Chamber; it has also agreed that the one document can be provided to the Trial Chamber unredacted. Accordingly, the Prosecution now re-submits the one document to the Trial Chamber unredacted.<sup>70</sup>

43. REDACTED has informed the OTP that it is currently REDACTED to what extent, if at all, the document concerned can be disclosed to the Defence and the accused, in the event that the Trial Chamber upon review of the documents deems such a disclosure necessary.

44. Fearing, however, that it would have REDACTED, REDACTED has declined to disclose its identity to the Defence and/or the accused, and thus also to the public.

## Conclusions

45. In conclusion and in consideration of the above, once the Trial Chamber has received all the unredacted UN documents<sup>71</sup> and all the unredacted NGO documents, it will have at its disposal for review *all* items that form part of the Undisclosed Evidence. *All* items will be provided in unredacted form.

46. In addition, the UN have agreed that - where the Trial Chamber finds that the items or information therein should be made available to the Defence and the accused, that they can either receive a summary of the disclosure value of the items, the adequacy of which the Trial Chamber would be able to assess, or,

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<sup>69</sup> Reference is made to Confidential – *ex parte* – Prosecution only Annex 32, as attached to the 3 June 2008 Filing.

<sup>70</sup> The document is attached as Confidential – *ex parte* – Prosecution only Annex 59.

<sup>71</sup> Explicit reference is made to para. 23 above: All documents can be provided *immediately*.

that they are otherwise provided with the items or information therein by other means – combined as appropriate with such protective measures as are permissible under the Statute and the Rules.

47. Furthermore, should the Trial Chamber decide that the documents from the NGOs need to be disclosed, the disclosure of 31 documents – in redacted form not impacting on the disclosure values – to the Defence and to the accused, out of 52, is already possible. There is a reasonable prospective that, if so requested, the information providers can agree to disclose most of the remaining 21 documents.

48. Should the Trial Chamber assess that a document from an NGO needs to be disclosed to the Defence and/or the accused, the Prosecution submits that it will return to the NGO concerned with the request and seek *ad hoc* solutions, taking into account the strong concerns expressed by the NGOs on the REDACTED and REDACTED.

49. Against this background, the Prosecution submits that it has effectively complied with the conditions set by the Trial Chamber to lift the stay of proceedings as detailed in paragraph 8 above:

- (i) The Trial Chamber can review the items concerned in chambers, and can make notes as it reviews the items;
- (ii) The Trial Chamber will be able to explain in a written decision by reference to the detail of evidence it has seen the reasons for its decision, thus providing for review by the Appeals Chamber, where necessary ;<sup>72</sup> and

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<sup>72</sup> Reference is made to para. 25 above.

- (iii) The suggestion in respect of the items originating from the UN envisages a range of possible remedies for Defence and the accused beyond the provision of summaries.<sup>73</sup>

50. The Prosecution submits that even if for 21 documents some of the remaining information providers are not at this time able to provide their consent for disclosure to the Defence and the accused, the Trial Chamber's ability to determine whether or not the non-disclosure of this potentially exculpatory material constitutes a breach of the accused's right to a fair trial<sup>74</sup> is not affected.

#### **Impact on the order to release the accused**

51. The "Decision on the release of Thomas Lubanga Dyilo" is based solely<sup>75</sup> on the order to stay the proceedings against him. Accordingly, in the event that the Trial Chamber orders the lift of the stay of proceedings, the decision on the release lacks its basis and consequently needs to be revoked.

#### **Confidential – *ex parte* – Prosecution only classification**

52. In light of the information that is provided on the NGOs and their position, the Prosecution files the present submission as "Confidential – *ex parte* – Prosecution only".

53. The Prosecution will file a public redacted version in due course; where necessary, it will also file a "Confidential – Prosecution and Defence only" version.

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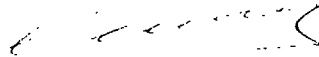
<sup>73</sup> See the 3 July 2008 UN letter, Annex 2, at page 3.

<sup>74</sup> Reference is made to para. 92(iii) of the Decision on the stay of proceedings.

<sup>75</sup> Specific reference is made to para. 30.

## Request

54. Accordingly, the Prosecution requests the Trial Chamber to lift the stay of the proceedings and to revoke the release of the accused.



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Luis Moreno-Ocampo  
Prosecutor

Dated this 11<sup>th</sup> day of July 2008  
At The Hague, The Netherlands