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**International
Criminal
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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

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

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

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REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC") in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following decision on the application of the Office of the Prosecutor ("prosecution") for leave to appeal against the Chamber's Decision on the Application to Lift the Stay of Proceedings:

I. Procedural history

1. On 13 June 2008, the Chamber rendered its "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008".¹ In this Decision the Chamber indefinitely stayed the proceedings against Mr Thomas Lubanga Dyilo as a result of the prosecution's failure to disclose to the defence or make available to the Chamber certain potentially exculpatory materials which had been obtained pursuant to confidentiality agreements made under Article 54(3)(e) of the Rome Statute ("Statute") ("Documents").
2. On 23 June 2008, the prosecution sought leave to appeal this Decision imposing a stay.² The legal representatives of victims a/0001/06 to a/0003/06 filed their response to the prosecution's application for leave to appeal on 24 June 2008, stating that they supported the application.³ On 27 June 2008, the defence filed its response to the prosecution's application for leave to appeal, which it did

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

² Prosecution's Application for Leave to Appeal "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 23 June 2008, ICC-01/04-01/06-1407.

³ Réponse à la demande du Procureur de faire appel contre la décision du 13 juin 2008, 24 June 2008, ICC-01/04-01/06-1410.

not oppose.⁴ On 2 July 2008, the Trial Chamber granted the prosecution's application for leave to appeal.⁵ The decision with regard to this appeal is currently pending before the Appeals Chamber.

3. The prosecution filed on a confidential *ex parte* basis a "Prosecution's application to lift the stay of proceedings" on 10 July 2008, and a public redacted version of the application, which was notified to the defence and the legal representatives of the victims the next day.⁶ The prosecution provided supplementary information to the application on 30 July 2008, 8 August 2008 and 22 August 2008 by way, respectively, of the "Prosecution's provision of information supplementing the 'Prosecution's application to lift the stay of proceedings'";⁷ the "Prosecution's provision of further information supplementing the 'Prosecution's application to lift the stay of proceedings'";⁸ and the "Prosecution's additional provision of further information supplementing the 'Prosecution's application to lift the stay of proceedings.'"⁹ The legal representatives of the victims did not respond to the application or supplementary information. On 26 August 2008, the Chamber ordered the

⁴ Réponse de la Défense à la « Prosecution's Application for Leave to Appeal "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 » datée du 23 juin 2008, 27 June 2008, ICC-01/04-01/06-1416.

⁵ Decision on the Prosecution's Application for Leave to Appeal the "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused", 2 July 2008, ICC-01/04-01/06-1417.

⁶ Prosecution's application to lift the stay of proceedings, 10 July 2008 (notified on 11 July 2008), ICC-01/04-01/06-1430-Conf-Exp, with 59 confidential *ex parte* prosecution only annexes; Prosecution's application to lift the stay of proceedings, 11 July 2008, ICC-01/04-01/06-1431, with 3 public annexes and 56 confidential *ex parte* prosecution only annexes.

⁷ Prosecution's provision of information supplementing the 'Prosecution's application to lift the stay of proceedings', 30 July 2008, ICC-01/04-01/06-1451, with 2 public annexes and 2 confidential, *ex parte*, prosecution only annexes

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

⁹ Prosecution's additional provision of further information supplementing the 'Prosecution's application to lift the stay of proceedings', 22 August 2008, ICC-01/04-01/06-1462, with 2 public annexes and 2 confidential, *ex parte*, prosecution only annexes.

defence to file a consolidated response,¹⁰ which was received on 1 September 2008.¹¹

4. On 3 September 2008, the Chamber rendered its Decision on the prosecution's Application to Lift the Stay of Proceedings ("Impugned Decision").¹² In the Impugned Decision the Trial Chamber rejected the prosecution's application to lift the stay and held, first, that the proposals unacceptably require the Chamber to return the Documents to the prosecution after its initial review unless the Appeals Chamber agrees to the same conditions as the Trial Chamber, thereby preventing the trial judges from keeping the Documents under review during the Trial.¹³ Second, the Chamber was not satisfied that it can adequately review the relevant Documents in a way which is susceptible to meaningful appellate review.¹⁴ The Chamber determined that these were the "core proposals", which in their current form are unacceptable, and unless and until they are adequately revised, it would be inappropriate for the Chamber to consider the Documents.¹⁵ The Chamber, furthermore, expressed its concern that "there is no assurance that the prosecution will be able to afford adequate disclosure of all the exculpatory materials in the event that the Chamber concludes that the Documents should be provided to the defence."¹⁶ However, the Chamber stressed that this apparent and significant difficulty would not prevent it from viewing the materials:

[...] the Chamber stresses that if all of the Documents from all the information providers are submitted to the Chamber in a non-redacted form for the entirety of the trial and if the Appeals Chamber is able to consider in a similar, non-redacted form all of the relevant materials and any decision of the Trial Chamber on the issue, the

¹⁰ Order for a defence response to the "Prosecution's application to lift the stay of proceedings" and the subsequent related filings, 26 August 2008, ICC-01/04-01/06-1463.

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

¹² Decision on the Prosecution's Application to Lift the Stay of Proceedings, 3 September 2008, ICC-01/04-01/06-1466-Conf-Exp; Redacted Version of "Decision on the Prosecution's Application to Lift the Stay of Proceedings", 3 September 2008, ICC-01/04-01/06-1467.

¹³ *Ibid*, paragraph 40 (ii)

¹⁴ *Ibid*, paragraph 30.

¹⁵ *Ibid*, paragraphs 29, 30, 31, 33, 34, 35, 36, 37 and 40 (v).

¹⁶ *Ibid*, paragraph 38

Bench would be prepared to review all the Documents (prior to lifting the stay) to assess which Documents need to be disclosed and whether the proposed methods of disclosure accord with the accused's right to a fair trial.¹⁷

5. On 9 September 2008, the prosecution filed an "Application for Leave to Appeal against Decision on Application to Lift the Stay of Proceedings"¹⁸ ("Application"). The defence filed its response to the application on 15 September 2008.¹⁹

II. Submissions of the parties

A. Prosecution

6. The prosecution has sought leave to appeal on two "issues":

The First Issue

- i) "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;" and

The Second Issue

- ii) "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

¹⁷ *Ibid*, paragraph 40 (v)

¹⁸ Prosecution's Application for Leave to Appeal against Decision on Application to Lift the Stay of Proceedings, 9 September 2008, ICC-01/04-01/06-1468.

¹⁹ Réponse de la Défense à la « Prosecution's Application for Leave to Appeal against Decision on Application to Lift the Stay of Proceedings » datée du 9 septembre 2008, 15 September 2008, ICC-01/04-01/06-1469

required by the provider to enable transmission of the such documents to the Appeals Chamber in the event that appellate review is required.”²⁰

7. In its Application, the prosecution submitted that it had complied with “the substance of the conditions” imposed by the Chamber and that the Chamber had erred in finding otherwise.²¹
8. The prosecution submitted that it was not a requirement of a fair trial that all collected information should be disclosed to the defence.²² The prosecution contended that access by the defence to the relevant Documents rehearsed in the application to lift the stay on proceedings is likely to be “sufficient”, on the basis that the United Nations has agreed to disclose to the defence 136 out of the 152 undisclosed UN Documents and that the “NGOs are prepared to assist the Court in its first trial”.²³

The First Issue

9. The prosecution contended that, with the provision to the Chamber of the non-redacted Documents from all the information providers, the original circumstances in which the Chamber had determined it was impossible to conduct a fair trial no longer apply, and that it is now possible to piece together

²⁰ Prosecution’s Application for Leave to Appeal against Decision on Application to Lift the Stay of Proceedings, 9 September 2008, ICC-01/04-01/06-1468, paragraph 12.

²¹ *Ibid*, page 3

²² *Ibid*, page 4. Insofar as it is suggested (which is unclear) that the Trial Chamber has ordered that “all documents should be disclosed to the defence” and that “all information collected has to be provided to the defence” (both set out at page 3 of the Application), this would fail to reflect each of the Trial Chamber’s decisions on disclosure. In its public and confidential rulings the Trial Chamber has expressly limited the prosecution’s obligation to disclosure to the terms of Article 67(2) and Rule 77.

²³ *Ibid*, pages 4 and 5. It is to be observed, however, that 84 of those 136 UN documents are available for disclosure only with redactions over which the Chamber seemingly has no control, and that for the 152 documents from other information providers, non-redacted disclosure does not appear possible in any circumstances and redacted disclosure is contemplated only in respect of 3 documents: ICC-01/04-01/06-1430-Conf-Exp and ICC-01/04-01/06-1431, paragraphs 25-26 and ICC-01/04-01/06-1430-Conf-Exp; ICC-01/04-01/06-1431, ICC-01/04-01/06-1451; ICC-01/04-01/06-1454; ICC-01/04-01/06-1462.

the constituent elements of a fair trial.²⁴ In particular the prosecution submitted that the “present circumstances warrant a review of the materials by the Chamber, and the lifting of (the) stay. The Chamber’s approach to the review of the stay, in the face of the progress and the options put before the Chamber, was unreasonable and erroneous”.²⁵

10. The prosecution argued that maintaining the stay affects the fair conduct of the proceedings, as it prevents the prosecution from presenting its case against the accused, in accordance with its statutory duty.²⁶ It submitted that the Chamber in refusing to lift the stay, has lost sight of the legitimate expectation of the parties that the proceedings will be fair,²⁷ and it emphasised that the procedural and substantive rights and obligations – which are the norms of a fair trial – apply equally to the prosecution and the defence, along with all the participants in the proceedings.²⁸ Therefore, the prosecution averred that in maintaining the stay, the Chamber has adversely affected the fairness of the proceedings as regards the prosecution and the participating victims.²⁹ The prosecution submitted that the Impugned Decision “loses sight of the rights of these procedural actors who also enjoy a legitimate expectation of fair proceedings”.³⁰

The Second Issue

11. The prosecution submitted that the judges are “the final arbiter of what has to be disclosed to the defence” and that the Trial Chamber is “custodian of the fairness of proceedings”.³¹ Against that background, the prosecution addressed one of the “fundamental concerns” of the Trial Chamber which led to its refusal to consider the Documents, namely whether any decision would be the subject

²⁴ *Ibid*, paragraphs 17 and 18

²⁵ *Ibid*, paragraph 14.

²⁶ *Ibid*, paragraph 19

²⁷ *Ibid*, paragraph 20.

²⁸ *Ibid*, paragraph 20 and footnote 44.

²⁹ *Ibid*, page 6 and paragraph 20.

³⁰ *Ibid*, paragraph 20.

³¹ *Ibid*, page 4.

of appellate review.³² The prosecution accepted that the Appeals Chamber (certainly as regards the Documents from the United Nations) will not be permitted to view the materials on which any decision of the Trial Chamber is based unless it accepted the same conditions as the Trial Chamber,³³ and it recognised that the Appeals Chamber has previously determined that it cannot rule on matters of procedure in the abstract (since it does not have the jurisdiction to provide an advisory opinion).³⁴ Notwithstanding those considerations, the prosecution contended that the Chamber's concern that its decision may not be fully reviewable is merely hypothetical.³⁵ In support of this contention, the prosecution suggested that the Appeals Chamber, in reviewing any decision of the Trial Chamber on the exculpatory nature of the Documents in question and the adequacy of any disclosure, may not wish to inspect the Documents themselves.³⁶

12. Against that background, although it accepted that "appellate review is a key component of the fair conduct of proceedings",³⁷ the prosecution argued that the concerns over appellate review expressed by the Trial Chamber are first and foremost for the Appeals Chamber to determine;³⁸ indeed, it averred that a determination of the proper scope of appellate review lies beyond the jurisdiction of the Trial Chamber.³⁹

Article 82(1)d of the Statute

13. The prosecution submitted that the First and Second Issues fulfil the criteria for leave to appeal on the basis of Article 82(1)(d) of the Statute.⁴⁰

³² *Ibid*, paragraph 27.

³³ *Ibid*, paragraph 30.

³⁴ *Ibid*, paragraph 29.

³⁵ *Ibid*, paragraph 28.

³⁶ *Ibid*, page 5.

³⁷ *Ibid*, paragraph 32.

³⁸ *Ibid*, paragraph 29.

³⁹ *Ibid*, paragraph 40.

⁴⁰ *Ibid*, paragraphs 12-40.

14. As regards the First Issue, the prosecution argued that the maintenance of the stay affects the fair and expeditious conduct of the proceedings, as it prevents the prosecution from presenting its case against the accused and accordingly will delay the proceedings.⁴¹ Moreover, the prosecution contended that the maintenance of the stay of the proceedings will affect the outcome of the trial as it precludes the determination of guilt or innocence.
15. As regards the Second Issue, the prosecution submitted that the fair and expeditious conduct of the proceedings and the outcome of the trial are affected thereby as the Chamber, in its Impugned Decision, diverged from the standard upon which the stay was originally based; it has prevented the prosecution from presenting its case; and that this may lead to an indefinite prolongation of the stay.⁴²
16. As regards both issues, the prosecution submitted that an immediate resolution by the Appeals Chamber would materially advance the proceedings as it may lead to, first, the review of the undisclosed materials by the Chamber; second, a lifting of the stay; and, third, the recommencement of preparations for trial.⁴³

B. Defence

17. The defence contended that the Application addresses only the Chamber's ability to view the exculpatory Documents, rather than the accused's access thereto, and the submissions highlighted that the former is already before the Appeals Chamber as part of the Appeal against the Decision imposing the

⁴¹ *Ibid*, paragraphs 19-22.

⁴² *Ibid*, paragraphs 31-37.

⁴³ *Ibid*, paragraphs 24 and 38-40

stay.⁴⁴ It submitted that the prosecution had not advanced a serious challenge to the Chamber's conclusion that there is a real prospect that adequate disclosure to the defence will be impossible.⁴⁵ Accordingly, the defence contended, the resolution of the issues raised by the prosecution in this Application would not, even if successful, result in the proceedings resuming, and that in the event the prosecution has failed to meet the requirements of Article 82(1)(d) of the Statute, since their resolution would neither significantly affect the fair and expeditious conduct of the proceedings nor materially advance the proceedings.⁴⁶

18. The defence also highlighted that the Application failed to meet most of the conditions imposed by the Chamber which should be met before the prosecution apply to lift the stay of proceedings.⁴⁷

III. Relevant Provisions

19. The following provisions from the Statute and Rules of Procedure and Evidence ("Rules") and other legislation are relevant to a consideration of the Application:

Article 54 of the Statute ("Duties and powers of the Prosecutor with respect to investigations"):

3. The Prosecutor may:

[...]

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

[]

Article 64 of the Statute ("Functions and powers of the Trial Chamber"):

⁴⁴ Réponse de la Défense à la *Prosecution's Application for Leave to Appeal against Decision on Application to Lift the Stay of Proceedings*, datée du 9 septembre 2008, 15 September 2008, ICC-01/04-01/06-1469, paragraphs 7-9.

⁴⁵ *Ibid*, paragraphs 10-11

⁴⁶ *Ibid*, paragraphs 12-14.

⁴⁷ *Ibid*, paragraph 15

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

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

[]

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

Article 67 of the Statute ("Rights of the accused"):

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

[...]

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

[.]

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

Article 82 of the Statute ("Appeal against other decisions"):

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[..]

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

[.]

Rule 77 of the Rules ("Inspection of material in possession or control of the Prosecutor"):

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

Rule 82 of the Rules (“Restrictions on disclosure of material and information protected under article 54, paragraph 3 (e)”):

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

Rule 83 of the Rules (“Ruling on exculpatory evidence under article 67, paragraph 2”):

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

Article 2 (“Right of appeal in criminal matters”) of Protocol 7 of the European Convention on Human Rights:

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Article 14, paragraph 5 of the Civil Covenant on Civil and Political Rights:

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

Article 8 (“Right to a Fair Trial”) of the American Convention on Human Rights

[. .]

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[.]

h. the right to appeal the judgment to a higher court.

IV. Analysis

A. The test to be applied on the Application

20. In its examination of the prosecution's Application, the Trial Chamber has considered Article 82(1)(d) of the Statute and its interpretation in the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" of 13 July 2006,⁴⁸ in which the Appeals Chamber set out the following:

- a) only an issue may form the subject-matter of an appealable decision;
- b) an issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination, i.e. not merely a question over which there is disagreement or conflicting opinion;
- c) not every issue may constitute the subject of an appeal, but it must be one apt to affect significantly (i.e. in a material way), either the fair and expeditious conduct of the proceedings or the outcome of the trial; and
- d) identification of an issue having the attributes adumbrated above does not automatically qualify it as the subject of an appeal insofar as the issue must be one for which, in the opinion of the Pre-Trial or Trial

⁴⁸ Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, paragraphs 9-15

Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

21. Accordingly, it has been necessary to examine the Application for leave to appeal against the following criteria:

- a) Whether the matter is an “appealable issue”;
- b) Whether the issue at hand could significantly affect:
 - i) the fair and expeditious conduct of the proceedings, or
 - ii) the outcome of the trial,

and

- c) Whether in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings.

22. The requirements a), b) and c) above are cumulative and therefore failure to fulfill one or more of them is fatal to an application for leave to appeal.⁴⁹

B. The merits of the prosecution’s Application

The Context

23. In its submissions, the prosecution suggested that the Trial Chamber “diverged from the standard upon which the stay was originally based”.⁵⁰

⁴⁹ Decision on the Prosecution’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06, a/0111/06 to a/0127/06, ICC-02/04-112, 20 December 2007, paragraph 17

To clarify, when it imposed the stay of proceedings, the issues and the facts before the Trial Chamber were markedly different; most particularly the Chamber, at that stage, was denied the opportunity, under any circumstances, of considering a significant number of potentially exculpatory Documents. The conditions that the Trial Chamber imposed on the prosecution in order to lift the stay were set out subsequently, at the Status Conference on 24 June 2008, during which the prosecution advanced proposals which it submitted sufficiently enabled the Chamber to view the Documents (namely, that the Chamber was to be allowed to see the documents, in the presence of a United Nations official at a location away from the seat of the Court, and without making any notes). The Chamber, in its Impugned Decision addressed, and found inadequate, the prosecution's further and significantly altered proposals (the Chamber is to be permitted to view the non-redacted Documents in Chambers and without supervision, for an initial review, during which it is to be allowed to make notes for the purposes of drafting a decision on disclosure).

The First Issue

24. For ease of reference, the First Issue is framed as follows:

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.⁵¹ (emphasis added)

25. The prosecution in framing the First Issue, consistent with its submissions, has merged two factors (viz. the Chamber's review of the materials and the maintenance of the stay) which, although related, are critically distinct.

⁵⁰ Prosecution's Application for Leave to Appeal against Decision on Application to Lift the Stay of Proceedings, 9 September 2008, ICC-01/04-01/06-1468, paragraph 18

⁵¹ *Ibid.*, paragraph 12

26. As set out in its 13 June 2008 Decision (and confirmed thereafter), the following is the position:

- i) In order for the Chamber to examine the Documents and to make disclosure rulings on them, they are to be provided in non-redacted form to the Trial Chamber for the entirety of the trial, and the Appeals Chamber (should there be a relevant appeal) will be able to review them under similar conditions, along with any non-redacted decision by the Trial Chamber on the issue of the disclosure or non-disclosure of the Documents.
- ii) In order for the Chamber to lift the stay, following its consideration of the materials and issuing Rulings thereon, there must be some real prospect that the accused will be given sufficient access to any Documents which the Chamber considers are exculpatory. (To put it otherwise, if there is no prospect that the accused will be given sufficient access to any Documents which the Chamber has determined are exculpatory, there can be no prospect that the trial will be fair. What is “sufficient” will be decided on the basis of a document-by-document review).

27. Examples of the manner in which the prosecution summarised the Chamber’s decision which may lead to a misunderstanding of the reasons contained therein, are to be found, first, at page 4 of the Application, in that as part of the introductory preamble it is suggested that:

The Trial Chamber appears to be now requiring as one of the pre-condition (sic) 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.⁵²

28. Second, the prosecution has linked two separate sentences, taken from different paragraphs of the Impugned Decision, as follows:

[...] 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 the Documents should be provided to the defence”, **and that as a result** “it is necessary for the stay of proceedings to remain in place”(emphasis added).⁵³

29. Third, the prosecution suggested “the Chamber’s current approach” is one in which it refuses “to modify the terms of the stay of proceedings and to even consider examining the documents in question...”.⁵⁴

30. As set out above, the Chamber’s review of the materials and a decision on lifting the stay of proceedings are separate issues, which will occur at different times, and they are dependent on different factors. Given this error in the Application, the First Issue **as framed** by the prosecution (which poses a question which is dependent on a false premise) does not arise out of the Impugned Decision.

31. However, the Trial Chamber has ruled that the stay of proceedings will remain in place until it is able to consider all the Documents **and** there is some real prospect that the accused will be given sufficient access to any Documents which meet the criteria of Article 67(2) and Rule 77.⁵⁵

⁵² *Ibid* , page 4, quoting excerpts from paragraph 30 of the Impugned Decision.

⁵³ *Ibid* , paragraph 10

⁵⁴ *Ibid* , page 5

⁵⁵ ICC-01/04-01/06-1466-Conf-Exp and ICC-01/04-01/06-1467, paragraph 30

32. Because these requirements have materially contributed to the maintenance of the stay of the proceedings, they affect the fair and expeditious conduct of the proceedings and the outcome of the trial, and, depending on the decision of the Appeals Chamber, an immediate resolution of them by that Chamber could materially advance the proceedings. Therefore, **on this formulation of the First Issue leave is granted.**

33. This formulation addresses the underlying question as regards the maintenance of the stay of the proceedings, which is whether a fair trial can occur if the Chamber concludes that there is, on the evidence before it, no prospect that material “exculpatory” evidence (viz. evidence covered by Article 67(2) and Rule 77) will be provided to the accused. It is necessary to stress, however, that this decision can only be made after each document has been reviewed.

The Second Issue

34. The Second Issue is framed as follows:

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 the such documents to the Appeals Chamber in the event that appellate review is required.

35. Although the Chamber is of the view that the Second Issue touches upon matters which should be the subject of an interlocutory appeal (viz. whether an adequate appellate review properly constitutes a precondition for the Chamber’s examination of the Documents), it considers that the Second Issue, as it is drafted by the prosecution, does not set out the matter to its full extent. Centrally, the prosecution has omitted one core element of the preconditions set by the Chamber in order for it to view the Documents, namely that the Chamber is to be provided with the material, in its non-redacted form, for the

entirety of the trial. It is only when this additional element is added to the Second Issue that the test set down in Article 82(1)(d) is met, because without it the fair and expeditious conduct of the proceedings or the outcome of the trial would not be engaged: whatever the outcome of the Appeal, the stay would remain in place unless and until this condition is met. Therefore, the issue as framed by the prosecution does not require an immediate resolution by the Appeals Chamber because it would not materially advance the proceedings.

36. However, with the inclusion of the necessary element highlighted above, the Second Issue raises matters which satisfy the test for an interlocutory appeal, as laid down by Article 82(1)(d) of the Statute, as follows:

37. The Trial Chamber has declined to consider the material in question until: **a)** the Documents are provided in non-redacted form to the Trial Chamber for the entirety of the trial, **and**, **b)** it is established that should there be a relevant appeal, the Appeals Chamber is able to review the Documents, along with any non-redacted decisions by the Trial Chamber addressing the disclosure or non-disclosure of the Documents. The Chamber observes that this is consistent with the central appellate provisions of the Statute and the human rights instruments set out at paragraph 19 above.
38. These conditions – a) and b) – are closely interrelated, in the sense that they must both be satisfied before the next step in the disclosure process (viz. the review of the Documents) can be taken. Because they have materially contributed to the maintenance of the stay of the proceedings, they inevitably affect the fair and expeditious conduct of the proceedings and the outcome of the trial, and, depending on the decision of the Appeals Chamber, an immediate resolution of them by that Chamber could materially advance the proceedings. Therefore, **on this issue leave is granted.**

39. In the present context, it is these factors alone which determine whether or not the Trial will progress; it follows that leave, on the prosecution's formulation of the First and Second Issues, is refused, and leave is granted on the reformulation set out below.

V. Conclusions

40. Following the overall order in which the Issues have been drafted by the prosecution, leave is granted in the following terms:

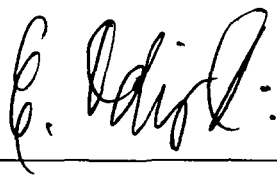
a) Whether the Chamber erred in ruling that the stay of proceedings will remain in place until it is able to consider all the Documents and there is some real prospect that the accused will be given sufficient access to any Documents which meet the criteria of Article 67(2) and Rule 77;

b) Whether the Chamber erred in refusing to consider the material until the following conditions are met: **a)** that the Documents are provided in non-redacted form to the Trial Chamber for the entirety of the trial, and, **b)** it is established that, should there be a relevant appeal, the Appeals Chamber is able to review the Documents, along with any non-redacted decisions by the Trial Chamber addressing the disclosure or non-disclosure of the Documents.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 24 September 2008

At The Hague, The Netherlands