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**International
Criminal
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THE APPEALS CHAMBER

Before: Judge Philippe Kirsch
Judge Georgios M. Pikis
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Daniel David Ntanda Nsereko

**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 on the
Prosecution's Application to Lift the Stay of Proceedings**

Source: Office of the Prosecutor

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

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INTRODUCTION

The Prosecution is appealing the “Decision on the Prosecution’s Application to Lift the Stay of Proceedings” (the “Decision”),¹ issued by Trial Chamber I on 3 September 2008.

In its Decision, the Trial Chamber erred:

- (i) in refusing to examine the Article 54(3)(e) materials with potential exculpatory value until it is sure that (a) in the event of an appeal, the Appeals Chamber is able to review the same documents and any non-redacted decisions by the Trial Chamber, and (b) it will have access to unredacted copies of the documents for the entirety of the trial (the first ground of appeal); and
- (ii) in refusing to lift the stay of trial, arguing that the conditions of fair trial are not met until it is assured that there exists a "real prospect" that the accused will have "sufficient access" to any document(s) that the Trial Chamber deems to be exculpatory or material to the preparation of the defence (the second ground of appeal).

As recognized in the Decision, the information providers have agreed and the Prosecution was able, at the time of the Decision, to put all material received under conditions of confidentiality but with potential exculpatory value before the Trial Chamber, for it to assess the impact of any non-disclosure on the fairness of the proceedings.²

However, the Decision affirmed 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

¹ ICC-01/04-01/06-1466-Conf-Exp (a public redacted version was filed the next day, ICC-01/04-01/06-1467).

² Decision, para.31.

version of any relevant decision of the Trial Chamber) one of the principal element of fair trial will be missing".³

The Chamber also considered 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". As a result, the Chamber determined "it is necessary for the stay of proceedings to remain in place."⁴

On the first ground, the Prosecution agrees that effective appellate review, whether sought by the prosecution or the defence, is a guarantee of a fair proceeding. But the Chamber is affecting the rights of the Prosecutor and the victims to an actual trial in order to preserve the fairness of a hypothetical appeal process. The Prosecution submits the stay was maintained based on a hypothetical argument – the possibility that the decision might not be able to be subject of full appellate review – and that the decision infringes on the prerogatives of the Appeals 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 declare its requirements and conditions for review.

On the second ground, the Prosecution submits that a fair trial does not necessarily require that all information collected has to be provided to the Defence. In this Court, and in national jurisdictions, there are recognized grounds – *inter alia*, protection of witnesses, national security – justifying non-disclosure. The trial will be fair if the accused has access to exculpatory information that he may offer into evidence at trial or an equivalent that will protect his rights. The equivalent may be analogous evidence, it may be a

³ Decision, para. 40(iii).

⁴ Decision, paras. 38, 39.

summary of the exculpatory information, it may be a stipulation, it may be the trial court's presumption or inference.

PROCEDURAL BACKGROUND

- 1) The Prosecution is currently appealing against two decisions of the Trial Chamber: the 13 June 2008 Decision to Stay the Proceedings⁵ and the 2 July 2008 Decision on Release of the Accused.⁶ The Prosecution filed its Appeal Brief in relation to the release of the Accused on 10 July 2008,⁷ and its Appeal Brief in relation to the imposition of a stay of proceedings on 14 July 2008.⁸ Detailed procedural histories are also set out in those Briefs and the Prosecution's 15 September 2008 Application under Regulation 28 to Provide Clarification or Additional Details.⁹
- 2) Following the 13 June decision, the Prosecutor continued to discuss disclosure with the providers of the Art. 54(3)(e) materials. On 10 July 2008, the Prosecution filed an Application to Lift the Stay of Proceedings.¹⁰ The Prosecution filed supplementary information with the Trial Chamber on 30 July 2008,¹¹ 8 August 2008,¹² and 22 August 2008.¹³

⁵ ICC-01/04-01/06-1401 ("Decision to Stay Proceedings").

⁶ ICC-01/04-01/06-1418 ("Decision on Release").

⁷ ICC-01/04-01/06-1429 OA12.

⁸ ICC-01/04-01/06-1434 OA13; ICC-01/04-01/06-1446-Anx1.

⁹ ICC-01/04-01/06-1470 OA12OA13.

¹⁰ ICC-01/04-01/06-1430-Conf-Exp; ICC-01/04-01/06-1431. At a 24 June 2008 status conference, the Trial Chamber made "suggestions and observations in relation to any application that may be made in due course to lift the stay": ICC-01/04-01/06-T-91-ENG ET, p.30, lines 22-24, pp. 31-33.

¹¹ ICC-01/04-01/06-1451.

¹² ICC-01/04-01/06-1454.

¹³ ICC-01/04-01/06-1462.

- 3) Pursuant to an order of the Trial Chamber,¹⁴ the Defence responded to the Application to Lift the Stay on 1 September 2008.¹⁵
- 4) On 3 September 2008, the Trial Chamber, in its “Decision on the Prosecution’s Application to Lift the Stay of Proceedings” (“the Decision”),¹⁶ denied the Application.
- 5) On 9 September, the Prosecution sought leave to appeal that decision.¹⁷ On 24 September, the Trial Chamber granted leave on two issues.¹⁸
- 6) The Prosecution’s Brief is filed pursuant to Regulation 65(4).

STATEMENT OF FACTS

- 7) The UN and other sources agreed to provide lead information to the Prosecution concerning crimes in the Democratic Republic of the Congo in accordance with the provisions of Art. 54(3)(e) of the Statute.¹⁹
- 8) The Prosecution notified the Trial Chamber that some of the documents acquired as lead information and subject to non-disclosure agreements contained potentially exculpatory information. The Prosecution provided the criteria by which the exculpatory value of the information was assessed, offered analogous information and invited the Trial Chamber to review the standard used.²⁰

¹⁴ ICC-01/04-01/06-1463.

¹⁵ ICC-01/04-01/06-1464.

¹⁶ ICC-01/04-01/06-1466-Conf-Exp; ICC-01/04-01/06-1467.

¹⁷ ICC-01/04-01/06-1468.

¹⁸ ICC-01/04-01/06-1473 (“Decision Granting Leave”).

¹⁹ The Rome Statute includes this guarantee of confidentiality at the investigative stage because it is essential to the ability of the ICC to investigate. See, e.g., Roy S. Lee, *The International Criminal Court*, Kluwer Law International, 1999, p. 1. See further ICC-01/04-01/06-1446-Anx1 OA13, paras. 20-21.

²⁰ ICC-01/04-01/06-1248.

- 9) On 13 June 2008, the Trial Chamber concluded that it would have to review the documents and ordered a stay of the proceedings, explaining that it "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".²¹ It further noted that there was "no prospect ... that the present deficiencies will be corrected."²² The Trial Chamber considered that its inability to determine whether non-disclosure would breach the rights of the accused had "ruptured" the process to the extent that it was "now impossible to piece together the constituent elements of a fair trial".²³
- 10) The Prosecution appealed this decision.
- 11) In parallel and as the Appeal was pending, the Prosecution continued to work with the providers to resolve the disclosure issues so that the trial could proceed in accordance with Trial Chamber decision. Through these efforts it obtained significant agreements from the providers to facilitate the Trial Chamber's review.
- 12) In particular, the United Nations, by letter to the Prosecutor on 3 July 2008, agreed to provide the documents to the Trial Chamber under conditions that "the judges conduct their review of those copies either in chambers or in closed session and ... *ex parte*" and that they not reveal the information from the documents.²⁴ The UN agreed that the judges could take notes and retain the notes under seal. The UN agreed to the provision of narrative summaries if information had to be disclosed to the defence. If narrative summaries were not adequate, the UN agreed to explore other

²¹ Decision to Stay Proceedings, para. 92(iii); see also paras. 83-84, 88-89.

²² Decision to Stay Proceedings, para. 91.

²³ Decision to Stay Proceedings, para. 93; relying upon ICC-01/04-01/06-772 OA4, para. 39.

²⁴ ICC-01/04-01/06-1431-Anx2 ("UN Letter" - a copy of this letter is annexed to the present Appeal Brief, Anx1).

alternatives, such as providing parts of the documents or allowing viewing by the accused and his Defence under protective circumstances.

13) The other providers also agreed that the Prosecution could provide their documents, unredacted and without conditions, to the Trial Chamber, without imposing further conditions for review by the Appeals Chamber.²⁵

14) The Prosecution thus filed an Application to Lift the Stay of Proceedings. That Application informed the Trial Chamber that, upon the Chamber's acquiescence to the UN conditions, the Prosecution could immediately provide all of the undisclosed UN materials to the Chamber in unredacted form.²⁶ The Prosecution also filed all of the material from the other information providers, again in unredacted form.²⁷ In a Confidential Ex Parte Annex to that filing, the Prosecution identified the providers and the nature of all of the documents concerned.²⁸ This addressed the concern that led to the imposition of the stay: the Trial Chamber could review all the undisclosed documents in their entirety and could consider their relevance and potentially exculpatory nature, assess the impact of their non-disclosure on the rights of the accused, and consider alternatives to disclosure or other safeguards to ensure the fairness of the trial.²⁹ Later supplementary filings informed the Chamber that the UN agreed that 136 documents (out of 152 documents provided by the UN) could be disclosed directly to the Defence -- 53 unredacted documents and 83 in redacted

²⁵ For an overview of the positions of the NGOs, see ICC-01/04-01/06-1430-Conf-Exp, paras. 28-44.

²⁶ ICC-01/04-01/06-1431, para. 23; see also para. 22.

²⁷ ICC-01/04-01/06-1431, paras. 28, 31, 33, 36, 39 and 42.

²⁸ ICC-01/04-01/06-1430-Conf-Exp-Anx1.

²⁹ As required by both the Appeals Chamber and the European Court of Human Rights (ECHR), see paras. 38) to 39), below, and authorities cited therein.

form³⁰ -- further reducing the undisclosed materials for the Trial Chamber's review.

- 15) The Trial Chamber held that the Application "meet[s] the requirements of the Trial Chamber in respect of its own initial access to the Documents".³¹ Nonetheless, the Trial Chamber refused to review them. It determined that conditions imposed by the UN -- namely, the fact that they did not permit access for the Appeals Chamber unless that Chamber had similarly provided for the same undertaking -- hindered the Trial Chamber's access to the documents for the entirety of the trial and its ability to refer to the details of the non-disclosed documents in a written decision that would be susceptible to full appellate review.
- 16) In addition, the Trial Chamber added a further condition to lifting the stay, namely that after the review is concluded, there must also be a "real prospect that the accused will be given sufficient access to any Documents which the Chamber considers to be exculpatory."³²

First Ground of Appeal –

THE TRIAL CHAMBER'S REFUSAL TO REVIEW THE ART. 54(3)(e) DOCUMENTS IS UNREASONABLE AND LEGALLY ERRONEOUS

- 17) On 13 June 2008, the Trial Chamber stayed this trial because the Prosecution could not provide the Art. 54(3)(e) documents to the Chamber to determine whether they contained exculpatory information or information material to the preparation of the accused's defence. In ordering the stay, the Trial Chamber explained that "the prosecution went no further than raising the possibility that the Chamber may be provided

³⁰ ICC-01/04-01/06-1462, para. 4.

³¹ Decision, para. 31.

³² Decision, para. 30 (emphasis added).

at some stage in the future with no more than incomplete and insufficient materials. There is, therefore, no prospect, on the information before the Chamber, that the present deficiencies will be corrected.”³³

18) As the Trial Chamber accepted in the Decision, the complaint identified in the first decision has been remedied. The confidentiality conditions proposed by the information providers are reasonable and consistent with the fair conduct of the proceedings.³⁴ The Trial Chamber now has the ability to determine whether information contained in the documents is exculpatory and consider the effect of non-disclosure on the fairness of the trial. That next step may be a determination that the information is of such marginal relevance in the context of the case, taking into account the nature of the information itself and the other analogous material already provided, that non-disclosure cannot possibly affect the fairness of the trial; or that the information must be disclosed.

19) Yet the Trial Chamber still refuses to proceed and will not review the materials. Its refusal is based on the ground that the Appeals Chamber has not already agreed to the UN’s conditions.

20) The Trial Chamber is first concerned that the Appeals Chamber may be denied access to a comprehensive and detailed decision and to the underlying Art. 54(3)(e) documents themselves. It concludes that to deprive the Appeals Chamber of these materials will deprive the accused of the possibility of a full and fair appeal, which is itself an essential attribute of a fair trial.

21) Second, the Trial Chamber is concerned that it will be denied continuing access to the documents throughout the trial, which it believes impacts its ability to make detailed and correct disclosure rulings during the trial

³³ Decision to Stay Proceedings, para. 91.

³⁴ Decision, para. 7.

itself. So, to protect the accused from a potentially unfair trial, the Trial Chamber declines to review the documents at all, the necessary prerequisite to the lifting of the stay.

22) The Appeals Chamber has expressly recognized that a stay should be ordered only when it is impossible to provide a fair trial. The circumstances here do not approach that standard. Thus, the Trial Chamber's conclusion is unreasonable and legally erroneous.

1. The Purported Unavailability of Appellate Review

23) The Prosecution agrees that effective appellate review, whether sought by the prosecution or the defence, is a guarantee of a fair proceeding. However, it is erroneous to conclude that the proposals by the UN would necessarily compromise appellate review, much less justify the Trial Chamber's refusal to review the documents now.

24) The NGO providers have not made demands in connection with the decision or the appeal. The UN's demands are *de minimus* in effect, but are based on fundamental concerns.³⁵ They arise out of the procedural uncertainty in the Statute and Rules as to how a Chamber of this Court is to proceed when faced with documents that the Prosecution obtained under Art. 54(3)(e). Without the undertaking sought by the UN being in place, the UN risks that the receiving Chamber, which is not itself bound by an Art. 54(3)(e) agreement, may proceed, pursuant to Art. 64(3)(c), to "provide for disclosure of documents or information not previously disclosed" by disclosing the documents without the UN's consent. Thus,

³⁵ The UN agreed to the Trial Chamber having access to the Art. 54(3)(e) documents on its undertaking to "conduct their review of those copies either in chambers or in closed session and ... on an ex parte basis" and would agree to Appeals Chamber access if it also accepted "not to disclose the documents or their contents to any other party." UN Letter, pp. 2, 3.

the UN required only that the Trial Chamber may not include, in its decision, “verbatim citations from, or paraphrases of the contents of, the documents.”³⁶ This is to reassure the UN that there will be no onward disclosure of the information contained in the documents without their prior consent. Moreover, due to the procedural uncertainty mentioned above, the UN seeks a similar clarification from the Appeals Chamber in the event that it needs access to the documents concerned.

25) As the Appeals Chamber has stated, “[t]he extent of the reasoning [required] will depend upon the circumstances of the case”.³⁷ A reasoned decision of the Trial Chamber must “indicate with sufficient clarity the basis of the decision”, “identify which facts it found to be relevant in coming to its conclusion”, and “provide reasoning to support its findings”.³⁸ It need not necessarily quote from or paraphrase the contents of the documents to satisfy that standard. All that may be required is identification of the document and its substance; an evaluation of its exculpatory value; and an assessment of the effect of nondisclosure, taking into account the available alternatives to disclosure, on the fairness of the trial.

26) There is thus no basis on which to conclude that it is impossible -- the very high threshold for imposition or continuation of the stay -- for the Trial Chamber to deliver a reasoned decision. If the Trial Chamber decides that the information is not disclosable, it can identify the information in sufficient terms and explain why it does not tend to show the innocence of the accused, mitigate his guilt, or affect the credibility of prosecution

³⁶ UN Letter, p. 3.

³⁷ ICC-01/04-01/06-773 OA5, para.20.

³⁸ *Ibid.*

evidence.³⁹ If the Trial Chamber determines that analogous other evidence suffices to protect the accused's rights, it can similarly identify the information and explain how the analogous evidence provides an adequate substitution. If the Chamber decides that the information should be disclosed and the provider refuses to consent, it can explain why the evidence is exculpatory and analyze alternatives to disclosure, including whether they are sufficient (or insufficient) to protect the defendant's right to a fair trial.

27) Further, it should not be assumed that the Appeals Chamber will have to conduct a *de novo* review and independently examine and assess the Art. 54(3)(e) protected documents in order to provide effective appellate review. Moreover, even to the extent that the Appeals Chamber determines that it must review the Art. 54(3)(e) protected documents, there is no reason to suppose that it would be unable or unwilling to provide the same degree of procedural certainty as the Trial Chamber itself already has.

28) The Prosecution also disagrees that the Trial Chamber could rightly have refused to perform its functions out of concern that a proper appeal is not "guaranteed". The "fundamental principle that first instance decisions ... should be susceptible to appellate review"⁴⁰ is appropriate, but the Chamber is incorrect in concluding that its decision cannot possibly be

³⁹ The Prosecution has already described information in some of the undisclosed documents in such a fashion. Its submission on undisclosed documents containing potentially exculpatory information, 28 March 2008, described categories of evidence. One example contained therein explained: "[t]his category of information relates to children who joined the UPC/FPLC voluntarily or were sent to the UPC/FPLC by their parents because they were hungry, orphans, destitute, or because they desired revenge for killed relatives, etc. The Prosecution submits that voluntary enlistment in the UPC/FPLC is legally irrelevant to the charges and that children under the age of 15 years cannot consent to enlistment or participation in hostilities and that voluntariness is thus not a valid defence." ICC-01/04-01/06-1248, para. 10.

⁴⁰ Decision, para. 33.

properly appealed under the current state of affairs. In making that determination it has intruded on the Appeals Chamber's prerogative. Moreover, assuming arguendo the possibility that there might be an effect on the subsequent appeal, that mere possibility does not justify the refusal of the Trial Chamber to perform its functions. The Trial Chamber has a duty to act. It cannot refuse to carry out that duty on the ground that another constituent Chamber may, in the future, be unable to perform its duties adequately.

29) Finally, the refusal of the Trial Chamber to review the documents imposes an impossible dilemma that further underscores the unreasonable nature of its decision. The Trial Chamber requires action that the Prosecutor cannot effect. The Appeals Chamber does not have an advisory function or jurisdiction.⁴¹ That this result -- an indefinite stay of the trial pending resolution of a matter that the parties are powerless to resolve -- follows from the Trial Chamber's decision is additional proof that the decision is unreasonable.

30) That said, the Trial Chamber's decision is now before the Appeals Chamber by virtue of this appeal, and the Appeals Chamber may deem that the appeal gives it jurisdiction to consider the UN's request.

2. The Possible Unavailability of Continuing Access to the Documents for the Entirety of the Trial

31) The Trial Chamber also considered that the Prosecutor's 10 July Application "does not appear to facilitate" its ability to keep within its possession the undisclosed material throughout the trial.⁴² The

⁴¹ ICC-01/04-503 OA4 OA5 OA6, para. 30; see also ICC-01/04-01/06-1433 OA11, Dissenting Opinion of Judge Song, para. 9; ICC-01/04-01/06-873 OA8, para. 6.

⁴² Decision, para. 31.

Prosecution disagrees that any perceived limitations on trial access to the documents necessarily creates the impossibility of a fair trial.

32) The UN does not seek to deprive the Trial Chamber of the access it needs.

Indeed, the UN explicitly contemplates the judges' retaining copies "for comparison and assessment against other evidence in the case."⁴³ The UN's sole concern is that the documents not be presented as part of a record on appeal absent the Appeals Chamber's agreement to protect their confidentiality.⁴⁴ Thus there appears to be no reason why the UN would object to the Trial Chamber retaining the documents throughout the trial, except for any confined period when an appeal (or application for leave to appeal) was pending and the Appeals Chamber had not itself agreed to protect the confidentiality of the documents.

33) Furthermore, even to the extent that there is any restriction on future access, this has no effect on the Trial Chamber's ability to review the documents now.

34) Finally, even during any period when the Trial Chamber does not have direct access to the documents, the judges may still retain their notes. Though the notes perhaps will not contain direct quotations and paraphrases, they nonetheless will allow the exculpatory value of the documents to be kept under ongoing review. These notes and any redactions can be cross-referenced to the original documents, further facilitating ongoing review and indicating the possibility of future access if required. Given these circumstances, the Trial Chamber could not legitimately conclude that any review, pre-trial or ongoing, will be inadequate.

⁴³ UN Letter, p. 2.

⁴⁴ UN Letter, p. 3: "This would be necessary since there would not yet, at that point, be any undertaking in place from the Appeals Chamber, similar to that made by the Trial Chamber, not to disclose the documents or their contents to any other party."

The Second Ground of Appeal

THE TRIAL CHAMBER ERRED IN LAW BY CONCLUDING THAT A FAIR TRIAL IS IMPOSSIBLE UNLESS THE ACCUSED HAS SUFFICIENT ACCESS TO ANY EXCULPATORY DOCUMENTS.

- 35) The Decision states that “before lifting the stay of proceedings, the Trial Chamber must be satisfied ... that there is some real prospect that the accused will be given sufficient access to any Documents which the Chamber considers to be exculpatory”.⁴⁵
- 36) The Prosecution disagrees with the conclusion that a trial is necessarily unfair if the accused is denied a given item because of a confidentiality undertaking sanctioned under Article 54(3)(e). The Appeals Chamber has ruled that “the right to disclosure is not absolute ... [T]he withholding of disclosure of information from the Defence is permissible so as to preserve the fundamental rights of another individual [N]ot every incident of non-disclosure automatically results in an unfair trial”.⁴⁶ Rather, the defence’s undisputed right to the disclosure of exculpatory information remains “subject to the statutory regime relating to restrictions on disclosure”.⁴⁷
- 37) According to the Appeals Chamber “a careful assessment will need to be made, in each case, to ensure that any measures restricting the rights of the Defence that are taken to protect individuals at risk are strictly necessary and sufficiently counterbalanced by the procedures taken by the ...

⁴⁵ Decision, para. 30 (emphasis added).

⁴⁶ ICC-01/04-01/07-475, para.62 (emphasis added). Indeed, the Trial Chamber appears to have adopted this approach in its 13 June Decision (see paras. 76 and 89).

⁴⁷ ICC-01/04-01/06-1433 OA11, para. 55.

Chamber”.⁴⁸ This assessment shall be made on the “facts of an individual case”.⁴⁹

38) In making the above findings, the Appeals Chamber relied, *inter alia*, on the consistent jurisprudence of the European Court of Human Rights.⁵⁰ In particular, it relied on the Grand Chamber case of *Rowe and Davis v. UK*, which applies the above principle not only to the pre-trial phase of the proceedings, but to criminal proceedings in general.

39) In line with the jurisprudence of the Appeals Chamber⁵¹ and the ECHR,⁵² and other jurisdictions that have considered the issue,⁵³ the general presumption is that exculpatory information should be disclosed.

⁴⁸ ICC-01/04-01/07-475, para.59.

⁴⁹ *Ibid*, para.62. The Appeals Chamber further provided specific guidance on the procedure to be followed for the purpose of determining whether or not redactions affect the fairness of the proceedings (ICC-01/04-01/07-475, paras.65-73).

⁵⁰ *Ibid*, para.57

⁵¹ In particular ICC-01/04-01/07-475 OA, paras. 62-64, 66, 69, 72(c) and (d), 73(a); see also ICC-01/04-01/07-476 OA2, paras. 62; ICC-01/04-01/06-568 OA3, para. 36.

⁵² In addition to *Rowe and Davis v UK* (above), see e.g. *Fitt v UK*, Application 29777/96, 16 February 2000, paras. 45-49; *Edwards and Lewis v UK*, Applications 39647/98 and 40461/98, 27 October 2004, para. 46; *Doorsen v Netherlands*, Application 20524/92, 26 March 1996, para. 70 (also paras. 75, 83).

⁵³ In the United Kingdom, the *Criminal Procedure and Investigations Act* 1996 expressly provides for the non-disclosure of potentially exculpatory evidence (section 3(1)(a) and (6)). The legislation of the United States of America also provides for alternatives to disclosure in the case of classified information, see e.g. the *Classified Information Procedures Act*, Title 18 US Code App., sections 4, 6.

In Canada, the Supreme Court has recognised that the “obligation to disclose is not absolute”, that “information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege”, and that “the absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure” (*R. v. Stinchcombe* (1991) 3 SC. 326). When considering the privilege for informers, disclosure is only required where the innocence of the accused is at stake (*R. v. Leipert*, [1997] 1 SCR 281, paras. 20-25): i.e. the true exculpatory value of the information must be considered, and not every piece of information which may assist need be disclosed.

In South Africa, the Constitutional Court has similarly recognised that an accused is entitled to disclosure of exculpatory material unless “the State is able to justify the refusal of such access on the grounds that it is not justified for the purposes of a fair trial”, albeit considering that such cases will be rare (*Shabalala v Attorney-General of Transvaal* [1995] ZACC 12, para. 72(3), see also paras. para. 37, 39, 43, 49-50, 52).

However, it is not the case that every instance of non-disclosure constitutes a *prima facie* deprivation of a fair trial.

40) Mindful of its obligations under the Rome Statute, the Prosecution adopted as a standard a very broad interpretation of the term potentially "exculpatory" information. This broad standard created the high number of documents with some potentially exculpatory value. This case presents instances where, as the Prosecution submitted to the Trial Chamber, documents included under the definition of potentially "exculpatory" and subject to confidentiality assurances can have no bearing on the outcome of the trial.

41) For instance, in the present proceedings, some undisclosed documents relate to the recruitment and use of child soldiers by other armed groups in Ituri.⁵⁴ Denying the defence access to one of these items could not in any sense render the trial unfair as the Prosecution has provided more than 100 items containing information on the same issue.⁵⁵ This example is illustrative of the fact that the Trial Chamber did not correctly assess the potential impact of the lack of disclosure of some materials on the fairness of the proceedings.

42) It is impossible to conclude, in advance of the trial (much less in advance of actually reviewing the documents themselves), that nondisclosure of exculpatory information automatically renders a trial unfair. Rather, the inability to disclose is only the beginning of the inquiry. It triggers a balancing process that will consider the relevance of the exculpatory information, the impact of nondisclosure on the fairness of the trial, the availability of suitable alternatives to full production -- including redactions, summaries, stipulations, or inferences -- and the possibility

⁵⁴ ICC-01/04-01/06-1248, paras. 11-12.

⁵⁵ See ICC-01/04-01/06-1248, footnote 28.

that, if disclosure is required and no suitable alternative exists, the Prosecution may withdraw one or more charges. The ultimate determination whether non-disclosure under the facts of the case renders the trial unfair should be made at the end of the inquiry.

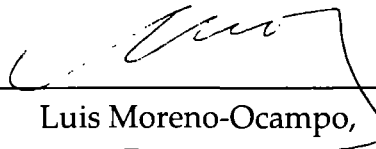
- 43) It was erroneous to decide, even before the review of the documents and the start of the trial, that the possible withholding of documents of unknown exculpatory value and the possible resort to other remedial measures necessarily makes the trial unfair.

RELIEF SOUGHT

- 44) For the reasons set out above, the Prosecution respectfully requests that the Appeals Chamber uphold the appeal, overturn the Decision, and direct the Trial Chamber to:

- (1) lift the stay,
- (2) review the materials,
- (3) rule on the extent to which disclosure and/or other remedies are required to ensure a fair trial.

- 45) Because the 13 June Decision to Stay Proceedings was predicated upon the Prosecution's inability to give the documents to the Trial Chamber for review, the fact that the documents are now fully available to it justifies, in the Prosecution's view, the request that the stay be lifted. If the Appeals Chamber agrees and orders as a remedy that the Trial Chamber lift the stay, the appeal number OA13 against decision ICC-01/04-01/06-1401 can then be discontinued; though the appeal number OA12 against decision ICC-01/04-01/06-1418 remains for determination.



Luis Moreno-Ocampo,
Prosecutor

Dated 6 October 2008

At The Hague, The Netherlands