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Date: **14 July 2008**

THE APPEALS CHAMBER

Before: **Judge Philippe Kirsch**
Judge Georghios M. Pikis
Judge Navi Pillay
Judge Sang-Hyun Song
Judge Erkki Kourula

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

Public Document

Prosecution's Document in Support of Appeal against Decision to Stay Proceedings

Source: **Office of the Prosecutor**

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Introduction

The Prosecution is appealing Trial Chamber I's "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" ("the Decision" or "Decision to Stay Proceedings").

In this Decision, the Trial Chamber erred in its interpretation of Article 54(3)(e), and mistakenly held that the Prosecution's conduct amounted to a violation of that provision. The Trial Chamber also erred in deciding to stay the proceedings in this case indefinitely.

The Prosecution submits that its conduct has been at all times consistent with its statutory duties. The Prosecution has defined and applied stringent standards for harmonizing its duties under Article 54(3)(e) with its duties of disclosure of exonerating information. In particular, the Prosecution has timely identified any document in its possession of an arguable exonerating nature covered by Article 54(3)(e) restrictions and has sought lifting of the restrictions in order to facilitate disclosure to the defence; it has at all times kept the Trial Chamber informed of all relevant developments; and it has continuously striven to find adequate solutions, including the provision of analogous evidence to the Defence. The Decision, however, mischaracterizes the conduct of the Prosecution, on the basis of flawed findings, both in law and in fact.

The Prosecution further submits that a stay of the proceedings should always be a measure of last resort. As the Chamber itself has recognized, a stay has profound adverse implications for "the international community, the peoples of the Democratic Republic of the Congo, the victims and the accused himself".[1] The Appeals Chamber has ruled that a stay of proceedings is appropriate where "Unfairness in the treatment of the suspect or the accused […] rupture[s] the process to an extent making it impossible to piece together the constituent elements of a fair trial".[2] Given the implications of a stay, such a decision must be based on a strict application of that standard. Yet, the Trial Chamber decided on this extraordinary step without fully exploring the range of available measures at the Chamber's disposal; considering the options offered by the Prosecution in order to respect the rights of the defence; or considering other relevant factors, such as the reduced exonerating nature of the materials involved. In particular, the Chamber failed to consider the offer of the UN to further discuss the possibilities to comply with the Chamber's requirements.

These errors invalidate the impugned Decision and require corrective action by the Appeals Chamber, overturning the Decision and allowing for a prompt resumption of the proceedings.

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[1] Decision, para. 95.

[2] *Prosecutor v. Lubanga*, ICC-01/04-01/06-772 OA4, 14 December 2006, para. 39; cited in Decision, para. 93.

Background

1. On 11 June 2008, the Trial Chamber orally announced that the trial date was vacated,[3] and on 13 June 2008, the Trial Chamber ordered that proceedings in the case be stayed.[4]

2. On 23 June 2008, the Prosecution sought leave to appeal against the Decision.[5]

3. On 2 July 2008, the Trial Chamber granted the Prosecution leave to appeal the Decision to Stay Proceedings,[6] in respect of the following issues:

> "Whether the Trial Chamber erred in the interpretation of the scope and nature of Article 54(3)(e) of the Statute and in its characterization of the Prosecution's use of it as constituting 'a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances'".
>
> "Whether the Trial Chamber erred in the interpretation and exercise of its authority under Article 64 of the Statute; […] and whether it imposed a premature and erroneous remedy in the form of a stay of the proceedings".[7]

4. On the same day the Trial Chamber also issued a separate decision in which it ordered the release of the Accused.[8] The Prosecution has appealed that Decision on Release,[9] and the Appeals Chamber has granted suspensive effect to that appeal.[10] As the Prosecution noted in that appeal, the Decision on Release was solely based on the Decision to Stay Proceedings, and the appeals against the two decisions are thus inextricably linked.[11]

5. On 11 July 2008, the Prosecution informed the Trial Chamber that it could place before it all the material in question, and therefore sought a lifting of the stay of the proceedings.[12]

6. The Prosecution hereby files its Document in Support of its appeal against the Decision to Stay Proceedings, pursuant to Regulation 65(4). The Prosecution submits that the Trial Chamber made three errors in the Decision:

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[3] ICC-01/04-01/06-T-90-ENG. The trial had been scheduled to commence on 23 June 2008. For further background to the vacating of the trial date and stay of proceedings, the Prosecution refers to the submissions cited in its Application for Leave to Appeal, para. 1.

[4] ICC-01/04-01/06-1401 ("Decision to Stay Proceedings"). The Decision to Stay Proceedings scheduled a hearing for 24 June 2008 to consider the release of the Accused (para. 94). The Prosecution subsequently filed submissions arguing that if the Trial Chamber granted leave to appeal the Decision to Stay Proceedings, then it should defer consideration of release pending resolution of the appeal (ICC-01/04-01/06-1407, 23 June 2008).

[5] ICC-01/04-01/06-1407 ("Application for Leave to Appeal").

[6] ICC-01/04-01/06-1417 ("Decision Granting Leave to Appeal").

[7] The Trial Chamber went beyond the Application for Leave to Appeal, granting leave to appeal "whether the Chamber correctly determined that its obligation to ensure the accused receives a fair trial is dependent on the prosecution disclosing any potentially exculpatory evidence to the defence under Article 67(2) of the Statute (having first delivered the evidence in full to the Chamber for review and decision in case of doubt)".

[8] ICC-01/04-01/06-1418 ("Decision on Release").

[9] ICC-01/04-01/06-1419 OA12, 2 July 2008; ICC-01/04-01/06-1429 OA12, 10 July 2008.

[10] ICC-01/04-01/06-1423 OA12, 7 July 2008. Given that the Appeals Chamber has suspended the release of the Accused pending determination of the appeal against the Decision on Release, the Prosecution is not seeking suspensive effect of this appeal at this time. However if the Appeals Chamber should render a decision on the release appeal prior to determining this appeal, then the Prosecution will seek suspensive effect of this appeal, as contemplated by the Trial Chamber itself – see Decision on Release, para. 32.

[11] See ICC-01/04-01/06-1429 OA12, 10 July 2008, in particular paras. 11, 13-17, 21-23.

[12] ICC-01/04-01/06-1341, 11 July 2008; also requesting that the Chamber revoke the release of the Accused.

(1) The Trial Chamber erred in law in its interpretation of the nature and scope of Article 54(3)(e) ("the First Ground");

(2) The Trial Chamber erred, in law and in fact, in its characterization of the Prosecution's conduct pursuant to Article 54(3)(e) ("the Second Ground"); and

(3) The Trial Chamber erred in the exercise of its discretion, by imposing an excessive and premature remedy in the form of an indefinite stay of the proceedings ("the Third Ground").

First Ground of Appeal – The Trial Chamber erred in law in its interpretation of the nature and scope of Article 54(3)(e)

7. The Prosecution submits that the Trial Chamber erred in its interpretation of Article 54(3)(e), and in the manner in which it considered that this provision operated and could be utilised by the Prosecution. The Trial Chamber considered that Article 54(3)(e) only applied "[i]n highly restricted circumstances" and could be resorted to "exceptionally, when particular, restrictive circumstances apply".[13] Further, the Chamber considered that Article 54(3)(e) could only apply to a limited, artificial and non-existent category of "lead or springboard material".[14] Contrary to this interpretation, the Prosecution submits that there are no substantive or numeric restrictions in Article 54(3)(e).

8. Article 54(3)(e) does not limit the <u>nature</u> of the material to which it applies, but only the <u>purposes</u> for which that material <u>may be used</u>. The Prosecution submits that this is clear in the language of Article 54(3)(e) - "solely <u>for the purpose</u> of…" (emphasis added) - and is further reinforced by language and structure of Article 93(8)(b).[15] This is even more explicit in Rule 82(1), which provides for the introduction of the "material or information [gathered under Article 54(3)(e)] into evidence", with the consent of the provider.[16] Thus one cannot distinguish between "lead material" and material with evidentiary value:[17] the material will often be, and remains, the same; the restrictions imposed under Article 54(3)(e) only affect the use to which the material may be put at a given point in time.[18]

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[13] Decision to Stay Proceedings, paras. 71, 72.
[14] See paras. 8-9 and footnote 19, below.
[15] "The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. <u>The Prosecutor may then use them solely</u> for the purpose of generating new evidence." (emphasis added). This contains no restriction at all on the class of documents or information covered; only on the use to which they may be put. While 93(8)(b) formally applies only to States, the Prosecution submits that this is further indicative of the manner in which Article 54(3)(e) as a whole is intended to operate.
[16] See also Article 93(8)(c).
[17] i.e. "material which either inculpates or exculpates the accused" - ICC-01/04-01/06-T-52-ENG ET, 1 October 2007, p. 86, lines 11-13; in relation to "lead or springboard material", see footnote 19, below.
[18] i.e. unless or until the provider consents. This applies where "the documents or information were <u>given</u> 'solely for the purposes of generating new evidence'." – Turone, "Powers and Duties of the Prosecutor", in Cassese, Gaeta and Jones (ed) (2002), p. 1170 (emphasis added); see further Application for Leave to Appeal, para. 7.

9. The Prosecution submits that at the core of the Trial Chamber's erroneous interpretation of Article 54(3)(e) is a misunderstanding of the information and material which may fall within its ambit. The Trial Chamber, on a number of occasions, appeared to create two independent and mutually exclusive categories of material – "lead" or "springboard" materials[19] on the one hand; and incriminatory or exculpatory evidence on the other – only one of which may be legitimately gathered under Article 54(3)(e). The Chamber appears to consider that the Prosecution must be "aware, prior to receiving the materials, that their potential use was solely for the purposes of generating new evidence".[20] The Prosecution submits that this is erroneous, and fundamentally misconceives the nature and operation of Article 54(3)(e): Article 54(3)(e) does not govern or limit all potential uses to which material might be put, but only the uses to which the material can be put without further consent from the provider. That misperception of the provision substantially contributed to the Chamber's flawed characterisation of the Prosecution's conduct, discussed below.[21]

10. Article 54(3)(e) is thus based on the Prosecution receiving material which the provider has insisted may only be used for the limited purpose of generating new evidence, unless the provider subsequently consents to its use as evidence. It is the provider who imposes the restrictions on its use, not the Prosecution.[22] Even if the Prosecution is in a position to review the documents in detail prior to their collection, the true incriminatory or exculpatory value of a document may only become apparent at a later stage, and in connection with other evidence.[23]

11. Similarly, restrictions may only be necessary for a limited period of time. This is recognised in Article 54(3)(e) and Rule 82, which as demonstrated above expressly contemplates the possibility of the provider consenting to the use of such material as evidence at a later point. The need to impose confidentiality and restrict the use of a

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[19] See e.g. ICC-01/04-01/06-T-52-ENG ET, 1 October 2007, p. 86, lines 11-13 ("a large body of material which isn't springboard or lead material, but which is material which either inculpates or exculpates the accused"); p. 94, lines 7-11 ("you entered into the agreements not knowing whether the material you were going to be receiving was lead or springboard material or material which was simply going to be freestanding and not being secured for the purposes of leading to other evidence.")

[20] Decision Granting Leave to Appeal, para. 12.

[21] See the Second Ground of Appeal, in particular paras. 15-17, below.

[22] In addition to Article 54(3)(e), Article 93(8)(b) further specifies that "The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis." (emphasis added). The restrictions are thus imposed by the provider "when necessary". Commentators to the Statute have confirmed that the imposition of the conditions is the prerogative of the provider, which "may require that these documents be kept strictly confidential and not be used as evidence in court or disclosed in any other manner." – Prost and Schlunck, "Article 93" in Triffterer (ed) (1999), p. 1115 (emphasis added). See further *Prosecutor v. Blaškić*, IT-95-14-T, Decision of Trial Chamber I on the Prosecutor's Motion for Video Deposition and Protective Measures, 11 November 1997, paras. 14-15; see para. 13, below.

[23] See e.g. *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-621, 20 June 2008, paras. 33. In this context, the Prosecution recalls that disclosure is an ongoing obligation. Similarly, the Prosecution will generally not be in a position to assess the true relevance of a document, and its utility for leads or evidentiary purposes, prior to its collection under Article 54(3)(e) – *ibid.*

particular item or piece of information may diminish with time, especially in the context of ongoing armed conflict for providers who are active in the field; yet it is also in the interests of the objective and efficient administration of justice for the Prosecution to be able to gather such information at the earliest possible time, in particular to guide its investigations.[24]

12. In the investigation and prosecution of serious international crimes, the ability to secure such information is a key tool at the disposal of the Prosecution: as one commentator has noted in respect of Article 54(3)(e), "this kind of information can be very significant to the preparation and prosecution of cases".[25] This power is thus not marginal[26] or exceptional, but is at the core of the Prosecution's ability to fulfil its mandate.[27]

13. Other courts have similar provisions.[28] The ICTY has recognised that the purpose of Article 70 (B) of its Rules of Procedure and Evidence is to encourage cooperation, without which the Prosecution would be unable to fulfil its mandate.[29] Given that Article 54(3)(e)

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[24] See para. 14, below; Application for Leave to Appeal, pp. 4-5, paras. 12, 15. "Article 54(3)(e) was adopted to assist the prosecutor to overcome a potential problem in the field, namely, that a number of bodies may have information which could help identify incidents worthy of further investigation, but which they may be reluctant to release because the information was provided to them on a confidential basis. This provision is designed to help protect the source of such information, and consequently to promote a steady stream of important investigatory leads and information which will be vital to the work of the Court." – Brady, "Disclosure of Evidence", in Lee (ed) (2001), p. 420-421.

[25] Bergsmo and Kruger, "Article 54" in Triffterer (ed) (1999), p. 724.

[26] The importance which States attached to the ability to provide, and for the Prosecution to obtain, material under these conditions and for these purposes is further evidenced by the fact that this authority was initially contained in a draft proposal for the draft Rules of Procedure and Evidence (see e.g. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, UN Doc. A/51/22 [VOL.II] (SUPP), 13 September 1996, Rule 87), but was considered sufficiently important to be included in the drafting of the Statute (Revised Abbreviated Compilation, Article 26, Investigation Of Alleged Crimes, UN Doc. A/AC-249/1997/WG-4/CRP-4, 14 August 1997; and related drafts) rather than being left for subsequent inclusion in the Rules.

[27] The interpretation of the scope of Article 54(3)(e), and characterisation of the Prosecution's conduct, directly impacts on the Prosecution's ability to fully investigate and establish the truth pursuant to Article 54(1)(a), including investigating incriminating and exonerating circumstances equally. The practical reality of conducting such investigations is that without the ability to receive materials under Article 54(3)(e) when providers insist on confidentiality, the Prosecution simply will not be able to collect a substantial body of relevant material, including material regarding exonerating circumstances. In the present case, this has resulted in the disclosure of an additional 100 items with potentially exculpatory value, which were only collected under Article 54(3)(e) (see para. 18, below); see further Application for Leave to Appeal, pp. 4-5, para. 12.

[28] "Article 54, paragraph 3 (e), reflects the approach taken to confidential information in rule 70 (B) of the ICTY Rules. Sub-rules 70 (C) to (F) of the ICTY Rules are linked to rule 70 (B), but are not reflected in article 54, paragraph 3 (e)." – Commentary to Rule 71(f), Draft Rules of Procedure and Evidence of The International Criminal Court: Proposal / Submitted by Australia, UN Doc. PCNICC/1999/DP.1, 26 January 1999; see also Brady, "Disclosure of Evidence", in Lee (ed) (2001), p. 420-421, in footnote 24, above, which further notes that "Rule 82 [is] based largely on sub-rules 70(B)-(F) of the ICTY and ICTR Rules, is concerns with restrictions on disclosure flowing from one specific provision of the Statute [i.e. Article 54(3)(e)]."

[29] The purpose "is to encourage States, organisations, and individuals to share sensitive information with the Tribunal. The Rule creates an incentive for such cooperation by permitting the sharing of information on a confidential basis and by guaranteeing information providers that the confidentiality of the information they offer and of the information's sources will be protected. […] without such guarantees of confidentiality, it is 'almost impossible to envisage this Tribunal, of which the Prosecution is an integral organ, being able to fulfil its functions.'" - *Prosecutor v Milosevic*, IT-02-54-AR108bis & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 19 (references omitted).

closely mirrors the language of Rule 70(B), the Prosecution submits that the manner in which Rule 70(B) was used and interpreted at the time of the drafting of the Rome Statute is instructive: namely that the purpose was to allow use of information which would not otherwise have been provided to the Prosecution as and when appropriate;[30] that the provider stipulated the conditions, rather than the Prosecution seeking to keep information confidential;[31] that only the provider was in a position to determine the need for and extent of the restrictions;[32] and that the Prosecution would not know how it may eventually seek to use the information prior to it being collected.[33]

14. The Prosecution further submits that Article 54(3)(e) does not limit numerically the information that can be collected, nor can it be characterised in all cases as "highly restricted" and "exceptional".[34] The realities of conducting investigations during ongoing conflicts or in regions of substantial instability reinforce the need for providers to be able to transmit material confidentially, and for the limited purpose of generating new evidence, when necessary. For example, situations of ongoing conflict, sometimes involving the subjects of the Court's investigation, may well raise serious security risks for organisations and individuals operating in the field.[35] Thus while the Statute creates Article 54(3)(e) as an exception to the ordinary use and disclosure of material, these limitations do not, in the context of the Court's operations, mean that in all situations the imposition of such conditions will be "exceptional". The ability to collect material under such conditions, where required, actually serves as a safeguard to the fairness and integrity of the proceedings.[36]

[30] "Sub-rules 70(B) to (E) were introduced into the Rules to permit the use, as and when appropriate, of certain information which, in the absence of explicit provisions, would either not have been provided to the Prosecutor or have been unusable on account of its confidential nature or its origin." - *Prosecutor v. Blaškić*, IT-95-14-T, Decision of Trial Chamber I on the Prosecutor's Motion for Video Deposition and Protective Measures, 11 November 1997, para. 10.

[31] "Sub-rule 70(B) does not suggest that it is the Prosecutor who is seeking that the information gathered be kept confidential but rather that it is the person or entity who has provided it who is stipulating a condition to that effect." - *Ibid*., para. 14.

[32] "it is neither for the Chamber nor the parties to determine whether the information in the possession of the Prosecutor is confidential or not; the person or entity having the information is the sole judge of what was deemed to be confidential and what must be kept so in whole or in part." - *Ibid*., para. 15.

[33] "the Prosecutor's argument that she could not know how she would use the information prior to even gathering it under Rule 70, seems well-founded." - *Ibid*., para. 15.

[34] Decision, paras. 71, 72 and 73.

[35] In addition to serious security risks for organisations and individuals operating in the field, the specific mandate of an organisation may be of such a nature that it cannot be seen to be cooperating with the Court or providing it with evidence, and such organisations may thus consider that they can only provide material confidentially to be used as leads. Restrictions under Article 54(3)(e) have also been considered necessary by information providers where they required such restrictions in order for the provider to comply with their obligations towards a third party originator of the information; the Prosecution notes that the Statute recognises the validity of such claims in other contexts – see e.g. Article 73.

[36] See footnote 27, above. For example, it ensures that the greatest possible range of information, including potentially exculpatory information, is available to the Prosecution and taken into consideration in making all determinations regarding investigations and cases; and allows the Prosecution to identify the widest possible

The Second Ground of Appeal – The Trial Chamber erred, in law and in fact, in its characterization of the Prosecution's conduct pursuant to Article 54(3)(e)

15. The Prosecution submits that the Trial Chamber further erred, as a matter of fact and of applied law, by characterising the Prosecution's conduct and use of Article 54(3)(e) in this case as "a wholesale and serious abuse, and a violation of an important provision".[37] In the first instance, the Prosecution submits that this erroneous characterisation was founded on the Chamber's misinterpretation of the Article 54(3)(e), as demonstrated above, and in particular the range and type of information which may be covered by it. To the extent that the Appeals Chamber upholds the Prosecution's First Ground of Appeal, the Prosecution submits that the Trial Chamber's characterisation of its conduct as a violation or abuse based on that underlying error cannot be sustained. However even to the extent that the Appeals Chamber considers that Article 54(3)(e) is indeed a "highly restricted" and "exceptional" provision, the Prosecution submits that the Trial Chamber still erred by characterising the Prosecution's conduct as a violation of that provision.

The Prosecution's conduct has been in compliance with Article 54(3)(e)

16. When deciding to investigate the conflict in the DRC, the Prosecution needed information on the nature of the conflict,[38] and the quantity of material collected was a function of the scope and complexity of the situation referred,[39] and the need to focus its investigation on an objective basis, in full compliance with both its obligations pursuant to Article 54(1) and with the language and purpose of Article 54(3)(e).[40] In contrast to the findings in the Decision,[41] the Prosecution submits that at all times the relevant information was properly received under Article 54(3)(e), pursuant to conditions imposed by the provider, and subject to the confidentiality and restrictions on use prescribed in that provision. This material was collected on the understanding (1) that the Prosecution would use it as lead material only and (2) that the Prosecution may seek from the providers lifting of the

range of potentially exculpatory issues, minimising the chances that such issues remain beyond the scope of the Prosecution's inquiry. The Prosecution will then be in a position to either seek the permission of the provider to lift the restriction and allow the use of the material directly (as expressly contemplated in Rule 82), or to seek new evidence going to those same issues (the very nature of "lead evidence" as described in the Decision, see para. 71) – see further Application for Leave to Appeal, para. 12.

[37] Decision to Stay Proceedings, para. 73 (emphasis added); see further paras. 70 and 72.

[38] In particular, in order to assist it in identifying the different groups involved and their respective leadership, and evaluate the security situation.

[39] i.e. covering the entire Democratic Republic of the Congo (DRC); the vast numbers of crimes and perpetrators, and the existence of multiple militias who continuously merge and divide. In the same way that Article 54(3)(e) does not limit the nature of the material gathered, but only its use, the Article similarly does not impose and substantive or numerical restrictions on the quantity of material gathered.

[40] Brady, "Disclosure of Evidence", in Lee (ed) (2001), p. 420-421, in footnote 24, above.; see further para. 22-23, below.

[41] Decision to Stay Proceedings, paras. 70-75, 92(ii).

Article 54(3)(e) restrictions in order to disclose the material and use it as evidence.[42] This understanding, and the Prosecution's conduct pursuant to it, is entirely consistent with the relevant provisions.

17. Article 54(3)(e) and related provisions, in particular Rule 82, do not limit the nature of the material that can be gathered,[43] but rather expressly contemplate that material which is initially provided under Article 54(3)(e) for limited uses may subsequently, with the consent of the provider, be used as evidence after disclosure. In light of these principles, the Prosecution has presented a consistent account of its use of Article 54(3)(e), which has been in compliance with the Statute and Rules. The Prosecution submits that the Trial Chamber's perceived inconsistencies in the Prosecution's submissions, and its findings of a violation of Article 54(3)(e), are in large part the result of the Chamber's attempts to reconcile those submissions and conduct with its erroneous perception that Article 54(3)(e) only applied to a limited sub-set of "lead or springboard material".[44] The Chamber's misinterpretation of the provision itself led it to misapprehend the Prosecution submissions and their implications.[45]

18. In most instances,[46] the Prosecution agreed to obtain material under Article 54(3)(e) only after it made an initial request for the material and the provider responded that it was <u>only</u> willing to provide the material on the conditions of confidentiality and the understanding that it be used for lead purposes. This is consistent with the Statute; pursuant to which it

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[42] See e.g. ICC-01/04-01/06-T-55-CONF-EXP-ENG, 2 October 2007, pp. 4-7; ICC-01/04-01/06-T-52-ENG, 1 October 2007, p. 94. Indeed, as discussed below, the Prosecution has a duty to request the lifting of restrictions in the case of potentially exculpatory information (see para. 19, below).
[43] See paras. 8-10, above.
[44] ICC-01/04-01/06-T-52-ENG ET, 1 October 2007, p. 94, lines 7-11 ; see further p. 86, lines 11-13 ("a large body of material which isn't springboard or lead material, but which is material which either inculpates or exculpates the accused").
[45] This confusion has lead the Chamber to consider that the Prosecution's recognition that some items may have evidentiary value in the future, and that it may seek the consent of the provider to use those items in evidence at a later point, to be inconsistent with Article 54(3)(e): see e.g. Decision, para. 72 (considering that any acceptance of material under Article 54(3)(e) must be based on the specific "springboard or lead potential" of that material); Decision Granting Leave to Appeal, para. 12 (discussed at para. 9, above). The Prosecution, on the other hand, submits that this is consistent with the Statute.
[46] The exception is the Memorandum of Understanding between the UN and the ICC concerning cooperation between the UN organization Mission in the DRC (MONUC) and the ICC, which provides that all materials provided under that specific agreement are provided under Article 54(3)(e), unless the UNSG or an ASG for Peacekeeping Operations otherwise specifies in writing – see ICC-01/04-01/06-T-52-ENG ET, 1 October 2007, p. 84. While much of the material gathered under Article 54(3)(e) came from this provider, the Prosecution submits that the specific context of this provider and the challenges it faces - namely the largest peace-keeping mission of the UN, currently deployed throughout the region of the Prosecution's investigations, and where armed conflicts continue, including involving some actors who are the subject of investigations – are indeed exceptional, and that the requirement of the UN for the application of Article 54(3)(e) in this manner is thus warranted. Further, as has been recalled in another decision, this MOU was signed by the then Registrar, exercising his functions under the authority of the President of the Court – see *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-621, 20 June 2008, para. 57.

is the provider who determines when such protection is necessary.[47] As the Prosecution informed the Trial Chamber, if it had not accepted the restrictions placed on the use of that material by the providers, it would not have received the material at all.[48] In this regard, aspects of the Decision's criticism of the Prosecution's conduct appear to be based on a false premise: that "if the exculpatory material was not covered by the agreements, it would have been provided to the defence".[49] This is not the case: if the material had not been received under Article 54(3)(e) it would not have been provided to the Prosecution in the first place, and thus could not have been disclosed.[50] To the contrary, the use of Article 54(3)(e) has allowed the Prosecution in this case to disclose to the Defence, after the provider agreed to lift the restrictions, 100 items of potentially exculpatory material by its most recent account which would not have been available to the Defence were it not for the Prosecution's use of Article 54(3)(e).[51]

19. When accepting material under the Article 54(3)(e) conditions required by providers, the Prosecution informed providers that it might seek the lifting of those restrictions in order to disclose the material if necessary,[52] as it was unable to assess the future evidentiary value of the material at that time.[53] The Prosecution also made this clear to the Trial Chamber,[54] and submits that this is consistent with the Statute. The Prosecution has applied stringent standards for harmonizing its duties under Article 54(3)(e) with its duties of disclosure. While the Prosecution has *discretion* to request the consent of the provider of Article 54(3)(e) incriminatory information, it recognises that it has a *duty* to make such

[47] See Article 93(8)(b), see footnotes 15 and 22, above; see further decision in *Prosecutor v. Blaškić*, IT-95-14-T, 11 November 1997, para. 14 (see para. 13 and footnote 31, above).
[48] See e.g. ICC-01/04-01/06-T-52-ENG ET, 1 October 2007, p. 85, lines 13-18, and p. 86, lines 4-9. See also footnotes 15 and 22, above, on the right of the provider to <u>require</u> confidentiality.
[49] Decision, para. 70.
[50] The Prosecution can only (and is only obliged to) disclose potentially exculpatory information "in the Prosecutor's possession or control" (Article 67(2)); quite contrary to the Trial Chamber's finding that "a significant body of exculpatory evidence <u>which would otherwise have been disclosed</u> to the accused is to be withheld from him, thereby improperly inhibiting the opportunities for the accused to prepare his defence" (Decision, para. 92(ii), emphasis added).
[51] See further Application for Leave to Appeal, p. 5 and para. 13.
[52] See e.g. Transcript of hearing of 2 October 2007, ICC-01/04-01/06-T-55-CONF-EXP-ENG, pp. 4-7; transcript of hearing of 1 October 2007, ICC-01/04-01/06-T-52-ENG, p. 94.
[53] In contrast to the criticism by the Trial Chamber that the Prosecution used Article 54(3)(e) "to gather information, unconnected with its springboard or lead potential" (Decision, para. 72), the Prosecution recalls that it is not able to make a detailed assessment of the value of material prior to accepting it under Article 54(3)(e), as it is unable to review the materials in context, and in any event the true incriminatory or exculpatory value of a document may only become apparent at a later stage, and in connection with other evidence – see further para. 10, above; *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-621, 20 June 2008, paras 33-34.
[54] Transcript of hearing of 2 October 2007, ICC-01/04-01/06-T-55-CONF-EXP-ENG, p. 5, line 15 – p. -7, line 18; transcript of hearing of 1 October 2007, ICC-01/04-01/06-T-52-ENG, p. 83, lines 12-16; and pp. 93, line 19 – p. 94, line 18; Transcript of hearing of 6 May 2008, ICC-01/04-01/06-T-86-ENG, p. 23, lines 8-14.

a request with respect to exonerating information.[55] If consent cannot be secured, the Prosecution will explore all other available options to address the situation, including:

(i) using the material to identify new exculpatory evidence of a similar nature and quality, pursuant to the scheme enshrined in Article 54(3)(e) which primarily and expressly contemplates the use of the information or material to generate new evidence;[56]

(ii) resorting to other avenues, such as exploring the possibility of providing the material in summarized form to the defence, or stipulating to the relevant facts; or

(iii) if needed, amending or withdrawing charges.

20. This is consistent with, and explicitly foreseen in, the system established by the Statute and the Rules. The fact that the Prosecution may need to avail itself of one of the options provided in the Statute and the Rules cannot be taken as a demonstration that it has abused or violated that provision.

The agreements referred to in the Decision are also consistent with Article 54(3)(e)

21. Furthermore, the Prosecution submits that the Trial Chamber has provided no foundation for the conclusions that the agreements which the Prosecution has entered into with providers of information are improper or beyond the scope of Article 54(3)(e).[57] The Prosecution submits that those findings are unsubstantiated, and constitute errors of fact. The Prosecution has resisted any default or blanket application of Article 54(3)(e) in the negotiation of such agreements.[58] Further, while the Trial Chamber discusses "the agreements [the Prosecution] reached with the information providers",[59] it only discusses Article 18(3) of the Relationship Agreement between the ICC and the UN.[60] The Prosecution recalls that this is not an agreement reached by the Prosecution, but concluded between the Secretary-General of the United Nations and the President of the Court, on behalf of the Court as a whole, and endorsed by the Assembly of States Parties.[61]

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[55] See e.g. *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-621, 20 June 2008, paras. 61, 100; see further paras. 9-10, 16, above.

[56] In this regard, the Prosecution submits that the Trial Chamber's "grave reservations as to whether serving other, similar evidence can ever provide an adequate substitute for disclosing a particular piece of exculpatory evidence" (Decision, para. 60) is not consistent with the underlying rationale of Article 54(3)(e), which it to use the material to identify and obtain other evidence of the same facts, whether incriminatory or exculpatory. To the extent that the Decision refers in this regard to the judgement of the ICTY in *Blaškić* (Decision, paras. 60 and 81), the Prosecution submits that the reliance by the Trial Chamber on that case is misplaced (see footnote 92, below).

[57] See in particular Decision, paras. 70, 71 and 75; see also para. 64.

[58] In relation to the MOU between the UN and the ICC concerning cooperation between MONUC and the ICC, see footnote 46, above.

[59] Decision, para. 70.

[60] ICC-ASP/3/Res.1; see Decision, para. 65.

[61] In this regard, given that the Relationship Agreement was approved by the Assembly of States Parties, pursuant to the *Vienna Convention on the Law of Treaties* it should be used to guide the interpretation of the relevant provisions of the Statute (VCLT, Art 31(3)(b)). In addition, pursuant to Articles 2 and 21(1)(b) of the

<u>The scale of material gathered in this situation does not violate or abuse Article 54(3)(e)</u>

22. At the time of selecting cases to investigate in the DRC situation, the Prosecution required information on mass crimes over the entire country and extending over many years. The information collected provided the Prosecution with an objective basis on which to focus its investigation against those persons most responsible among the thousands of persons involved in the crimes, in full compliance with its obligations pursuant to Article 54(1).[62] As this material was collected before, and for the purpose of, selecting cases, the Prosecution was not in a position to assess the evidentiary value, either incriminatory or exculpatory, of the material.[63] This is not improper in law; to the contrary it is a practical implication of case selection in situations of massive criminality.

23. Furthermore, the investigation in this case has been conducted in a situation of ongoing conflict, where groups and individuals who have been the subject of the Court's investigations are sometimes still active participants,[64] and where it appears that persons assisting in domestic prosecutions of militia members have been killed or threatened.[65] In such a situation, information providers who are active in the field may have very legitimate concerns which lead them to impose restrictions on the use of material. Thus even to the extent that the Appeals Chamber considers that the use of Article 54(3)(e) is "highly restricted" and "exceptional", the Prosecution submits that in the particular circumstances of this case, its conduct - including the collection of "a wide range of materials"[66] under Article 54(3)(e) - still did not constitute a violation of that provision,[67] and that the Trial Chamber erred in characterising it as such.

Statute, the Relationship Agreement itself becomes an independent source of law, binding on the Prosecution and the Court, unless otherwise determined otherwise by a Chamber of this Court. As such, the inability of the Prosecution to provide the judges for their viewing materials it had obtained from the United Nations pursuant to article 18(3) of the Relationship Agreement was not attributable to the manner in which the Prosecution had entered into its agreements (contrast Decision, para 70); nor was it a matter for the Prosecution to "choose not to" disclose the material in question (Decision, para. 75); but rather an obligation placed on the Prosecution pursuant to the Statute and this Court-wide agreement.

[62] "to establish the truth", to "extend the investigation to cover all facts and evidence relevant" and to "investigate incriminating and exonerating circumstances equally".

[63] See e.g. *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-621, 20 June 2008, paras. 33-34. As noted in that decision, the insistence by certain providers on blanket coverage further contributed to this (see para. 101).

[64] See e.g. *Prosecutor v Ntaganda*, ICC-01/04-02/06-18, 28 April 2008, p. 4.

[65] See Application for Leave to Appeal, p. 5; see further ICC-01/04-01/06-586, 18 October 2006, p. 6; ICC-01/04-01/06-517, 5 October 2006, p. 3; ICC-01/04-01/06-437 15 September 2006, p. 7; ICC-01/04-01/06-T-65-ENG, 13 December 2007, p. 5, line 20 – p. 6, line 1.

[66] Decision to Stay Proceedings, para. 73.

[67] The Prosecution recalls that a Judge of Pre-Trial Chamber I, despite considering that Article 54(3)(e) should be used "only in exceptional or limited circumstances", recently drew a distinction between the Prosecution's use of Article 54(3)(e) – even a "reckless resort" to that article – and a violation of it when considering the Prosecution's conduct in this situation – see *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-621, 20 June 2008, para. 56.

24. For all of the reasons set out above, the Prosecution submits that the Trial Chamber erred in law and fact by casting the Prosecution's use of Article 54(3)(e) as a violation or wholesale abuse of that provision.

The Third Ground of Appeal – The Trial Chamber erred by imposing an excessive and premature remedy in the form of an indefinite stay of proceedings

25. The Prosecution submits that the Trial Chamber erred in the exercise of its discretion, by imposing an excessive and premature remedy in the form of an indefinite stay of proceedings. The Decision to Stay Proceedings was solely based on the fact that the Prosecution was not, at that point in time, in a position to put all of the relevant material – 171 items[68] - before the Trial Chamber so that the Chamber could assess the impact of any non-disclosure and proposed alternatives on the fairness of the proceedings.[69]

26. The Prosecution has recognised the Trial Chamber's critical role as the custodian of the fairness of the trial, and consequently the need for it to make an informed decision as to whether the rights of the accused and the fairness of trial are adversely affected at any time during the proceedings. The starting point for the Chamber's exercise of its powers to deal with matters of disclosure[70] should have been consideration of the Prosecution's conduct,[71] and the Prosecution's assessment of the material in question. The Prosecution provided the Chamber with its detailed and reasoned assessment that none of the information would materially impact on the determination of guilt or innocence, and in order to facilitate this assessment further provided it with a range of information: i.e. some of the documents in question directly; the proposal of summaries of other documents; and information on its disclosure of alternative evidence of a similar exculpatory nature. The Prosecution was also continuing to address this matter with the information providers, who had proposed solutions and had expressed their willingness to propose alternative arrangements and, for the UN, to meet with the Chamber.[72] Despite these options and factors which were before it, the Trial Chamber held that there was "no prospect […] that the present deficiencies will be corrected", that it was "impossible to

[68] At the time, the Prosecution was only in a position to provide the Trial Chamber with 33 out of a total of 204 items – see ICC-01/04-01/06-1341, 11 July 2008, for details of the items and the slight variation in numbers.
[69] Decision to Stay Proceedings, paras. 76; 77; 83-88; 92(iii).
[70] Article 64(3)(c); see Decision on Leave to Appeal, para. 5.
[71] As has been noted, " the Prosecution, as the organ of the Court primarily entrusted by the International Community with the investigation of the most serious crimes of international concern, must be presumed not to conduct itself and not to conclude agreements in violation of the Statute and the Rules" - *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-621, 20 June 2008, para. 62.
[72] See further ICC-01/04-01/06-1341, 11 July 2008.

piece together the constituent elements of a fair trial",[73] and therefore imposed an indefinite stay on the proceedings.

27. The Prosecution submits that the remedy chosen by the Chamber was excessive in light of the nature of the material in question, the Prosecution's transparent approach to Article 54(3)(e) material and its disclosure obligations in the case, and the availability of other, less drastic options that the Trial Chamber did not explore.

28. In light of the circumstances before it, which the Trial Chamber failed to consider, the Prosecution submits that the Decision to impose an indefinite stay of proceedings – a remedy with profound consequences for victims and the administration of justice[74] – was unreasonable. A decision to stay proceedings is within the discretion of the Chamber, and the Prosecution submits that the Appeals Chamber may review such a decision where the Chamber has failed to consider relevant factors, has considered irrelevant factors, or where the decision is otherwise unreasonable.[75]

<u>The standard for staying proceedings and the basis for the stay in this case</u>

29. The Appeals Chamber has ruled that a stay of proceedings is appropriate where "Unfairness in the treatment of the suspect or the accused […] rupture[s] the process to an extent making it impossible to piece together the constituent elements of a fair trial".[76] The Trial Chamber in this case failed to properly apply this standard. Any unfairness in this instance did not rise to this level of prejudice. This has never been a case where a fair trial has been "impossible". The fact that the Trial Chamber recognised that the stay may be lifted, and identified the conditions which would allow it to consider such a lifting,[77] means that a fair trial – far from being "impossible" – always remained possible, in due course under specified conditions. The Prosecution submits that a stay of proceedings can only be imposed as a last resort:[78] a finding that there is <u>no prospect</u> of a fair trial

[73] Decision, para. 91, 93.
[74] Trial Chamber recognised as much in para. 95 – "the Court will not make a decision on issues which are of significance to the international community, the peoples of the Democratic Republic of the Congo, the victims and the accused himself. […] The judges are acutely aware that by staying these proceedings the victims have, in this sense, been excluded from justice." Further, the stay was the basis for the Chamber ordering the immediate and unconditional release of the Accused (which the Prosecution is appealing separately), which has (again as recognised by the Trial Chamber) further profound consequences for victims and witnesses.
[75] See further *Prosecutor v Katanga*, ICC-01/04-01/07-215-Anx OA, 20 February 2008, para. 30 and authorities cited therein. The Appeals Chamber has previously reviewed determinations based on "a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the *sub judice* issues" – see *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-572 OA4, 9 June 2008, para. 25.
[76] *Prosecutor v. Lubanga*, ICC-01/04-01/06-772 OA4, 14 December 2006, para. 39; relied upon in Decision to Stay Proceedings, para. 93.
[77] Decision, para. 94; ICC-01/04-01/06-T-91-ENG, 24 June 2008, pp. 31-33.
[78] *Prosecutor v Tadic,* IT-94-1-A, Judgement, 15 July 1999, para. 55 (only in "exceptional circumstances", and "after exhausting all the other measures", is a stay appropriate); *Prosecutor v. Lubanga*, ICC-01/04-01/06-772 OA4, 14 December 2006, para. 31, ("[t]he power to stay proceedings should be sparingly exercised"); Don Mathias, "The Duty to Prevent an Abuse of Process by Staying Criminal Proceedings".

continuing necessarily implies that all other avenues to remedy and ensure the fairness of the proceedings have been exhausted.

30. In contrast, in the present situation there were a range of options which remained open to the Trial Chamber other than the indefinite stay of the proceedings, which the Trial Chamber failed to consider, and that as a result a fair trial has at all time remained possible.[79] The prior decision of the Appeals Chamber regarding stay of proceedings, upon which the Trial Chamber relied, addressed a situation in which it was alleged that prior and egregious violations of the right of the Accused tainted any future trial or proceedings, such that "right from the outset, the applicant was definitively deprived of a fair trial."[80] In contrast, the situation before the Trial Chamber was one in which the fairness of the proceedings could not be guaranteed in the circumstances at that time; and the Trial Chamber was expressing reservations about the prospect of a sufficient change in those circumstances in the future.

The Trial Chamber failed to consider relevant factors

31. The Prosecution submits that the core of the Trial Chamber's erroneous exercise of its discretion to stay the proceedings was its failure to consider a series of factors which were highly relevant to the Trial Chamber's determinations of whether there was "no prospect" of the deficiencies being corrected, and thus whether a fair trial was "impossible"; and whether fairness had been ruptured to such an extent that it warranted an indefinite stay of the proceedings. As a result, and especially in the context of an ongoing process, those findings and the decision to stay proceedings were unreasonable.

i) The nature of the material in question

32. The Chamber firstly failed to consider the Prosecution's submissions, provided pursuant to the request and guidance of the Trial Chamber,[81] that none of the material in question could in fact materially impact on the Chamber's determination of guilt or innocence: for example, 46 of the documents relate only to *tu quoque*,[82] which the Trial Chamber had previously ruled to be irrelevant,[83] and their non-disclosure thus could not render the trial

[79] Application for Leave to Appeal, p. 7, paras. 24-26; see *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-PT, Decision on the Defence Motion for Continuance of Trial, 30 April 2005, para. 7, stating that "[t]he remedy of a continuance is not the only remedy for a violation of the Prosecution's disclosure obligations".
[80] *Prosecutor v. Lubanga*, ICC-01/04-01/06-772 OA4, 14 December 2006, para. 38. The Appeals Chamber provided the example of "entrapment by undercover agents, provides an example of serious breaches of the rights of the accused by the investigating authorities, rendering the holding of a fair trial impossible". See further *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision, 3 November 1999, para. 75, and additional authorities cited therein.
[81] See Application for Leave to Appeal, para. 18.
[82] ICC-01/04-01/06-T-89-ENG, 10 June 2008, p. 46, lines 1-13; ICC-01/04-01/06-1400, 13 June 2008, para. 4.
[83] ICC-01/04-01/06-T-71-ENG, 18 January 2008, p. 8, line 13 to p. 9, line 3.

materially unfair.[84] The Prosecution provided detailed analysis and set out the reasons for these assessments,[85] as a result of which the Prosecution stated that it had no doubt as to the impact of the material. None of this was considered by the Chamber. The Prosecution further notes that the Chamber had at its disposal various means to assist it in verifying the manner in which the Prosecution made its determinations on the impact of the material: the Chamber had been given around 30 documents previously covered by Article 54(3)(e);[86] the Chamber also had a description of the categories of information;[87] and finally, if necessary the Chamber could (and should) have requested further details from the Prosecution as to the reasons underpinning its assessment of the material.[88]

33. While the question of whether an item would materially impact on the Chamber's determination of guilt or innocence does not alter whether the item falls under Article 67(2) or Rule 77 *per se*,[89] the considerations above do demonstrate that this is not a situation where a trial was about to start with critical exculpatory evidence, going to the heart of the Prosecution's case, being withheld from the accused. The extent to which the material exculpates the Accused is highly relevant to assessing the impact of any non-disclosure on the fairness of the proceedings,[90] and therefore also to the appropriate remedies, and yet the Trial Chamber failed to consider this.

ii) The Prosecution's provision of alternative exculpatory evidence

34. The Prosecution had also informed the Trial Chamber that it had already served the Defence with a significant amount of alternative evidence of the same exculpatory nature as the information that is covered by Article 54(3)(e) restrictions.[91] The purpose of

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[84] Especially when over 100 items of other material of a similar nature had been provided - see ICC-01/04-01/06-1248, 28 March 2008, footnote 28. The Prosecution submits that this is sufficient "to understand the situation" and "the phenomenon of the use of child soldiers", in order to be able to prepare the Defence (ICC-01/04-01/06-1433 OA11, 11 July 2008, para. 82); and that at the very least this was a factor which was relevant to the degree of impact on the fairness of the proceedings which was before the Trial Chamber but was ignored.

[85] On 28 March 2008, the Prosecution informed the Chamber that a number of categories of materials, though falling within the Prosecution's broad definition of PEXO pursuant to Article 67(2) and Rule 77, were not of such an exonerating calibre that they *per se* could "materially impact" on the determination of the case (ICC-01/04-01/06-1248, paras. 9-17). The Prosecution explained that while a number of further materials fell into categories which *by their nature* could potentially "materially impact" on the guilt or innocence of the accused (paras. 18-26), *in fact*, based on the Prosecution's close assessment, there was *no doubt* that the materials concerned do *not* meet this threshold (para. 18).

[86] ICC-01/04-01/06-1373, 3 June 2008; ICC-01/04-01/06-1385, 9 June 2008. The Decision acknowledges that those documents were received by the Chamber (para. 64).

[87] ICC-01/04-01/06-1248, 28 March 2008, and annexes.

[88] The Prosecution notes that it did provide to the Chamber on 15 April 2008 further information on the reasons why the undisclosed evidence did not in fact materially impact on the Court's determination of guilt or innocence of the accused. See ICC-01/04-01/06-1281.

[89] These include items which go only to mitigation, which would not justify staying proceedings at this stage.

[90] See e.g. *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-475 OA. 13 May 2008, para. 72(c); ICC-01/04-01/07-476 OA2. 13 May 2008, para. 62.

[91] See ICC-01/04-01/06-1248, 28 March 2008, paras. 9 and 18. This alternative evidence refers both to protected information, which in the view of the Prosecution falls into categories of evidence which by their nature do not

Article 54(3)(e) and the purpose of gathering "lead material" is that it be used to generate other evidence, i.e. to obtain, disclose and use alternative evidence for the same facts or issues. The Prosecution thus submits that its active disclosure of other evidence which provided the same types of potentially exculpatory information,[92] was a further factor which was relevant to the assessment of the Prosecution's conduct and the impact of the material on the fairness of the proceedings, but which the Chamber failed to consider.

iii) The Prosecution's approach to its disclosure duties in this case

35. The Decision appears to be premised upon a reluctance to accept the Prosecution's good faith assessment of material and its impact on the proceedings.[93] While the Chamber has an independent duty to verify the overall fairness of the proceedings, and for these purposes may consider assurances from the Prosecution to be insufficient, it is submitted that the Prosecution's assessment of the situation was a factor to be weighed when determining the adequate and proportionate remedy.

36. The Prosecution's approach to disclosure has been completely transparent: from the outset of pre-trial proceedings before the Trial Chamber, the Prosecution has explained to the Chamber in detail its approach, the efforts that it had undertaken, and the issues that had to be resolved.[94] The Chamber had before it numerous examples of the Prosecution having scrupulously exercised its disclosure obligations. The Prosecution has consistently demonstrated willingness and flexibility in seeking solutions, including through the possible use of concessions.[95] In relation to the undisclosed material at issue in the Decision, the Prosecution has provided the Chamber with clear information as to the existence of the problem, relevant developments and the manner in which it was

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materially impact on the Court's determination of the guilt or innocence of the accused (paras. 9-17), as well as to information falling into categories which by their nature could materially impact on the Court's determination of the guilt or innocence of the accused (paras. 18-26).

[92] See e.g. ICC-01/04-01/06-T-52-ENG, 1 October 2008, p 18, lines 1-10; ICC-01/04-01/06-T-79-ENG, 13 March 2008, p 7, lines 18-24; ICC-01/04-01/06-1248, 28 March 2008, in particular paras 9 and 18 and footnotes 22, 23, 28-33, 36-37, 39, 41-43 (further providing the alternative evidence in 23 annexes); ICC-01/04-01/06-T-89-ENG, 10 June 2008, p 7, line 18 to p 8, line 2. When dismissing this consideration, the Trial Chamber's reliance on the judgement of the Appeals Chamber of the ICTY in the *Blaškić* case (Decision, paras. 60 and 81) also appears misplaced, as it does not relate to the facts and circumstances in this case. First, the *Blaškić* case was not dealing with the question of material gathered under Rule 70(B) "which has been used solely for the purposes of generating new evidence". Further, the finding in the *Blaškić* case does not refer to a scenario were alternative information of a similar nature has been actively disclosed (as the Prosecution did in the present case), but to a situation where such material is publicly available (but not necessarily reasonably accessible to the defence) – the language of the *Blaškić* decision is "there exists other information", as opposed to "other information has been disclosed" (see *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, para. 294).

[93] See in particular Decision, paras. 60, 68, 87 and 88; see further Decision Granting Leave to Appeal, para. 12.

[94] See ICC-01/04-01/06-T-52-ENG ET, 1 October 2007, regarding a detailed overview of the disclosure situation (pp. 10-26, 62-68, 83-94); Article 54(3)(e) matters (pp. 13-19 and 83-94); and the keyword list developed for the purposes of identifying Article 67(2) material (pp. 23-26).

[95] See e.g. ICC-01/04-01/06-1311-Anx2, 8 May 2008, paras. 90-91.

proceeding.[96] At no time has the Prosecution concealed facts from the Chamber or the defence, misrepresented the facts, or otherwise acted in bad faith in its disclosure duties.

iv) the offer by the United Nations to consult and the ongoing nature of the process

37. The Prosecution submits that in the circumstances of this Decision, indications from the Prosecution and the providers of the information that they were continuing to actively seek a resolution – which would permit all relevant information to be placed before the Judges and maximum possible disclosure of information to the Defence – is of the highest possible relevance to a determination that there is no prospect that the situation would be resolved and that it is impossible to piece together the elements of a fair trial. As part of its ongoing consultations with providers and provision of information to the Trial Chamber, on 11 June 2008 the Prosecution informed the Chamber that a representative of the United Nations was willing to discuss the UN's position with the Chamber, which the Prosecution further submitted provided an opportunity explore additional measures.[97]

38. The Trial Chamber did not address this offer at all in its Decision.[98] The question is not whether this offer itself resolves the issues before the Trial Chamber. At a minimum, it demonstrates a willingness of the provider to work with the Prosecution and with the Chamber to facilitate the adequate disclosure of exculpatory material to the Defence, in order to ensure the fairness of ongoing proceedings. The Trial Chamber, however, appears to have dismissed this offer – which the Prosecution stressed could provide an opportunity for the Chamber to explore alternative possibilities – out-of-hand.

39. The Chamber attempts to justify the total absence of consideration of the offer in the Decision, retroactively, when granting leave to appeal: stating that "it would be wholly wrong for the Bench to engage in private discussions with an information-provider outside of the context of a court hearing".[99] However there is nothing in the offer which precludes the discussions taking place in the context of a hearing, and the Trial Chamber has no basis on which to assume such limitations, especially without having explored the matter with the provider.

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[96] ICC-01/04-01/06-951, 11 September 2007; ICC-01/04-01/06-T-52-ENG, pp 10-20 and 62-68; ICC-01/04-01/06-1248, 28 March 2008; ICC-01/04-01/06-T-81-CONF-EXP-ENG, see pp 19-29; ICC-01/04-01/06-1267, 7 April 2008; ICC-01/04-01/06-1281, 16 April 2008; ICC-01/04-01/06-T-86-ENG, 6 May 2008, esp pp 14-24; ICC-01/04-01/06-T-88-ENG, 28 May 2008, pages 1 to 3,43 to 46 and 47 to 48; ICC-01/04-01/06-1364, 2 June 2008; ICC-01/04-01/06-1373, 3 June 2008; ICC-01/04-01/06-1385, 9 June 2008; ICC-01/04-01/06-T-89-ENG, 10 June 2008; ICC-01/04-01/06-1391-Conf, 11 June 2008; ICC-01/04-01/06-1400, 13 June 2008.

[97] ICC-01/04-01/06-1391-Conf, 11 June 2008, para. 7.

[98] Its absence from the Decision to Stay Proceedings is particularly conspicuous in the discussion of the Prosecution's recent discussions with the UN, paras. 67-69.

[99] In particular, the Chamber had concerns with the safeguard of a reliable court-provided record – see Decision Granting Leave to Appeal, para. 15. While the Chamber also refers to the absence of the Defence, the Prosecution notes that Rule 83 explicitly provides for hearings relating to Article 67(2) to be held *ex parte*.

40. In light of a tangible offer of direct and continued contact with the provider[100] which remains unexplored, the Prosecution submits that the key conclusion in the Decision that there was "no prospect" of the material being viewed by the Chamber[101] is startling. This is all the more so given that the provider in question, the United Nations, is under an obligation to "cooperate closely" with the Court in order to "facilitat[e] the effective discharge of [our] respective responsibilities":[102] a further factor indicating that the situation at hand was resolvable; but which the Trial Chamber failed to consider. The Prosecution submits that the recent developments in the case underscore the relevance of these considerations, and the unreasonable nature of the imposition of an indefinite stay: less than one month later, the Prosecution has been able to secure the agreement of the providers to place all relevant material before the Trial Chamber.

v) the availability of additional, more proportionate, remedies and options

41. In addition to the considerations above, there remained a range of other options which the Trial Chamber should have considered prior to taking the extraordinary step of staying the proceedings. For example, the Trial Chamber appears to have failed to consider the offer by some information providers to allow the Chamber to review 32 of the documents in question.[103] The Chamber also dismissed without consideration the possibility of examining the summaries of the undisclosed materials before making any other decision, which could have assisted in assessing the type of exonerating information in question; whether the summaries, on their face, were insufficient; and whether the system was workable.[104] The Chamber could further have commenced the trial and instructed the Prosecution to solve the matter within a specific time frame, after which a stay could have been ordered if no satisfactory solution had been reached.[105]

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[100] The Prosecution recalls that in the ICTY, such contacts have been used to jointly solve the problems arising due to the protection of information – see e.g. the case *Prosecutor v. Haradinaj et al.*, set out in more detail in Application for Leave to Appeal, para. 24 and footnote 76.
[101] Decision, para. 91.
[102] Relationship Agreement between the ICC and the UN, ICC-ASP/3/Res.1, Articles 2 and 3; see further *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-621, 20 June 2008, para. 106.
[103] See Decision, para. 64.
[104] At a minimum, the Chamber could have viewed the summaries for the purposes of narrowing the set of documents that it considered required closer examination, instead of assuming that it had to look at the totality of the material.
[105] In this context, the Chamber could have instructed the Prosecution to determine whether any of the material was critical for the cross-examination of any witness, and if so to re-arrange the presentation of evidence. The Prosecution notes that progressive disclosure of exculpatory evidence has happened in the *ad hoc* Tribunals, and that the fairness of trial has not been considered automatically compromised, much less irreparably - see e.g. the ICTY case *Prosecutor v. Brdjanin* et al., IT-99-36-T, "Decision on "Motion for relief from Rule 68 violations by the prosecutor and for sanctions to be imposed pursuant to rule *68bis* and motion for adjournment while matters affecting justice and a fair trial can be resolved", 30 October 2002. Once the problem of access to the exculpatory information was solved, the Chamber would have been in a position to compensate any arguable prejudice by deciding to have witnesses re-called, adjournments granted, or resort to any other remedies that the Chamber deemed adequate. *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-PT, Decision on the Defence Motion

42. Finally, the Chamber could have decided a confined postponement of the trial date pending a suitable solution of the issue, and instructed the Prosecution to focus all its efforts on solving the problem before the newly scheduled date for commencement of trial. However rather than recognising the ongoing nature of the process, and exploring any of these available and viable alternatives - either individually or in combination[106] - the Trial Chamber presented the situation as futile or an end-point, and prematurely imposed an indefinite stay of proceedings.

The stay of proceedings was also based on the consideration of irrelevant factors

43. The Trial Chamber's imposition of a stay of proceedings was based, in part, on its findings regarding the Prosecution's use of Article 54(3)(e).[107] Thus, to the extent that these findings were erroneous, i.e. if the Appeals Chamber upholds either of the first two grounds of appeal, then the imposition of the stay proceedings was based in part on a faulty legal premise. At the very least, a factor determined to be erroneous cannot be relevant for the purposes of the Decision, and its consideration as a factor underpinning the imposition of the stay itself constitutes an error.

Relief Sought

44. For the reasons set out above, the Prosecution respectfully requests that the Appeals Chamber overturn the Decision to Stay Proceedings.

Luis Moreno-Ocampo,
Prosecutor

Dated this 14th day of July 2008
At The Hague, The Netherlands

for Continuance of Trial, 30 April 2005, para. 7; *Prosecutor v. Brima et al.*, SCSL-04-16-T, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rule 66 and/or 68, 4 May 2005, para. 16; *Prosecutor v. Brdjanin*, IT-99-36-T, Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed pursuant to Rule *68bis* and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved", 30 October 2002, para. 26; *Prosecutor v. Oric*, IT-93-68-T, Judgement, 30 June 2006, para. 76; *Prosecutor v. Stakic*, IT-97-24-A, Judgement, 22 March 2006, para. 185.

[106] In addition to pursuing the proposal for consultations with the information provider, the Trial Chamber could also have issued requests for cooperation itself – see e.g. *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-621, 20 June 2008, paras. 104-105.

[107] Decision Granting Leave to Appeal, para. 24: "Underpinning the decision, in part, is the finding that the prosecution has inappropriately used Article 54(3)(e) of the Statute."