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TRIAL CHAMBER I

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

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

Public Document

**Prosecution's Application for Leave to Appeal against Decision
on Application to Lift the Stay of Proceedings**

Source: Office of the Prosecutor

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Introduction

The Prosecution hereby seeks leave to appeal Trial Chamber I "Decision on the Prosecution's Application to Lift the Stay of Proceedings" ("the Decision") of 3 September 2008. The Prosecution application is confined to the following issues:

- (1) whether the Trial Chamber erred in refusing to consider the documents now available to it (all the undisclosed evidence in unredacted form) and to lift the stay; and
- (2) whether the Trial Chamber erred in its interpretation and application of the requirement that any decision must be able to be the object of appellate review - refusing to review the documents, in the circumstances of this case, unless the Appeals Chamber had previously agreed to the conditions required by the provider to enable transmission of such documents to the Appeals Chamber in the event that appellate review is required.¹

Regarding the first issue, the Decision provides that the Chamber is not prepared at this time to "review all the documents (prior to lifting the stay) to assess which documents need to be disclosed". The Decision recognises that substantial progress has been made since the Chamber decided to stay proceedings in the instant case.² However, and based in considerations of fair trial it refuses to lift the stay of the proceedings or to even allow for consideration of the material in question by the Chamber.

The Prosecution respectfully submits that it has addressed the concerns that led to the original stay and complied with the substance of the conditions imposed by the Chamber, and that it was an error of the Chamber to conclude otherwise. The Chamber can now review all undisclosed documents in an unredacted form. It is in a position to make a decision on which documents need to be disclosed. In its initial decision of 13 June 2008, the Chamber decided to stay the proceeding because there

¹ The present request for leave to appeal does not concern the interpretation of Article 54(3)(e), and the way the Prosecution has previously provided information to the Judges to allow them to assess fairness of the proceedings while respecting its obligations under article 54 (3) (e), an issue on which the Prosecution previously sought and was granted leave to appeal.

² Decision, para. 28.

was no prospect for the Chamber to receive the necessary material in order to assess the impact, if any of the undisclosed information on the rights of the defence.

The Prosecution submits (1) that the principle of fair trial requires that the judges are the final arbiter of what has to be disclosed to the defence and (2) that, fair trial does not necessarily require that all information collected has to be provided to the Defence. In this Court, as well as in other national and international jurisdictions, there are grounds – *inter alia*, protection of witnesses, national security – providing for non disclosure in specific circumstances.

The Prosecution submits that the role of the Chamber as a custodian of the fairness of the proceedings and the rights of the accused has not been affected in the present proceedings, and the Chamber is in a position to make informed determinations on these matters. At this time, the Chamber can be provided with all the relevant material from the information providers for its examination. The Prosecution has provided to the Trial Chamber all undisclosed evidence from NGOs in unredacted form and on 10 July informed the Trial Chamber that “the Prosecution is in a position to *immediately* provide *all* UN documents that form part of the Undisclosed Evidence to the Trial Chamber”.³

The Trial Chamber appears to be now requiring as a one of the pre-condition to its consideration of all available documents that there is a “real prospect” of “sufficient access to any documents which the Chamber considers to be exculpatory” by the accused.⁴ The Prosecution reiterates that the requirements of fair trial do not imply that all documents should be disclosed to the defence; rather, fair trial requires that the Chamber first review the documents to ascertain their exculpatory nature and that, after its review, the Chamber can decide which information need to be disclosed and in what form (for instance, the Chamber can decide that the analogous information provided is enough to guarantee the right of the defence). Additionally, the Prosecution submits that, in fact, there is real prospect that the accused will be given “sufficient access” to any document which the Chamber considers to be

³ ICC-01/04-01/06-1450-Conf.Exp., para. 23.

⁴ Decision, para. 30.

exculpatory since the information providers have already accepted to disclose to the defence most of the undisclosed evidence. The UN had consented to disclose to the Defence at least 136 out of the 152 undisclosed UN documents. The UN is proceeding with its review and prepared to lift restrictions over other documents. The NGOs also are prepared to assist the Court in its first trial.

The Chamber's current approach, chiefly its refusal to modify the terms of the stay of proceedings and to even consider examining the documents in question, adversely affects the fairness of the proceedings *vis-à-vis* the Prosecution and the victim participants, as well as the expeditious conduct of the proceedings and the outcome of trial.

Concerning the second issue, the Decision affirms that "the proposals do not guarantee that any decision by the Chamber will be susceptible to full appellate review" and that "until a proper appeal is guaranteed (during which the Appeals Chamber is able to review all of the relevant documentation, along with a non redacted version of any relevant decision of the Trial Chamber)" an element of fair trial is missing. The Chamber would only be prepared to review the underlying material prior to lifting the stay [...] if the Appeals Chamber is able to consider in a similar non redacted form all of the relevant materials and any decision of the Trial Chamber on the issue".

The Prosecution submits this is a hypothetical argument – the possibility that the decision might not be able to be subject of full appellate review – and this hypothetical argument was a basis for a decision to maintain the stay of the proceedings. It is hypothetical as (1) there could be no appeal, (2) the Appeal Chamber could decide that it does not require reading the documents in order to review the Decision and (3) finally, the Appeal Chamber, as the master of its own proceedings, will determine the conditions it can and cannot accept from the information providers.

The Decision further infringes on the prerogatives of the Appeal Chamber. The Prosecution submits that the proper scope of appellate review is a matter within the

sole jurisdiction of the Appeals Chamber, and it is for that Chamber to authoritatively pronounce upon the requirements and conditions for such review.

Finally, the Trial Chamber has imposed a condition which may be impossible to fulfill for the Prosecutor, as there appears to be no procedural basis on which the Appeals Chamber could consider and agree to the assurances required by the provider in advance or in the abstract, outside of the context of any appeal. Thus, the Chamber is affecting the rights of the Prosecutor and the victims to an actual trial in order to preserve a hypothetical unfair appeal process.

The Prosecution presents below its arguments showing that the criteria for leave to appeal are met.

Background

1. On 11 June 2008, the Trial Chamber orally announced that the trial date was vacated,⁵ and on 13 June 2008, the Trial Chamber ordered that proceedings in the case be stayed.⁶
2. On 23 June 2008, the Prosecution sought leave to appeal against the Decision to Stay Proceedings.⁷
3. On 24 June 2008, the Trial Chamber held a status conference in which it, *inter alia*, provided "suggestions and observations in relation to any application that may be made in due course to lift the stay" proceedings.⁸
4. On 2 July 2008, the Trial Chamber granted the Prosecution leave to appeal the Decision to Stay Proceedings,⁹ in respect of two issues, including "Whether the

⁵ ICC-01/04-01/06-T-90-ENG. For further background to the vacating of the trial date and stay of proceedings, the Prosecution refers to the submissions cited in its Previous Application for Leave to Appeal, para. 1.

⁶ 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).

⁷ ICC-01/04-01/06-1407 ("Previous Application for Leave to Appeal").

⁸ ICC-01/04-01/06-T-91-ENG ET, 24 June 2008, p. 30, lines 22-24, and setting out those observations at pp. 31-33 ("Transcript of 24 June 2008 Status Conference").

⁹ ICC-01/04-01/06-1417 ("Previous Decision Granting Leave to Appeal").

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”.¹⁰

5. On 2 July 2008, the Trial Chamber also issued a separate decision in which it ordered the release of the Accused.¹¹ The Prosecution also appealed the Decision on Release,¹² noting that it was solely based on the Decision to Stay Proceedings and the appeals against the two decisions are thus inextricably linked.¹³
6. On 14 July 2008, the Prosecution filed its document in support of appeal against the Decision to Stay Proceedings,¹⁴ in which it submitted that the Trial Chamber made three errors in the decision, including 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 the proceedings.¹⁵
7. On 10 July 2008, the Prosecution filed an Application to Lift the Stay of Proceedings,¹⁶ in which it informed the Trial Chamber that “the Prosecution is in a position to *immediately provide all* UN documents that form part of the Undisclosed Evidence to the Trial Chamber”,¹⁷ as well as those from the other information providers, in unredacted form.¹⁸

¹⁰ The Trial Chamber went beyond the Application for Leave to Appeal, also 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)”.

¹¹ ICC-01/04-01/06-1418 (“Decision on Release”).

¹² ICC-01/04-01/06-1419 OA12, 2 July 2008; ICC-01/04-01/06-1429 OA12, 10 July 2008. The Appeals Chamber has granted suspensive effect to that appeal (ICC-01/04-01/06-1423 OA12, 7 July 2008).

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

¹⁴ ICC-01/04-01/06-1434 OA13. On 24 July 2008, pursuant to an order of the Appeals Chamber (ICC-01/04-01/06-1445 OA13, 22 July 2008) the Prosecution re-filed its Document in Support of Appeal (ICC-01/04-01/06-1446 and annexes).

¹⁵ On 16 July 2008, the legal representatives of the Victims filed an application to participate in this appeal (ICC-01/04-01/06-1439 OA13). On 25 July 2008, the Defence filed its response to the Prosecution’s Document in Support of Appeal (ICC-01/04-01/06-1447 OA13). On 6 August 2008, the Appeals Chamber granted the Victims “the right to participate in the present appeal for the purpose of presenting their views and concerns respecting their personal interests in the issues raised on appeal” (ICC-01/04-01/06-1453 OA13), which the victims filed on 12 August 2008 (ICC-01/04-01/06-1456 OA13).

¹⁶ ICC-01/04-01/06-1430-Conf-Exp. A public redacted version of this Application was filed the next day (ICC-01/04-01/06-1431). In that filing, the Prosecution also informed the Chamber that of the 19 documents from the United Nations which had been recently discovered, two fall within the range of Undisclosed Materials (see para. 12).

¹⁷ *Ibid*, para. 23 (and outlining the conditions of such review in para. 22)

¹⁸ *Ibid*, paras. 28, 31, 33, 36, 39 and 42.

8. The Prosecution continued to address this issue with the providers of the Undisclosed Materials, and in light of the progress which it made provided supplementary information to the Trial Chamber on 30 July 2008,¹⁹ 8 August 2008²⁰ and 22 August 2008.²¹ As a result, at the time of the Decision, the Prosecution was in a position to disclose the bulk of the UN documents directly to the Defence, in either redacted or unredacted form.²²
9. Pursuant to an order of the Trial Chamber,²³ the Defence responded to the Application to Lift the Stay on 1 September 2008.²⁴
10. On 3 September 2008, the Trial Chamber rendered its "Decision on the Prosecution's Application to Lift the Stay of Proceedings" (the "Decision"),²⁵ in which it held that it was unable to adequately review the undisclosed materials, that there was "no assurance that the prosecution will be able to afford adequate disclosure of all the exculpatory materials in the event that the Chamber concludes that Documents should be provided to the defence", and that as a result "it is necessary for the stay of proceedings to remain in place."²⁶
11. The Prosecution hereby seeks leave to appeal the Decision pursuant to Article 82(1)(d).

The Issues for which Leave to Appeal is Sought

12. The current application for leave to appeal is confined to the following issues:
 - whether the Trial Chamber erred in refusing to review the material in question and holding that the stay of proceedings must be maintained in the present circumstances;²⁷ and

¹⁹ ICC-01/04-01/06-1451.

²⁰ ICC-01/04-01/06-1454.

²¹ ICC-01/04-01/06-1462.

²² See, *ibid*, para. 4.

²³ ICC-01/04-01/06-1463, 26 August 2008.

²⁴ ICC-01/04-01/06-1464.

²⁵ ICC-01/04-01/06-1466-Conf-Exp (a public redacted version was filed the next day, ICC-01/04-01/06-1467).

²⁶ Decision, paras. 30, 38, 39.

²⁷ Leave to appeal this issue is requested without prejudice to the Prosecution's existing appeal regarding whether the stay of proceedings was properly imposed in the first place.

- whether the Trial Chamber erred in its interpretation and application of *the requirement that any decision must be able to be the object of appellate review* - refusing to review the documents, in the circumstances of this case, unless the Appeals Chamber had previously agreed to the conditions required by the provider to enable transmission of such documents to the Appeals Chamber in the event that appellate review is required.

The Prosecution submits that both issues affect the fair and expeditious conduct of the proceedings. In addition, each issue may affect the outcome of the trial. Finally, the immediate resolution of each issue by the Appeals Chamber will materially advance the proceedings.

The First Issue Fulfils the Criteria for Leave to Appeal

13. The First Issue has a similar impact on the proceedings as the issue of the Trial Chamber's original imposition of the stay of proceedings: by its refusal to consider the underlying materials, the Trial Chamber has maintained the stay and precluded any prospect of it being lifted at this stage. The Prosecution recalls that the Trial Chamber has already granted leave to appeal that issue – recognising that it affects both the fair and expeditious conduct of the proceedings, and that its immediate resolution will materially advance the proceedings.
14. Based on the Trial Chamber's original rationale for the imposition of the stay (i.e. that "The Chamber has been prevented from exercising its jurisdiction [...] in that it is unable 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"²⁸), and irrespective of the propriety of the original imposition of the stay of proceedings,²⁹ the Prosecution submits that the present circumstances warranted the review of the materials by the Trial Chamber, and the lifting of that stay. The Trial Chamber's approach to the review of the stay, in the face of the progress and

²⁸ Decision to Stay Proceedings, para. 92(iii); see also paras. 83-84, 88-89.

²⁹ As noted above, the issue of the original imposition of the stay is currently under consideration by the Appeals Chamber.

the options put before the Trial Chamber, was unreasonable and erroneous. For the purposes of the standard in Article 82(1)(d), the Trial Chamber's refusal to review the material and the consequential maintenance of the stay has a similar impact on the proceedings to its original imposition.

The First Issue arises out of the Decision

15. The Decision rejects the Prosecution's position that the relevant developments since the decision to stay proceedings removed the basis for such stay and met the conditions set forth by the Chamber to consider its lifting.³⁰ After considering the Prosecution's Application to Lift the Stay and subsequent filings providing Supplementary Information, the Trial Chamber held that "it is necessary for the stay of proceedings to remain in place."³¹ This question was the very object of the Application and Decision, and was therefore manifestly "a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination."³² Thus, irrespective of the propriety of the original stay of proceedings, the issue of whether that stay could have been maintained in the circumstances at this time arises out of this Decision and constitutes an appellable issue.

16. The Trial Chamber initially imposed the stay of proceedings because it deemed it was unable to review the potentially exculpatory material in order to assess the impact which such non-disclosure has on the fair trial rights of the accused.³³ The Trial Chamber recognized that Article 54(3)(e) provides a basis on which information³⁴ may be provided on a confidential basis to the Prosecutor in

³⁰ See, *inter alia*, Decision, paras. 39-40.

³¹ Decision, para. 39.

³² *Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 9.

³³ See e.g. Decision to Stay Proceedings, paras. 88 ("only the Chamber can make a decision on non-disclosure if exceptional circumstances so require. If it is proposed that evidence of this kind should be withheld, it is to be put before the judges in its original form and in its entirety. The ultimate responsibility for securing justice and ensuring fairness has been given to the Chamber [...] In this case, the Bench has been prevented from assessing for itself the impact on the fairness of these proceedings should the evidence remain undisclosed"); also para. 92(iii).

³⁴ Such material may be sensitive based on either the nature of the material or the circumstances at the time.

particular circumstances,³⁵ and that the consent of those providers was required before the material could be disclosed.³⁶ The Chamber also understood that some items of material may not be able to be disclosed to the defence in these proceedings, and that alternative measures may be necessary.³⁷ The stay was therefore not based on obstacles to disclosure of the documents to the defence *per se*; rather the primary basis for the stay was the Trial Chamber's assessment that it was unable to review the documents (in light of the defence's *prima facie* right to disclosure and the consequential implications of non-disclosure for the fairness of the proceedings).

17. However the situation now is quite different to that prior to the imposition of the stay: the Prosecution has provided, or is in a position to provide, the Chamber with all of the material for its review;³⁸ and the Chamber may thus perform its statutory duties and consider the exculpatory value of that material and the impact of non-disclosure (or disclosure through alternative means³⁹) on the fairness of the proceedings at this point.
18. This is therefore no longer a situation in which it is "impossible to piece together the constituent elements of a fair trial";⁴⁰ and by refusing to review the nature of the undisclosed material, assess the impact that any non-disclosure may have on the fair conduct of the trial at this stage, and consider whether preparation for trial can resume, the Prosecution submits that the Trial Chamber diverged from the standard upon which the stay was originally based. The refusal to review the

³⁵ Decision to Stay Proceedings, paras. 62, 71.

³⁶ See e.g. ICC-01/04-01/06-T-86-ENG ET, 6 May 2008, p. 35, line 20 to p. 36, line 4, and p. 37, lines 18-23; Decision to Stay Proceedings, paras. 64, 76.

³⁷ See in particular ICC-01/04-01/06-T-86-ENG ET, 6 May 2008, p. 36, line 3 to 10 (referring to items where it may be "impossible to disclose it to the Defence" and whether or not in such cases there is an "adequate remedy"); see also Decision to Stay Proceedings, para. 76.

³⁸ See Application to Lift Stay of Proceedings, para. 23 (and outlining the conditions of such review in para. 22). As the Chamber notes in para. 7 of the Decision, it has expressly given the undertaking required by the United Nations, namely that it not directly disclose the documents or their contents to the defence without the United Nations' consent.

³⁹ Including, for example, the provision of summaries, the possibility of making such items or information available to the defence by other means including subject to other permissible protective measures – see e.g. ICC-01/04-01/06-1431, 11 July 2008, paras. 22(ii), 34, 40; ICC-01/04-01/06-1431-Anx2, 11 July 2008, p. 4.

⁴⁰ Decision to Stay Proceedings, para. 93.

material and consider the substance of the Application to Lift the Stay is thus a separate and independent issue from its original imposition.

The First Issue affects the fair conduct of the proceedings

19. The maintenance of the stay of proceedings affects the fair conduct of those proceedings for the same reasons as the original imposition of the stay did. As the Prosecution previously submitted, this prevents it from fulfilling its core statutory duty.⁴¹ In granting leave to appeal against the Decision to Stay Proceedings, the Trial Chamber has recognized that “[t]he impugned decision has had the effect of halting the proceedings, and the prosecution is accordingly unable to present its case against the accused [...] the criterion as regards ‘fairness’ is made out, given the result of the decision.”⁴² The same logic applies: as a result of the maintenance of the stay of the proceedings, the Prosecution remains unable to present its case against the accused, and the fairness of the proceedings is therefore affected by this Decision.
20. In this sense, the Prosecution emphasizes that fairness is not a concept confined to the rights of the accused. Rather, fairness requires that the procedural and substantive rights and obligations of all participants, including the Prosecution,⁴³ be respected.⁴⁴ The Chamber’s refusal to lift the stay of proceedings adversely impacts on the fairness of the proceedings *vis-à-vis* the Prosecution and the victims. The Decision, loses sight of the rights of these procedural actors who also enjoy a legitimate expectation of fair proceedings.

⁴¹ Previous Application for Leave to Appeal, para. 27, and authorities cited therein (including Articles 42(1) and 54(1)(b)).

⁴² Previous Decision Granting Leave to Appeal, para. 24; see also para. 31 (“For the reasons set out above, a resolution of this second issue is necessary to ensure that the proceedings are fair and expeditious”).

⁴³ *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, paras. 38-39; *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24. This includes “that the Prosecutor must be able to exercise the powers and fulfil the duties listed in article 54” - *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, para. 39.

⁴⁴ This has been held to include respect for the norms of a fair trial (*Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 11), equality and the principle of adversarial proceedings (*Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, para. 38) See further *Situation in the DRC*, ICC-01/04-141, 25 April 2006, para. 48; *Prosecutor v Kony et al*, ICC-02/04-01/05-212, 26 February 2007, paras. 10-11.

21. Finally, this issue of whether the Trial Chamber should have reviewed the undisclosed materials in the present situation directly raises the question of “the extent to which, and the circumstances in which, the Trial Chamber should review and determine the prosecution’s obligations ‘in case of doubt’”⁴⁵ – a factor based on which the Trial Chamber previously granted leave to appeal.

The First Issue affects the expeditious conduct of the proceedings

22. The impact of the maintenance of the stay on the expeditious conduct of the proceedings is equally clear. The expeditious conduct of proceedings involves their conduct without undue impediment or delay.⁴⁶ The maintenance of the stay of proceedings will unavoidably delay those proceedings: as the Trial Chamber has recognised, the stay of the proceedings has “an inevitable consequence on the expeditiousness of the proceedings” and a resolution of that stay “is necessary to ensure that the proceedings are fair and expeditious”.⁴⁷

The First Issue affects the outcome of trial

23. In addition to the impact on the fair and expeditious conduct of the proceedings, the Prosecution also submits that the maintenance of the stay of proceedings may affect the outcome of the trial. The Trial Chamber itself recognised, when imposing the stay, the degree to which it may affect the outcome of trial.⁴⁸ As a result of the continued stay of proceedings (despite the recognised progress which has been made to resolve the difficulties) and the manner in which the Trial Chamber has interpreted and implemented the conditions imposed on the review of the material (set out in its observations subsequent to the imposition of

⁴⁵ Previous Decision Granting Leave to Appeal, para. 31.

⁴⁶ Referring to “the unimpeded and expeditious conduct” of the relevant proceedings: ICC-01/04-01/06-1335 OA9 OA10, 16 May 2008, para. 14. The Prosecution has previously submitted that expeditiousness requires that decisions at all stages not unduly or unnecessarily delay the overall determination of responsibility - see further *Situation in the DRC*, ICC-01/04-103, 23 January 2006, para. 29 and authorities cited therein. See Previous Application for Leave to Appeal, para. 29 and footnotes 88 and 89.

⁴⁷ Previous Decision Granting Leave to Appeal, paras. 24 and 31.

⁴⁸ As a result of the stay, “the Court will not make a decision on issues which are of significance to” a range of interested actors – Decision on Stay of Proceedings, para. 95.

the stay), there may be no determination of guilt or innocence. This impacts on the outcome of the trial in the most serious possible manner.

Immediate resolution of the First Issue will materially advance the proceedings

24. The Prosecution finally submits that the immediate resolution of this issue will materially advance the proceedings. The Trial Chamber previously held it to be “self-evident” that the immediate resolution of an issue regarding the stay will advance the proceedings “in the sense that if the stay is lifted, the trial will resume”.⁴⁹ Once more, the same logic applies in this case. If the Appeals Chamber resolves this issue, then the Trial Chamber may proceed to perform its statutory function by reviewing the undisclosed material, simultaneously or subsequently deciding on the lifting of the stay and allowing preparation for trial to recommence. Indeed, given the manner in which the Trial Chamber is interpreting and applying the additional requirements which have been added to the lifting of the stay, the resolution of this issue by the Appeals Chamber is the most likely method of progressing this case.

25. The Prosecution submits that the immediate resolution of this issue is required notwithstanding that the issue of the original imposition of the stay is presently pending before the Appeals Chamber. As demonstrated above, the issue arising out of this Decision is separate from the one presently under appeal; and the issue of whether the undisclosed materials should have been considered and the stay lifted does require prompt resolution at this time.

The Second Issue Fulfils the Criteria for Leave to Appeal

26. In addition to the overall impact of the maintenance of the stay of proceedings, the Prosecution submits that the Decision also raises a second issue, namely the manner in which the Trial Chamber interpreted and applied the requirement that

⁴⁹ Previous Decision Granting Leave to Appeal, para. 24; see also para. 31.

its decision be able to be the subject of appellate review. Such interpretation and application resulted in the refusal of the Trial Chamber to consider the substance of the Undisclosed Material and to assess the impact of their non-disclosure on the fairness of the proceedings.

The Second Issue arises out of the Decision

27. The Decision makes explicit that one of the fundamental concerns of the Trial Chamber, which led it to refuse to consider the substance of the Application for Lifting the Stay, was whether any decision could be the subject of appellate review.⁵⁰ The Decision states that “the proposals [... do not] guarantee that any decision by the Chamber will be susceptible to full appellate review” and that until “a proper appeal is guaranteed (during which the Appeal Chamber is able to review all of the relevant documentation, along with a non-redacted version of any relevant decision of the Trial Chamber), one of the principal elements of a fair trial will be missing”.⁵¹ The Chamber would only be prepared to review the underlying material prior to lifting the stay if “if the Appeals Chamber is able to consider in a similar, non-redacted form all of the relevant materials and any decision of the Trial Chamber on the issue”.⁵² The Second Issue is thus integral to the resolution of the matter before the Chamber, and constitutes an appealable issue arising out of the Decision⁵³.

28. The Trial Chamber allowed a hypothetical concern – the possibility that the decision might not be able to be subject of full appellate review⁵⁴ – to maintain the

⁵⁰ Decision, para. 33.

⁵¹ Decision, para. 40(iii).

⁵² Decision, para. 40(v).

⁵³ While the Decision refers to the status conference on 24 June 2008, including the Chamber’s discussion of the potential for any consideration of the undisclosed material being the subject of appellate review, the Prosecution submits that the Second Issue arises as an appealable issue out of this Decision. At that status conference, the Chamber presented its “preliminary view” (Transcript of 24 June 2008 Status Conference, p. 31, line 1) and made “certain suggestions and observations” (Transcript of 24 June 2008 Status Conference, p. 30, line 22; see also p. 31, line 21; p. 33, line 2), including on the approach that the Chamber is “likely” (Transcript of 24 June 2008 Status Conference, p. 32, line 18) to take in a given situation, in order to provide the Prosecution with “guidance” (Decision, para. 29).

⁵⁴ The Decision refers to a “real possibility” that a decision on review of the materials “may not be fully reviewable” (para. 33, emphasis added). In this context, the Prosecution recalls that such a question would only

stay of the proceedings. In contrast, the Prosecution recalls that a stay of proceedings is a measure of last resort,⁵⁵ to be imposed only (as the Trial Chamber recognized) when “at the outset, it is clear that the essential preconditions of a fair trial are missing”; “once it has become clear that the inevitable conclusion in the final judgment will be that the proceedings are vitiated because of unfairness”; and when there is “no prospect, on the information before the Chamber, that the present deficiencies will be corrected”.⁵⁶ The Prosecution submits that the Decision should not maintain this measure of last resort in order to avert a hypothetical risk to the fairness of the proceedings which may never materialize.⁵⁷ The Trial Chamber further allowed such a concern which, in addition to being hypothetical, in no way impeded its performance of its review function, to form the key basis on which the stay was maintained.

29. If leave to appeal is granted, the Prosecution will develop arguments before the Appeals Chamber to demonstrate that the concerns over appellate review could not sustain the stay of proceedings. The concerns relates to the ability of the Appeals Chamber to properly discharge its review functions, a matter that the Prosecution respectfully submits is first and foremost for the Appeals Chamber to determine. The Decision also requires the Appeals Chamber to agree to certain *conditions before a decision is rendered by the Trial Chamber*; whereas the Prosecution recalls that the Appeals Chamber has previously determined that it could not rule on matters of procedure in the abstract and does not have the jurisdiction to provide an advisory opinion.⁵⁸

arise if a party seeks, and is granted, leave to appeal; and that moreover that the provider has already agreed to enable the Appeals Chamber to review the items on the same conditions which the Trial Chamber has already considered as acceptable and consistent with the independent exercise of judicial functions and the fair conduct of the proceedings – see further para. 29, below.

⁵⁵ See further Previous Application for Leave to Appeal, para. 26; ICC-01/04-01/06-1446-Anx1, 24 July 2008, paras. 26-27; and authorities cited therein.

⁵⁶ Decision to Stay Proceedings, para. 91, emphasis added; see also para. 93 (“it is now impossible to piece together the constituent elements of a fair trial”). See further *Prosecutor v Lubanga*, ICC-01/04-01/06-772 OA4, 14 December 2006, para. 39 (relied upon in Decision to Stay Proceedings, para. 93), and also referring to situation in which “right from the outset, the applicant was definitively deprived of a fair trial” (para. 38, emphasis added).

⁵⁷ e.g. because no-one appeals the Chamber’s decision, or because at the relevant time the provider no longer requires such conditions, or because the Appeals Chamber simply agrees to the conditions in due course.

⁵⁸ *Situation in the DRC*, ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 30.

30. Furthermore, in this case the United Nations had made it clear that it would allow the Appeals Chamber to fully review the items on the same conditions which the Trial Chamber had already considered as acceptable and consistent with the independent exercise of judicial functions and the fair conduct of the proceedings.⁵⁹
31. Given the degree to which the Trial Chamber's refusal to review the materials and lift the stay of proceedings was based on its interpretation and application of the requirement that any decision be able to be the subject of effective appellate review, this issue also affects the fair and expeditious conduct of the proceedings and the outcome of the trial, and its immediate resolution will materially advance the proceedings, for the same reasons as those set out above in respect of the First Issue.⁶⁰ The Prosecution submits that those reasons in themselves warrant granting leave to appeal the Second Issue. However the Prosecution also submits that there are a number of additional ways in which this issue further impacts on the fair and expeditious conduct of the proceedings, and for which its immediate resolution is required.

The Second Issue affects the fair conduct of the proceedings

32. The right of appellate review is a key component of the fair conduct of the proceedings. The manner in which the Trial Chamber applied the requirement that its decision be able to be effectively reviewed by the Appeals Chamber, and its insistence on certainty with respect to this requirement prior to any consideration or review of the materials, thus affects the fair conduct of the proceedings.

⁵⁹ Namely the review of the documents in closed session and on an *ex parte* basis, and an undertaking not to disclose the documents or any non-public information contained therein without the consent of the information provider (ICC-01/04-01/06-1431-Anx2, 11 July 2008, pp. 4-5). See further Decision, para. 7; see also Decision to Stay Proceedings, para. 64.

⁶⁰ See paras. 19-25, above.

33. The Prosecution recalls that fairness also includes that all “participants be granted a genuine opportunity to present their case”.⁶¹ The Trial Chamber’s application of this requirement has prevented the Prosecution from having the merits of its application to lift the stay even considered. It has thus impacted on the ability of the Prosecution to present its case with respect to the impact of non-disclosure on the fairness of the proceedings and the lifting of the stay.
34. Finally, the manner in which the Trial Chamber has imposed this requirement directly impacts on “the extent to which, and the circumstances in which, the Trial Chamber should review and determine the prosecution’s obligations ‘in case of doubt’”⁶² – a factor based on which the Trial Chamber previously ruled that the original Decision to Stay Proceedings warranted appellate review.

The Second Issue affects the expeditious conduct of the proceedings

35. The manner in which this condition is being interpreted and applied is preventing the Trial Chamber from considering in substance the lifting of the stay of proceedings, despite all of the Undisclosed Material being available to the Trial Chamber.⁶³ This in itself impacts on the expeditious conduct of the proceedings.
36. Further, the Trial Chamber has imposed a condition which may be impossible to fulfill, as there appears to be no procedural basis on which the Appeals Chamber could consider and agree to the assurances required by the provider in advance or in the abstract, outside of the context of any appeal.⁶⁴ Thus, the interpretation and application of this condition by the Trial Chamber might lead to an indefinite prolongation of the stay.

⁶¹ *Prosecutor v Kony et al*, ICC-02/04-01/05-90, 11 July 2006, para. 24 (unsealed pursuant to ICC-02/04-01/05-135, 5 February 2007)

⁶² Previous Decision Granting Leave to Appeal, para. 31.

⁶³ See footnote 38, above.

⁶⁴ As noted above, the Appeals Chamber has previously ruled that it may not provide an advisory opinion, including on matters of procedure – see *Situation in the DRC*, ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 30.

The Second Issue affects the outcome of trial

37. The Prosecution submits that in light of the degree to which the refusal to review the Undisclosed Materials and consider lifting the stay was based on the concerns over the potential for appellate review of any decision, the Second Issue affects the outcome of the trial for the same reasons as the First Issue.⁶⁵

Immediate resolution of the Second Issue will materially advance the proceedings

38. As noted above, the Trial Chamber's decision not to review the Undisclosed Materials and consider the merits of the Application to Lift the Stay was in large part based on its concerns regarding appellate review. The immediate resolution of those concerns by the Appeals Chamber will thus materially advance the proceedings by providing an opportunity for the stay to be lifted or at least the Application to Lift the Stay to be considered, and possibly for the proceedings to recommence.

39. Further, the issue involves the question of whether the Appeals Chamber has agreed to certain conditions, or must agree to them. Granting leave to appeal this issue may thus provide the Appeals Chamber with an opportunity to consider the conditions themselves, in addition to whether they should have been imposed by the Trial Chamber, if appropriate.

40. More generally, in this Decision the Trial Chamber is purporting to set out the requirements for effective appellate review. The Prosecution submits that the proper scope of appellate review is a matter within the sole jurisdiction of the Appeals Chamber, and it is for that Chamber to authoritatively pronounce the requirements for such review.

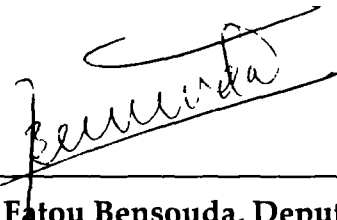
⁶⁵ See paras. 23, 26-27 and 31, above.

Request for an Expedited Decision

41. The Prosecution respectfully requests that the Trial Chamber decide on this application on an expedited basis. The Prosecution will also strive to file any appeal brief within a reduced time-limit.

Relief Sought

42. The Prosecution requests that the Trial Chamber grant leave to appeal the Decision.

A handwritten signature in black ink, appearing to read 'Fatou Bensouda', is written over a horizontal line.

Fatou Bensouda, Deputy Prosecutor
on behalf of

Luis Moreno-Ocampo, Prosecutor

Dated this 9th day of September 2008

At The Hague, The Netherlands