

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 13 June 2008

TRIAL CHAMBER I

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

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

Public Document

URGENT

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

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

1. Trial Chamber 1 (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”) in the case of The Prosecutor v. Thomas Lubanga Dyilo, following the Status Conference on 10 June 2008 and the Chamber’s oral announcement on 11 June 2008 that the trial date of 23 June 2008 was vacated,¹ delivers its decision on the following issues:

(a) The consequences of the inability on the part of the Office of the Prosecutor (“prosecution”) to disclose to the accused potentially exculpatory materials covered by agreements entered into pursuant to Article 54(3)(e) of the Rome Statute (“Statute”);

(b) The applications by the defence on 2 June 2008, contained within its “Requête de la Défense aux fins de cessation des poursuites”² seeking **orders** from the Chamber:

1. For the discontinuance of the prosecution and the release of the accused;
2. For the immediate disclosure of potentially incriminatory material;
3. That the defence is not obliged to notify the Court of its lines of defence; and
4. That any potential charges currently being investigated in the context of the situation in the Democratic Republic of

¹ Transcript of hearing on 11 June 2008, ICC-01/04-01/06-T-90-ENG.

² ICC-01/04-01/06-1366.

the Congo ("DRC") will not be brought against the accused.

2. Certain other matters were addressed during the Status Conference which, given the Chamber's conclusions on the first issue, have not been resolved in this Decision.

I. Background and submissions

A. Procedural history

3. The disclosure of potentially exculpatory evidence received by the prosecution under the provisions of Article 54(3)(e) of the Statute has been the subject of consideration – including by way of oral and written submissions – since the earliest hearings before the Trial Chamber in this case. It was first raised by the prosecution in its 11 September 2007 filing³ to which the defence responded on 24 September 2007;⁴ these were followed by oral submissions during the Status Conference of 1 October 2007⁵ and 2 October 2007.⁶ The main elements of those submissions, in so far as they relate to the subject matter of the present decision, are rehearsed below.
4. Furthermore, during the course of this pre-trial phase, the Chamber has rendered various decisions which have touched upon this issue, and these also, where relevant, are set out below.

³ Prosecution's submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol, 11 September 2007, ICC-01/04-01/06-951.

⁴ Argumentation de la Défense sur des questions devant être tranchées à un stade précoce de la procédure : la date du procès, les langues à être utilisées au procès, la divulgation de la preuve et le *e-court protocol*, 24 September 2007, ICC-01/04-01/06-960.

⁵ Transcript of hearing on 1 October 2007, ICC-01/04-01/06-T-52-ENG, pages 13-19, 51-52, 83-88 and 93-94.

⁶ Transcript of hearing on 2 October 2007, ICC-0104-0106-T-54-ENG, pages 47-49.

5. On 9 November 2007 this Chamber rendered its “Decision regarding the timing and manner of disclosure and the date of trial” wherein it held as regards the agreements entered into by the prosecution for the provision of information on a confidential basis, that “from the moment the prosecution entered into the agreements and was thereafter presented with exculpatory materials, it has been under an obligation to act in a timely manner to lift the agreements in order to ensure a fair trial without undue delay.”⁷ In light of the proposed commencement of trial (at that time being 31 March 2008)⁸ the Chamber ordered the disclosure of the prosecution evidence to the defence by 14 December 2007.⁹ Any redactions sought by the prosecution were to be explained and justified.¹⁰ The Chamber stated that the obligation to disclose potentially exculpatory evidence as soon as is practicable would continue throughout the trial period.¹¹
6. The Chamber further indicated that the prosecution would be under an obligation to withdraw any charges where non-disclosed exculpatory material has a material impact on the Chamber’s determination of the guilt or innocence of the accused. If the prosecution were in doubt as to whether or not any material falls into this category, the Chamber directed that it should be put before the Trial Chamber for its determination.¹²

⁷ Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, 9 November 2007, ICC-01/04-01/06-1019, paragraph 19.

⁸ *Ibid*, paragraph 29.

⁹ *Ibid*, paragraph 25.

¹⁰ *Ibid*, paragraph 27.

¹¹ *Ibid.*, paragraph 28.

¹² *Ibid.*.

B. Submissions of the parties and the participants

1. Interpretation of the statutory provisions

a. The extent of the prosecution's disclosure obligations

7. The prosecution underlined that whilst Article 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence ("Rules") require disclosure of materials, Rule 77 refers to Rule 81 which "subjects disclosure to the requirements of confidentiality contained *inter alia* in Article 54, as well as to Rule 82 which similarly operates as a restriction on disclosure".¹³
8. The prosecution submitted that it had taken a very liberal approach to the definition of "exculpatory" under Article 67(2) so as to include *tu quoque* material. However, the prosecution submitted that material in this category did not afford the accused with a valid defence since in its view the undisclosed evidence does "not materially impact on the Court's determination of the guilt or innocence of the accused".¹⁴
9. During the Status Conference on 10 June 2008, the Bench requested the prosecution to define its usage of the term "exculpatory". In particular it queried how potentially exculpatory evidence would not, *ipso facto*, potentially impact on the guilt or innocence of the accused. To this the prosecution submitted that such evidence could be merely mitigating, or Rule 77 evidence (the latter only being material to the preparation of the defence). The prosecution clarified, therefore, that its use of the term "exculpatory material" included, but was not limited to, mitigating evidence.¹⁵

¹³ Prosecution submission on undisclosed documents containing potentially exculpatory information, 28 March 2008, ICC-01/04-01/06-1248, paragraphs 5 and 31.

¹⁴ Transcript of hearing on 10 January 2008, ICC-01/04-01/06-T-69-ENG, page 59, line 18 to page 60, line 9. See also Transcript of hearing on 10 June 2008, ICC-01/04-01/06-T-89-ENG, pages 14-15.

¹⁵ Transcript of hearing on 10 June 2008, ICC-01/04-01/06-T-89-ENG, pages 14-15.

10. On the question of whether mitigating material should also be disclosed to the defence, prior to any sentencing procedure, the prosecution submitted there should be no difference in the approach to the disclosure of such material.¹⁶
11. The defence argued that Article 54(1)(a) of the Statute imposed a responsibility on the prosecution to investigate exonerating materials. One reason for this, in the submission of the defence, was that it did not have the resources, authority or institutional aids which are available to the prosecution.¹⁷ This responsibility, according to the defence, created an obligation for the prosecution to disclose exculpatory and mitigating evidence to the defence.¹⁸
12. The defence submitted that the prosecution had adopted an unjustifiably narrow interpretation of Article 67(2) of the Statute. In particular, it emphasised that the prosecution must disclose not only exculpatory evidence but also mitigating evidence or evidence that affects the credibility of prosecution evidence.¹⁹ The defence argued that exculpatory evidence must be understood in light of Rule 145 of the Rules which provides that any mitigating or aggravating factors must be taken into account when sentencing. This included, in the submission of the defence, evidence relating to: the nature of the unlawful behaviour, the means used to employ it, the accused's degree of participation and intent and the manner, time and location of the crime. The defence argued that all mitigating material within Rule 145 must be disclosed by the prosecution.²⁰

¹⁶ Transcript of hearing on 6 May 2008, ICC-01/04-01/06-T-86-ENG, page 24, lines 19-25.

¹⁷ Réponse de la Défense à la "Prosecution's submissions on undisclosed documents containing potentially exculpatory information" datée du 28 mars 2008, 22 April 2008, ICC-01/04-01/06-1291, paragraph 6.

¹⁸ *Ibid.*, paragraph 7.

¹⁹ *Ibid.*, paragraphs 9-10.

²⁰ *Ibid.*, paragraphs 12-13.

13. The defence submitted and relied on jurisprudence of the International Tribunal for the Former Yugoslavia ("ICTY"), in support of the proposition that restrictions on disclosure of materials do not relieve the prosecution of its obligation to disclose to the defence material which tends to show the innocence of the accused.²¹ The prosecution contended that the jurisprudence of the ICTY which upheld the principle of the disclosure of exculpatory material could be distinguished from the present circumstances as the prosecution has already disclosed evidence similar to the protected exculpatory material to the defence.²²

b. Status and exculpatory value of non-disclosed materials

14. On 11 September 2007 the prosecution informed the Chamber that it anticipated completing disclosure, or applying for the removal of restrictions, by the end of October 2007.²³ However, it suggested that the outcome of the process was beyond its control.²⁴

15. During the Status conference on 1 October 2007 the prosecution informed the Chamber of the disclosure status of evidence obtained pursuant to Article 54(3)(e). The prosecution noted that information providers had refused to lift the restrictions in respect of 46 documents comprised of about 220 pages.²⁵ The prosecution informed the Chamber that, at that time, requests to lift redactions were pending as regards over 500 documents which amounted to about 3080 pages.²⁶

²¹ Transcript of hearing on 6 May 2008, ICC-01/04-01/06-T-86-ENG, page 28, lines 3-14.

²² *Ibid.*, page 33, lines 14-18. See also Transcript of hearing on 10 June 2008, ICC-01/04-01/06-T-89-ENG, page 7, line 24 to page 8, line 4.

²³ Prosecution's submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol, 11 September 2007, ICC-01/04-01/06-951, paragraph 24.

²⁴ *Ibid.*, paragraph 25.

²⁵ Transcript of hearing on 1 October 2007, ICC-01/04-01/06-T-52-ENG, page 14, lines 3-6.

²⁶ *Ibid.*, page 14, lines 7-11.

16. Following a request by the Chamber on 13 March 2008,²⁷ the prosecution provided a summary of the status of exculpatory materials in its written submissions on 28 March 2008.²⁸

17. In its 28 March filing the prosecution provided an update on the status of potentially exculpatory materials collected pursuant to Article 54(3)(e).²⁹ In particular it informed the Chamber that as of 25 March 2008 it had disclosed or provided for pre-inspection 76 documents containing potentially exculpatory information or falling within the scope of Rule 77. Of these 76 documents, the prosecution noted that 44 were disclosed or provided in full, whilst 32 were disclosed with redactions requested by the information providers. Finally, in reporting on the status of potentially exculpatory material, the prosecution informed the Chamber that a total of 216 items containing potentially exculpatory material or information falling within the scope of Rule 77 had not been disclosed to the defence. For 35 of these items, the prosecution noted that it was awaiting responses to requests to disclose from information providers. However, it noted that information providers had refused to lift Article 54(3)(e) restrictions as regards the remaining 181 items.³⁰

18. On 7 April the prosecution informed the Chamber that the undisclosed evidence comprised 212 rather than 216 items.³¹

19. During the Status Conference of 10 June 2008 the prosecution provided up-to-date information to the Chamber on the situation as regards undisclosed material and its sources.³² In particular the prosecution informed the Chamber

²⁷ Transcript of hearing on 13 March 2008, ICC-01/04-01/06-T-79, page 8, lines 7-16.

²⁸ Prosecution submission on undisclosed documents containing potentially exculpatory information, 28 March 2008, ICC-01/04-01/06-1248, paragraphs 8-26.

²⁹ *Ibid.*, paragraphs 5-7.

³⁰ *Ibid.*, paragraph 7.

³¹ Prosecution's submission on Article 54(3)(e) confidentiality agreements, 7 April 2008, ICC-01/04-01/06-1267, paragraph 5.

³² Transcript of hearing on 10 June 2008, ICC-01/04-01/06-T-89-ENG, pages 5-6.

that there currently are 156 documents provided by the UN under Article 54 (3) (e) for which authorisation to disclose to the defence had been refused.³³ Of those 156 documents, the prosecution informed the Chamber that 112 fell under the heading of Rule 77 of the Rules whilst the remaining 95 were considered potentially exculpatory or mitigating in nature.³⁴ As to the documents for which a response was pending, the prosecution submitted that negotiations were ongoing, although it was unable to predict the outcome thereof.³⁵

20. In addressing the undisclosed materials, the prosecution divided the evidence into two categories: evidence which would not materially impact on the Chamber's determination of the guilt or innocence of the accused and evidence which had that potential.³⁶ However, having clearly indicated that the evidence fell into these two categories, in a seemingly contradictory submission the prosecution thereafter maintained that none of the undisclosed evidence "in fact" materially impacted on the Chamber's determination of the guilt or innocence of the accused.³⁷

21. In elaboration of this latter submission, the prosecution submitted that evidence which could not, in the prosecution's contention, impact upon the Chamber's decision as to the guilt or innocence of the accused consisted of the following: evidence which purported to establish that children voluntarily joined the UPC/FPLC or were sent by their parents; *tu quoque* evidence which purported to establish the use of child soldiers by the Lendu or other armed groups in Ituri; reported benevolent acts by Thomas Lubanga Dyilo; material relating to the political nature of the UPC/FPLC and its aim of pacifying Ituri

³³ Transcript of hearing on 10 June 2008, ICC-01/04-01/06-T-89-ENG, page 5, lines 8-11.

³⁴ *Ibid.*, page 45, line 17 to page 46, line 2.

³⁵ *Ibid.*, page 6, lines 12-23; see also page 7, lines 4-6.

³⁶ Prosecution submission on undisclosed documents containing potentially exculpatory information, 28 March 2008, ICC-01/04-01/06-1248, paragraph 8.

³⁷ Prosecution's additional information on the undisclosed evidence, 15 April 2008, ICC-01/04-01/06-1281, paragraph 2.

or references to it as an “all-inclusive” organisation;³⁸ and information falling within the scope of Rule 77 (which, in the prosecution’s submission, did not go to the guilt or innocence of the accused but was material to the preparation of his defence).³⁹

22. The categories of evidence which the prosecution submitted could materially impact on the Court’s determination of the guilt or innocence of the accused included: evidence indicating that Thomas Lubanga Dyilo suffered from a mental condition; that he was intoxicated thus impairing his capacity to control, or understand the unlawfulness of, his conduct; that he was under duress or compulsion; that he acted in self-defence; that he made efforts to demobilise child soldiers; that he had insufficient command over people who committed the crimes with which he is charged; that the UPC/FPLC was under the control of Uganda, Rwanda and other countries.⁴⁰ However, it submitted that none of this evidence revealed control as regards the recruitment of children,⁴¹ and that there was “no doubt” that these categories of evidence would only impact *in principle* on the Chamber’s decision, and that it would not *in fact* materially impact on the determination of the guilt or innocence of the accused.⁴²

23. The defence averred that the documents outlined in the prosecution’s description of the categories of undisclosed potentially exculpatory materials⁴³ were in fact exculpatory and should be disclosed.⁴⁴

³⁸ Prosecution submission on undisclosed documents containing potentially exculpatory information, 28 March 2008, ICC-01/04-01/06-1248, paragraph 15.

³⁹ *Ibid.*, paragraph 29

⁴⁰ *Ibid.*, paragraphs 19-26.

⁴¹ *Ibid.*, paragraphs 25-26.

⁴² *Ibid.*, paragraph 18, original emphasis.

⁴³ Réponse de la Défense à la “Prosecution’s submissions on undisclosed documents containing potentially exculpatory information” datée du 28 mars 2008, 22 April 2008, ICC-01/04-01/06-1291, paragraphs 14-19.

⁴⁴ *Ibid.*, paragraph 16.

2. Interpretation of agreements under Article 54(3)(e) of the Statute

a. Purpose of Article 54(3)(e) and agreements concluded pursuant to Article 54(3)(e)

24. The prosecution argued that Article 54(3)(e) guaranteed confidentiality, unless the information-providers authorised otherwise, because many of them did not wish for their co-operation to be revealed in juridical proceedings. This interpretation, it was averred, accorded with the terms of the agreements as well as the approach of the prosecution and the information-providers.⁴⁵

25. Despite the requirements of Article 54(3)(e) that confidentiality agreements are to be used solely for the purpose of generating new evidence, the prosecution contended that evidence which it is anticipated may be used during the trial can also be obtained pursuant to Article 54(3)(e). This argument was founded on Rule 82, which anticipates that materials obtained under Article 54(3)(e) may later be introduced as evidence.⁴⁶

26. In defending the confidentiality agreements, the prosecution submitted that it depends upon the co-operation of information-providers who were working under very difficult conditions on the ground and who had made a deliberate decision that, in order to protect staff, their information must be confidential.⁴⁷ In the prosecution's submission, the Court "has to accept" that the mandate of the information-providers was "very different to [that of] the Office of the Prosecutor" and that the materials were not collected for the purpose of trial.⁴⁸ The prosecution submitted that if the Court was not to accept the "realities"

⁴⁵ Prosecution's submission on Article 54(3)(e) confidentiality agreements, 7 April 2008, ICC-01/04-01/06-1267, paragraph 7.

⁴⁶ Transcript of hearing on 2 October 2007, ICC-01/04-01/06-T-55-ENG, page 4, lines 9-15.

⁴⁷ Transcript of hearing on 1 October 2007, ICC-01/04-01/06-T-52-ENG, page 84, lines 2-13.

⁴⁸ *Ibid.*, page 15, lines 4-10.

for the UN and NGOs on the ground, then they would not provide evidence and “there was no other option available”.⁴⁹ Similarly, in a later submission, the prosecution argued that it was not possible to approach the UN with specific issues in which it was interested before being provided with materials, and that such an approach would only be viable at later stages of the investigation.⁵⁰ The prosecution contended that it would not have been able to initiate an investigation in the DRC without the information provided by the UN under the confidentiality agreements.⁵¹

27. The prosecution has interpreted Article 54(3)(e) as not limiting confidentiality agreements to evidence obtained solely for the purpose of generating new evidence.⁵² Rather, it submitted that the UN had provided general materials to the prosecution pursuant to the confidentiality agreement, and thereafter the prosecution had selected the evidence to be used in the trial and the items that were to be treated as lead evidence.⁵³ The prosecution accepted that at the material time, there had been a clear understanding that these materials were likely to be used as evidence.⁵⁴

28. By contrast, the defence noted that Article 54(3)(e) of the Statute only permits the prosecution to enter into a confidential agreement of this kind when it will generate new evidence and it argued that once obtained under this provision, the material should not be tendered as evidence in the trial.⁵⁵

29. The defence submitted that Article 54(3)e was not intended to make the prosecution’s task easier or to allow it to obtain the information more quickly

⁴⁹ *Ibid.*, page 86, lines 7-9.

⁵⁰ Transcript of hearing on 2 October 2007, ICC-01/04-01/06-T-55-ENG, page 7, lines 20-23.

⁵¹ *Ibid.*, page 8, lines 1-5.

⁵² *Ibid.*, page 4, lines 9-15.

⁵³ *Ibid.*, page 5, lines 15-23.

⁵⁴ *Ibid.*, page 7, lines 2-12.

⁵⁵ Réponse de la Défense à la “Prosecution’s Application for authorisation to disclose and rely on incriminating evidence for which Article 54(3)(e) restrictions have been lifted”, 10 March 2008, ICC-01/04-01/06-1215-Conf, paragraphs 13-14.

but rather it had a specific purpose that had not been adhered to in the these proceedings.⁵⁶

30. The defence argued that Article 54(3)(e) of the Statute permits confidentiality agreements to cover only documents which will generate new evidence. Accordingly, in the defence's submission, these agreements cannot be used loosely to cover all documents from a particular source.⁵⁷

b. Incorporation of agreements under article 54(3)(e) of the Statute in the Court's legal framework

31. Addressing the Relationship Agreement with the UN and those reached with other information providers, the prosecution argued that their interpretation and use of the agreements were justified. In particular, during the *ex parte* Status Conference held on 2 October 2007, the prosecution argued that Article 18(3) of the Relationship Agreement between this Court and the United Nations ("Relationship Agreement") which prohibited it from disclosing confidential materials to any organ of the Court without consent of the information providers, had been endorsed by the Assembly of States Parties. It was argued that the approval by this entity, being the Court's legislative body, gave authority to the prosecution's interpretation of Article 54(3)(e).⁵⁸

32. Despite this, the prosecution acknowledged that an excessive use of Article 54(3)(e) would be problematic and that its use in the present case may be viewed as excessive.⁵⁹ The prosecution acknowledged that the language used

⁵⁶ Transcript of hearing on 6 May 2008, ICC-01/04-01/06-T-86-ENG, page 29, lines 24-25.

⁵⁷ Réponse de la Défense à la "Prosecution's submissions on undisclosed documents containing potentially exculpatory information" datée du 28 mars 2008, 22 April 2008, ICC-01/04-01/06-1291, paragraphs 20-21.

⁵⁸ Transcript of hearing on 2 October 2007, ICC-01/04-01/06-T-55-ENG, page 1, lines 21-24.

⁵⁹ *Ibid.*, page 2, lines 6-9.

in the agreements did not necessarily reflect what Article 54(3)(e) was meant to cover.⁶⁰

33. At the Status Conference of 10 June 2008 the defence submitted that the prosecution's use of the confidentiality agreements, which could affect the discovery of the truth and the fairness of the trial, was untenable because no instance-specific reasons had been provided by the UN justifying the suggested need for confidentiality.⁶¹ The defence cited as an example of the misuse of the agreements that one of the documents provided to it recently by the prosecution, which had been covered by one of the confidentiality agreements, was in fact a public document.⁶²

34. The prosecution submitted that the obligation to provide exculpatory material under Article 67(2) of the Statute must be read in conjunction with the Relationship Agreement with the UN, and that, in the result, the obligation is limited to material that has not been provided to the prosecution confidentially or whenever the information provider, under a confidentiality agreement, has granted consent.⁶³ It submitted that the Relationship Agreement, which prevented the Chamber from viewing the undisclosed material, became binding law pursuant to Article 21(1)(b) of the Statute.⁶⁴

35. The defence submitted, in the context of the Relationship Agreement, that agreements made between the Court and other bodies cannot take precedence over the Statute or the fundamental right of the accused to obtain exculpatory

⁶⁰ Transcript of hearing on 1 October 2007, ICC-01/04-01/06-T-52-ENG, page 83, lines 12-15.

⁶¹ Transcript of hearing on 10 June 2008, ICC-01/04-01/06-T-89-ENG, page 17, line 24 to page 18, line 4.

⁶² *Ibid.*, page 19, lines 9-11.

⁶³ Transcript of hearing on 6 May 2008, ICC-01/04-01/06-T-86-ENG, page 4, lines 1-7; page 5, lines 15-19; page 7, line 22 to page 8, line 11.

⁶⁴ Transcript of hearing on 10 June 2008, ICC-01/04-01/06-T-89-ENG, page 24, line 9 to page 25, line 2.

material. Accordingly, the defence argued that the prosecutor had manifestly exceeded his mandate.⁶⁵

*c. Authorisation from information providers under Article 54(3)(e)
of the Statute*

36. The prosecution made extensive submissions regarding its attempts to obtain the consent of information providers to disclose exculpatory materials. It first informed the Chamber of these attempts during the Status Conference of 1 October 2007.⁶⁶ In order to facilitate disclosure, the prosecution informed the Chamber that it had emphasised the urgency of the matter and it was trying to speed up the process of obtaining authorisation.⁶⁷ Whilst the prosecution noted that the United Nations in particular was “very well-prepared to lift the restrictions”⁶⁸ it submitted that the negotiation process would take time and that the outcome was beyond the prosecution’s control.⁶⁹ The prosecution, nonetheless maintained that it “anticipate[d] having disclosed or provided for inspection or having sought to lift any restrictions on disclosure on the materials concerned by the end of October [2007]”⁷⁰

37. The prosecution confirmed its attempts at obtaining this consent from the information-providers in its 10 December 2007 filing and submitted that it maintained its aim of effecting full disclosure before 14 December 2007.⁷¹

⁶⁵ Réponse de la Défense à la “Prosecution’s submissions on undisclosed documents containing potentially exculpatory information” datée du 28 mars 2008, 22 April 2008, ICC-01/04-01/06-1291, paragraph 34.

⁶⁶ Transcript of hearing on 1 October 2007, ICC-01/04-01/06-T-52-ENG, page 14, lines 12-21.

⁶⁷ *Ibid.*, page 19, lines 6-13.

⁶⁸ *Ibid.*, page 85, lines 9-12.

⁶⁹ *Ibid.*, page 14, lines 15-21, page 15, lines 11-20; page 19, lines 2-3. See also Prosecution’s submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol, 11 September 2007, ICC-01/04-01/06-951, paragraph 25.

⁷⁰ Transcript of hearing on 1 October 2007, ICC-01/04-01/06-T-52-ENG, page 16, lines 21-23.

⁷¹ Prosecution’s Application for Extension of Time Limit for Disclosure, 10 December 2007, ICC-01/04-01/06-1073, paragraph 43.

38. However, in its written submissions of 24 January 2008, the prosecution submitted that it had not received responses to its requests to lift the Article 54(3)(e) restrictions prior to 14 December 2007.⁷²
39. The prosecution indicated that it was engaged in continuing negotiations with the information-providers at the Status Conference of 13 March 2008.⁷³
40. On 7 April 2008 the prosecution informed the Chamber that whilst it was seeking consent from the information providers other than the UN, the deadline imposed by the Chamber had not afforded it sufficient time.⁷⁴ However, the prosecution indicated that some responses were expected within a short period.⁷⁵
41. During the Status Conference on 10 June 2008 the prosecution submitted that negotiations were ongoing, although it was unable to predict the eventual outcome.⁷⁶

d. Disclosure of similar materials as an alternative to disclosure under Article 67(2) of the Statute

42. In the event that consent to disclose materials was not forthcoming, the prosecution submitted that its approach was to provide the defence with similar alternative materials. ⁷⁷ On 10⁷⁸ and 15 April 2008,⁷⁹ pursuant to an

⁷² Prosecution's application for authorisation to disclose and rely on incriminating evidence for which Article 54(3)(e) restrictions have been lifted, 24 January 2008, ICC-01/04-01/06-1129-Conf, paragraph 4.

⁷³ Transcript of hearing on 13 March 2008, ICC-01/04-01/06-T-79-ENG, page 7, lines 10-24.

⁷⁴ Order on the "Prosecution's submission on undisclosed documents containing potentially exculpatory information", 3 April 2008, ICC-01/04-01/06-1259, paragraph 3.

⁷⁵ Prosecution's submission on Article 54(3)(e) confidentiality agreements, 7 April 2008, ICC-01/04-01/06-1267, paragraph 9.

⁷⁶ Transcript of hearing on 10 June 2008, ICC-01/04-01/06-T-89-ENG, page 3, lines 5-6, page 6, lines 12-23; page 7, lines 4-6.

⁷⁷ Transcript of hearing on 1 October 2007, ICC-01/04-01/06-T-52-ENG, page 18, lines 5-9. See also transcript of hearing on 13 March 2008, ICC-01/04-01/06-T-79-ENG, page 7, lines 10-24.

⁷⁸ Prosecution's submission of alternative potentially exonerating evidence further to the Trial Chamber's *Ex Parte* order of 9 April 2008, 10 April 2008, ICC-01/04-01/06-1272-Conf-Exp, paragraphs 3-8.

order of the Chamber,⁸⁰ the prosecution filed its submissions on similar alternative material to the undisclosed evidence. The prosecution submitted that it had provided the defence with sufficient similar alternative evidence to allow it to prepare for trial.⁸¹

43. The defence contested the prosecution's argument that sufficient similar evidence had been provided; it argued that the fundamental right of the accused is to receive the totality of exculpatory materials and no confidentiality agreement, in the submission of the defence, could justifiably form an obstacle to this fundamental right.⁸²

e. The provision of non-disclosed material to the Bench

44. In order to address the matter fully, on 3 April 2008 the Chamber ordered the prosecution to provide it with the undisclosed exculpatory material.⁸³ The prosecution indicated it was unable to comply with this order, citing the provisions of the agreements under which the material had been obtained.⁸⁴ Thereon, the Chamber directed the prosecution to furnish it with descriptions of the undisclosed potentially exculpatory material, together with explanations as to why each document was not in the prosecution's view exculpatory; however, the prosecution indicated that it was also unable to comply with this order of the Chamber.⁸⁵

⁷⁹ Prosecution's supplementary submission of alternative potentially exonerating evidence further to the Trial Chamber's *Ex Parte* order of 9 April 2008, 10 April 2008, ICC-01/04-01/06-1277-Conf-Exp.

⁸⁰ Transcript of hearing on 9 April 2008, ICC-01/04-01/06-T-82-EXP-ENG, page 25, lines 14-18.

⁸¹ Transcript of hearing on 10 June 2008, ICC-01/04-01/06-T-89-ENG, page 7, line 22 to page 8, line 4. Prosecution submission on undisclosed documents containing potentially exculpatory information, 28 March 2008, ICC-01/04-01/06-1248, paragraphs 17-18.

⁸² Réponse de la Défense à la "Prosecution's submissions on undisclosed documents containing potentially exculpatory information" datée du 28 mars 2008, 22 April 2008, ICC-01/04-01/06-1291, paragraph 18.

⁸³ Order on the "Prosecution's submission on undisclosed documents containing potentially exculpatory information", 3 April 2008, ICC-01/04-01/06-1259, paragraph 3.

⁸⁴ Prosecution's submission on Article 54(3)(e) confidentiality agreements, 7 April 2008, ICC-01/04-01/06-1267, paragraphs 7-10, Order on the "Prosecution's submission on undisclosed documents containing potentially exculpatory information", 3 April 2008, ICC-01/04-01/06-1259, paragraph 3.

⁸⁵ Transcript of hearing on 9 April 2008, ICC-01/04-01/06-T-81-CONF-EXP-ENG, page 27, lines 6-10.

45. As an alternative, the prosecution agreed that if the Chamber were to undertake not to disclose the material without the consent of the information-providers, the latter may provide the documents to the Chamber for its review⁸⁶ (the Chamber having indicated its willingness to give such an undertaking⁸⁷). However it emerged thereafter that at least two information providers (including the UN) declined to allow the Chamber to view the material, notwithstanding the Chamber's undertaking, and other information-providers required redactions to the information which removed information which may identify individuals or bodies.⁸⁸

46. The defence submitted that the Chamber was able to review the relevant materials, accepting that this process may reveal some incriminatory material.⁸⁹

47. In the contention of the defence, exculpatory evidence and the confidentiality agreements should be provided to the Chamber so that it can establish whether the agreements are justified.⁹⁰ Accordingly, the Chamber can override confidentiality agreements which affect the rights of the defence under Article 67(2) of the Statute and Rule 77 of the Rules.⁹¹

48. The prosecution submitted that disclosure of exculpatory material should not be ordered by the Chamber pursuant to its powers under Article 72(7) of the Statute but, rather, the appropriate remedy for non-disclosure "where the evidence is so critical as to materially impact on the guilt or innocence of the accused is for the Chamber to make such inferences in the trial as to the

⁸⁶ Transcript of hearing on 6 May 2008, ICC-01/04-01/06-T-86-ENG, page 17, lines 12-22.

⁸⁷ *Ibid.*, page 35, line 20 to page 36, line 17.

⁸⁸ Prosecution's updated information on documents that were obtained by the Office of the Prosecutor from the United Nations pursuant to Article 54(3)(e) on the condition of confidentiality and solely for the purpose of generating new evidence and that potentially contain evidence that falls under Article 67(2), 10 June 2008, ICC-01/04-01/06-1387-Conf.

⁸⁹ Transcript of hearing on 28 May 2008, ICC-01/04-01/06-T-88-ENG, page 44, lines 17-19.

⁹⁰ Réponse de la Défense à la "Prosecution's submissions on undisclosed documents containing potentially exculpatory information" datée du 28 mars 2008, 22 April 2008, ICC-01/04-01/06-1291, paragraphs 37-38.

⁹¹ *Ibid.*, paragraph 39.

existence or non-existence of facts as may be appropriate in the circumstances, and where the Chamber considers this remedy to be insufficient, the appropriate remedy is the dropping of the relevant charges”.⁹²

49. On 9 June 2008, the prosecution filed an update on information obtained from the United Nations containing potentially exculpatory materials.⁹³ Therein the prosecution informed the Chamber that, pursuant to recent negotiations, the United Nations had authorised disclosure of two documents to the defence. In respect of 33 documents, the prosecution noted that the UN was willing to explore ways in which “elements of information” could be provided to the Chamber.⁹⁴ On 11 June 2008, the prosecution filed a further confidential update on information obtained from the UN.⁹⁵

50. The Presiding Judge observed during the Status Conference on 10 June 2008 that Article 67(2) establishes that the Chamber is the arbiter of whether or not material falls to be disclosed and that the confidential agreements tended to undermine its role in this regard.⁹⁶ In response, the prosecution argued that the materials it had disclosed to the defence were similar to the material covered by the confidentiality agreements and thus the Chamber was able to evaluate the latter by process of analogy.⁹⁷

⁹² Transcript of hearing on 6 May 2008, ICC-01/04-01/06-T-86-ENG, page 12, line 4 to page 13, line 8.

⁹³ Prosecution's updated information on documents that were obtained by the Office of the Prosecutor from the United Nations pursuant to Article 54(3)(e) on the condition of confidentiality and solely for the purpose of generating new evidence and that potentially contain evidence that falls under Article 67(2), 9 June 2008, ICC-01/04-01/06-1387-Conf; Transcript of hearing on 10 June 2008, ICC-01/04-01/06-T-89-ENG, page 3, lines 16-18.

⁹⁴ Prosecution's updated information on documents that were obtained by the Office of the Prosecutor from the United Nations pursuant to Article 54(3)(e) on the condition of confidentiality and solely for the purpose of generating new evidence and that potentially contain evidence that falls under Article 67(2), 9 June 2008, ICC-01/04-01/06-1387-Conf, paragraphs 3-6; see also ICC-01/04-01/06-T-89-ENG, page 3, lines 16-18.

⁹⁵ Prosecution's further updated information on documents that were obtained by the Office of the Prosecutor from the United Nations pursuant to Article 54(3)(e) on the condition of confidentiality and solely for the purpose of generating new evidence and that potentially contain evidence that falls under Article 67(2), 11 June 2008, ICC-01/04-01/06-1391-Conf.

⁹⁶ Transcript of hearing on 10 June 2008, ICC-01/04-01/06-T-89-ENG, page 8, lines 11-25 and page 9, lines 1-17.

⁹⁷ *Ibid.*, page 11, lines 5-10.

3. Suitability of 23 June 2008 trial date

51. In arguing for the retention of the 23 June 2008 trial date, the prosecution averred on 10 June 2008 that the defence had been provided with alternative evidence, not covered by confidentiality agreements,⁹⁸ which was similar in nature. Furthermore, the prosecution argued that Article 67(2), by directing the prosecution to disclose materials that it *believed* to be potentially exculpatory, implied that it was trusted to deal with evidence in this area appropriately⁹⁹ and that disclosure, as an ongoing obligation, necessitated the defence accepting that disclosure of exculpatory materials would continue throughout the trial.¹⁰⁰ In support of this, the prosecution repeated its contention that none of the undisclosed potentially exculpatory material would impact on the guilt or innocence of the accused. Similarly, in the prosecution's submission, the defence would have adequate time to prepare given the trial date is in late June and the limited volume of the material in question.¹⁰¹

52. On the proposed 23 June commencement of the trial, the defence argued, during the Status Conference on 10 June 2008, that it had "never requested the postponement of the trial in writing and will not do so."¹⁰²

4. The power of the Chamber to stay the proceedings

53. Whilst the prosecution acknowledged the inherent power of the Chamber to discontinue the proceedings, it submitted that such a drastic remedy is strictly limited to the most serious cases involving an abuse of power by the prosecution. It submitted that the abuse would have to call into question the

⁹⁸ *Ibid*, page 7, line 24 to page 8, line 4.

⁹⁹ *Ibid.*, page 8, lines 5-11.

¹⁰⁰ *Ibid.*, page 13, lines 12-14.

¹⁰¹ Transcript of hearing on 12 March 2008, ICC-01/04-01/06-T-78-CONF-ENG, page 90, lines 11-19.

¹⁰² Transcript of hearing on 10 June 2008, ICC-01/04-01/06-T-89-ENG, page 47, lines 24-25.

integrity of the system, resulting in a contravention of the rights of the accused of constitutional magnitude. In the prosecution's submissions no such abuse had occurred, nor had the defence alleged as such.¹⁰³

54. The defence argued that the proceedings should be terminated.¹⁰⁴ The power to do so, in the submission of the defence, originated in the inherent power of the Bench to prevent an abuse of the process and ensure the fairness of proceedings.¹⁰⁵

55. The legal representative of victims a/0001/06 to a/0003/06 submitted that issues relating to the possible discontinuance of the trial go to the crux of victims' interests.¹⁰⁶ Responding to the defence's filing requesting the discontinuance of the proceedings, the legal representative of victims a/0001/06 to a/0003/06 argued that there are legally only two justifications for such discontinuance: inadmissibility or lack of jurisdiction.¹⁰⁷ He further submitted that in such a situation certain participants must be heard, including the referring state and victims.¹⁰⁸ Discontinuance of the present proceedings, in the submission of the legal representative of victims a/0001/06 to a/0003/06, was not possible and in any event was not within the Trial Chamber's powers but rather those of the Pre-Trial Chamber.¹⁰⁹

5. Ongoing investigations

56. In relation to the issue of ongoing investigations the prosecution submitted that it was continuing to investigate other possible crimes committed by

¹⁰³ *Ibid*, page 28, line 9 to page 20, line 19. The prosecution relied specifically on the Appeal's Chamber decision titled Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, paragraphs 36-39.

¹⁰⁴ Transcript of hearing on 10 June 2008, ICC-01/04-01/06-T-89-ENG, page 19, lines 17-18.

¹⁰⁵ *Ibid.*, page 20, lines 7-16.

¹⁰⁶ *Ibid.*, page 36, lines 16-20.

¹⁰⁷ *Ibid.*, page 37, lines 8-21.

¹⁰⁸ *Ibid.*, page 39, lines 1-2.

¹⁰⁹ *Ibid.*, page 39, lines 3-18.

Thomas Lubanga Dyilo. However, it averred that it would not seek to amend the charges and that it had the right and obligation to conduct such investigations.¹¹⁰

57. In this regard, the defence submitted that the prosecution was concealing further potential charges against the accused.¹¹¹ This, the defence argued, was in violation of the accused's right to be informed of the charges against him and prosecutorial fairness.¹¹²

II. Relevant provisions

Article 21 of the Statute

Applicable Law

1. The Court shall apply:

[...]

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

[...]

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights [...]

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

[...]

¹¹⁰ *Ibid.*, page 30, lines 2-15.

¹¹¹ *Ibid.*, page 20, line 22 to page 21, line 8.

¹¹² *Ibid.*, page 21, lines 13-23.

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.

Rule 77 of the Rules of Procedure and Evidence ("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.

58. In addition, in light of Article 21(3) of the Statute,¹¹³ the Chamber has also considered the following international provisions:

Article 14(1) of the International Covenant on Civil and Political Rights¹¹⁴

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

[...]

Article 11(1) of the Universal Declaration of Human Rights¹¹⁵

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

Article 6 of the European Convention on Human Rights¹¹⁶

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

¹¹³ Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, paragraph 36.

¹¹⁴ International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

¹¹⁵ Universal Declaration of Human Rights, United Nations General Assembly resolution 217 A (III) of 10 December 1948, third session.

¹¹⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, as amended by protocol no 11 with protocols 1, 4, 6, 7, 12 and 13.

3. Everyone charged with a criminal offence has the following minimum rights:

- a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b. to have adequate time and the facilities for the preparation of his defence;
- c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

III. Analysis and conclusions

The inability on the part of the prosecution to disclose to the accused exculpatory materials covered by Article 54(3)(e) agreements

Preliminary matters

59. The expression “exculpatory material” has been used during the submissions on this issue to cover a variety of circumstances,¹¹⁷ all of which are to be found in Article 67(2) of the Statute. Exculpatory material therefore includes material, first, that shows or tends to show the innocence of the accused; second, which mitigates the guilt of the accused; and, third, which may affect the credibility of prosecution evidence. The prosecution accepts that the exculpatory material which it is unable to disclose to the defence or to put before the judges in non-redacted form comes, in each instance, from one of these categories. Furthermore, the prosecution has included under the general umbrella of materials that it has been unable to disclose those that are covered by Rule 77 of the Rules.

¹¹⁷ For interpretation by the prosecution see for example “Prosecution submission on undisclosed documents containing potentially exculpatory information”, 28 March 2008, ICC-01/04-01/06-1248, paragraph 9. For the interpretation adopted by the defence, see “Réponse de la Défense à la “Prosecution’s submissions on undisclosed documents containing potentially exculpatory information” datée du 28 mars 2008”, 22 April 2008, ICC-01/04-01/06-1291, paragraphs 9-10.

60. Although the prosecution has sought to suggest, in a general sense, that the exculpatory value of the non-disclosed material has been covered in other documents or information that have already been served, the Court has been unable to assess for itself whether this proposition is accurate, and whether, notwithstanding the existence of other disclosed material, fairness dictates that the accused should be provided with part or all of the undisclosed evidence. On this latter issue, the Chamber has grave reservations as to whether serving other, similar evidence can ever provide an adequate substitute for disclosing a particular piece of exculpatory evidence: the right of the accused is to both items. In the Chamber's "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters" of 8 May 2008¹¹⁸ the majority observed in the context of the accused's "absolute entitlement" to potentially exculpatory evidence:

The fact that it may be undermined by other evidence, or the witness may also provide incriminating evidence, or there are other sources providing similar evidence are all irrelevant for these purposes. If the real possibility exists that this evidence may contribute to a resolution of material factual issues in the case in favour of the accused, he is to be provided with it [...]

(See also the decision of the Appeals Chamber of the ICTY in the case of *Blaskic*, which is considered in paragraph 81 below.)

61. As set out above, under the heading 'Rights of the accused', Article 67(2) obliges the prosecution to disclose to the defence exculpatory material 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". It is left to the Chamber to decide whenever there is a doubt as to the application of this

¹¹⁸ Decision issuing a confidential and a public redacted version of "Decision on disclosure issues, responsibilities for protective measures and other procedural matters", 8 May 2008, ICC-01/04-01/06-1311-Anx2, paragraph 94.

provision: “In case of doubt as to the application of this paragraph, the Court shall decide”.

62. Despite the unequivocal terms of this section, the prosecution has been given the opportunity, pursuant to Article 54(3)(e), to enter into agreements not to disclose material provided on a confidential basis, when the sole purpose of obtaining the material is to generate new evidence.

63. In this case over 200 documents, which the prosecution accepts have potential exculpatory effect or which are material to defence preparation, are the subject of agreements of this kind. On 10 June 2008, the Chamber was told that there are “approximately” 95 items of potentially exculpatory material and 112 items which are “material to defence preparation”,¹¹⁹ pursuant to Rule 77, making a total of 207 items of evidence. Of these 207 items, 156 were provided by the UN.¹²⁰

64. The prosecution is unable to disclose any of these items of evidence to the accused, in full or in a redacted form. Furthermore, save for a limited number of documents (32) that have been supplied to the Chamber by six unidentified information-providers in redacted form,¹²¹ the prosecution (given the terms of the agreements) is unable to show them to the Chamber. This is because the information-providers do not consent to the judges viewing copies of the original materials (in the majority of instances the Chamber cannot be shown the documents at all),¹²² notwithstanding an undertaking which has been

¹¹⁹ Transcript of hearing on 10 June 2008, ICC-01/04-01/06-T-89-ENG, page 45, lines 16-22.

¹²⁰ *Ibid.*, page 5, lines 8-9.

¹²¹ Prosecution’s provision of 32 documents and further information on documents that were obtained by the Office of the Prosecutor pursuant to Article 54(3)(e) on the condition of confidentiality and solely for the purpose of generating new evidence and that potentially contain evidence that falls under Article 67(2), 3 June 2008, ICC-01/04-01/06-1373; Prosecution’s corrigendum and supplementary information to the “Prosecution’s provision of 32 documents and further information on documents that were obtained by the Office of the Prosecutor pursuant to Article 54(3)(e) on the condition of confidentiality and solely for the purpose of generating new evidence and that potentially contain evidence that falls under Article 67(2)”, 9 June 2008, ICC-01/04-01/06-1385.

¹²² Transcript of hearing on 1 October 2007, ICC-01/04-01/06-T-52-ENG, page 14, lines 4-6.

given by the judges to uphold the confidential status of the documents or information, unless consent is given by the information-providers for their wider distribution.¹²³ It needs to be stressed, however, that the Chamber fully appreciates that the UN, and possibly other information-providers, were invited by the Court to enter into these agreements, and it unreservedly accepts that they will have approached this issue in good faith, bearing in mind their own particular responsibilities and their respective mandates.

65. The Chamber has only seen two of the agreements that have been reached under Article 54(3)(e) of the Statute; the Relationship Agreement with the UN, stipulates in Article 18(3) that:

The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.¹²⁴

66. The Chamber has not seen the agreements with the other unidentified information-providers; it does not know who they are; and the Chamber has not been provided with the terms of these further agreements.

67. Having been informed earlier¹²⁵ that the Prosecutor was to raise these issues with the UN, in a document filed at 20.48 on 9 June 2008, the judges were informed that the Prosecutor and the UN Legal Counsel had met on 3 June 2008 to discuss them. Following that meeting, two documents have been

¹²³ Transcript of hearing on 6 May 2008, ICC-01/04-01/06-T-86-ENG, page 35, line 20 to page 36, line 17.

¹²⁴ Prosecution's submission on Article 54(3)(e) confidentiality agreements, 7 April 2008, ICC-01/04-01/06-1267, Annex 1; the second agreement is the "Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo and the International Criminal Court", ICC-01/04-01/06-1267, Annex 2.

¹²⁵ Prosecution's information on documents that were obtained by the Office of the Prosecutor from the United Nations pursuant to Article 54(3)(e) on the condition of confidentiality and solely for the purpose of generating new evidence and that potentially contain evidence that falls under Article 67(2), 2 June 2008, ICC-01/04-01/06-1364, paragraph 5.

disclosed to the defence,¹²⁶ and in relation to a further 33 documents “the UN is ready and willing to explore with the OTP ways in which elements of information that are contained in the documents and that the OTP believes to be of a potentially exculpatory nature may be made available to the Trial Chamber without at the same time disclosing the documents themselves, either in whole or in part.”¹²⁷

68. It is to be observed that if this proposal is adopted, in the result the Chamber will not be allowed to view and evaluate any of this evidence in its original form and instead it will be dependent on the prosecution’s evaluation of its “exculpatory nature” and the adequacy of any “elements of information” – whatever this latter expression means – as may be provided to the judges.

69. The other documents supplied by the UN are not covered by this proposal and the Chamber has simply been informed that “[t]he OTP continues its discussions and efforts to find solutions with the UN in respect of the remaining documents that form part of the list of documents that due to their status cannot be disclosed.”¹²⁸

The Agreements

70. It is necessary, first, to analyse whether the prosecution has correctly applied the provisions of Article 54(3)(e) in the agreements it reached with the information-providers, because it is self-evident that the situation confronting the Court has only arisen because of the agreements which the prosecution has entered into in this case, and the way which they have been implemented. Importantly, therefore, if the exculpatory material was not covered by the

¹²⁶ Prosecution’s updated information on documents that were obtained by the Office of the Prosecutor from the United Nations pursuant to Article 54(3)(e) on the condition of confidentiality and solely for the purpose of generating new evidence and that potentially contain evidence that falls under Article 67(2), 9 June 2008, ICC-01/04-01/06-1387-Conf, paragraph 4.

¹²⁷ *Ibid.*, paragraph 3(ii).

¹²⁸ *Ibid.*, paragraph 7.

agreements, it would have been provided to the defence: non-disclosure is the direct result of the prosecution's use of the Article 54(3)(e) agreements.

71. Addressing whether the agreements conform to the provisions of Article 54 (3) (e), in the view of the Chamber the wording of the subsection is clear, and its purpose is readily apparent. In highly restricted circumstances, the prosecution is given the opportunity to agree not to disclose material provided to it at any stage in the proceedings. The restrictions are that the prosecution should receive documents or information on a confidential basis solely for the purpose of generating new evidence – in other words, the only purpose of receiving this material should be that it is to lead to other evidence (which, by implication, can be utilised), unless Rule 82(1) applies.

72. The prosecution has given Article 54(3)(e) a broad and incorrect interpretation: it has utilised the provision routinely, in inappropriate circumstances, instead of resorting to it exceptionally, when particular, restrictive circumstances apply. Indeed, the prosecution conceded in open court that agreements reached under Article 54(3)(e) have been used generally to gather information, unconnected with its springboard or lead potential. During the Status Conference on 6 May 2008, the prosecution made this unequivocally clear, during the following exchange:

Presiding Judge:

You have used the expression [...] "lead evidence" on various occasions today. Is it the Prosecution's intention that these agreements in fact were all limited to lead evidence, what I think on earlier occasions I have referred to as springboard material?

Prosecution:

Mr President, your Honours, not at all [...] and this is just an example, but the most important example, in relation to the United Nations. On top of the UN relationship agreement and the Memorandum of Understanding there's a letter of 8 November 2005 to the United Nations where interpretation is given to the relevant provisions in the agreement and, in particular, in respect of the Memorandum of Understanding, and here it says in relation to Article 10 (6) [...] "It is understood as a general rule the United Nations will endeavour to the

extent possible to accede to all requests to consent to view such documents and information in trial. This understanding shall also apply with respect to the information of records referred to in Article 11(7)."[...] And this [...] refers to the question you put to me. Of course, there was never any intention on the side of the Prosecutor, and it was also understood as such by the United Nations, that these materials were received only for lead purposes. The point was to obtain these materials as quickly as possible for the sake of the ongoing investigation and then to allow the Office of the Prosecutor to identify the materials it wishes to use as evidence and then seek permission [added emphasis].¹²⁹

73. Therefore, although the Chamber does not have the information necessary to analyse the circumstances in which each of the individual documents was supplied to the prosecution, the overall picture is clear: the prosecution's general approach has been to use Article 54(3)(e) to obtain a wide range of materials under the cloak of confidentiality, in order to identify from those materials evidence to be used at trial (having obtained the information-provider's consent). This is the exact opposite of the proper use of the provision, which is, exceptionally, to allow the prosecution to receive information or documents which are not for use at trial but which are instead intended to "lead" to new evidence. The prosecution's approach constitutes a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances. The logic of the prosecution's position is that all of the evidence that it obtains from information-providers can be the subject of Article 54(3)(e) agreements.

74. Judge Steiner on 2 June 2008 in her "Decision Requesting Observations concerning Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence's Preparation for the Confirmation Hearing" observed:

9. At the outset, the Single Judge notes the considerable number of documents (1632 according to the last indication given by the Prosecution on 25 April 2008) that the Prosecution has collected pursuant to article 54(3) (e) of the

¹²⁹ Transcript of hearing on 6 May 2008, ICC-01/04-01/06-T-86-ENG, page 22, line 4 to page 23, line 6.

Statute, and that, according to the Prosecution, "were considered to be relevant" for the present case. In the view of the Single Judge, this is particularly notable because the present case is confined to the crimes allegedly committed during one attack against one village on a single day.

10. The Single Judge finds this considerable number of documents to indicate that the Prosecution is not resorting to article 54(3) (e) of the Statute only in exceptional or limited circumstances, but rather is extensively gathering documents under such provision.

11. This practice, in the view of the Single Judge, is at the root of the problems that have arisen in the present case, as well as in the case of the Prosecutor v. Thomas Lubanga Dyilo, with regard to the disclosure to the Defence of those materials identified as potentially exculpatory (article 67(2) of the Statute) or otherwise material for the Defence's preparation for the confirmation hearing (rule 77 of the Rules) and that have been collected under the conditions of confidentiality set forth in article 54(3)(e) of the Statute.

12. Furthermore, the series of reports filed by the Prosecution in the last six and a half months (i.e. from 14 November 2007 to 23 May 2008) show that the problems posed by the practice of extensively gathering materials pursuant to article 54(3)(e) of the Statute are significantly aggravated by the Prosecution's difficulties in securing the consent of the providers.

With respect, this Bench echoes those sentiments.

75. In light of the prosecution's inappropriate use of these confidentiality agreements, and the resulting inability to effect proper disclosure to the defence, it is manifest that the agreements should not be allowed to operate in a way that subverts the Statute. The choices for the prosecution are clear and stark. Either it must disclose all the potentially exculpatory material in its possession (in accordance with the Statute) to the accused or it will choose not to do so because of the improper agreements it has reached with information-providers. If it follows the latter course, the consequences of that decision are analysed in detail hereafter.

76. Finally on this subject, if Article 54(3)(e) is used appropriately, the apparent tension which exists between this provision and Article 67(2) is likely to be negligible: although exculpatory material may be included in the springboard or lead evidence, in the limited circumstances in which this provision should

be used, it is likely that a mechanism can be established which facilitates all necessary disclosure; for instance, the prosecution may need to make arrangements with the information-provider for disclosure of such parts of the Article 54(3)(e) material as will enable it to provide any potentially exculpatory evidence to the accused. In any event, if the prosecution is unable to disclose evidence of this kind which is covered by these agreements, the issue should always be raised with the Chamber in accordance with Rule 83.

Does the right to a fair trial include the right to disclosure of potentially exculpatory material?

77. The Chamber has unhesitatingly concluded that the right to a fair trial – which is without doubt a fundamental right – includes an entitlement to disclosure of exculpatory material. This is established not only by the provisions of Article 67(2) of the Statute, but also by a review of the relevant international jurisprudence,¹³⁰ and particularly that of the European Court of Human Rights and the ICTY. In *Krstic* the Appeals Chamber of that latter court stated:

The disclosure of exculpatory material is fundamental to the fairness of proceedings before the Tribunal and considerations of fairness are the overriding factor in any determination of whether the governing Rule has been breached.¹³¹

78. In *Oric* the Trial Chamber of the ICTY observed:

¹³⁰ See for example ECtHR, *V. v Finland*, no 40412/98, Judgment of 24 July 2007, paragraph 74 in which the European Court of Human Rights stated that “both [the] prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party... prosecution authorities [must] disclose to the defence all material evidence in their possession for or against the accused.” See also ECtHR, *Jasper v United Kingdom*, no 27052/95, Judgment of 16 February 2000.

¹³¹ *The Prosecutor v Krstic*, IT-98-33-A, Judgment, 19 April 2004, paragraph 180.

The jurisprudence of the Tribunal is clear that, in pursuit of justice, the disclosure of Rule 68 [exculpatory] Material to the Defence is of paramount importance to ensure the fairness of proceedings before this Tribunal.¹³²

79. In *Jespers v. Belgium*, the European Commission of Human Rights held that the principle of equality of arms imposes on prosecuting and investigating authorities an obligation to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating himself or in obtaining a reduction in sentence. This principle covers a wide variety of evidential possibilities, and it includes evidence which may undermine the credibility of a prosecution witness.¹³³

80. Critically, although international human rights jurisprudence and that of the *ad hoc* tribunals indicate that “only such measures restricting the rights of the accused, which are strictly necessary, ought to be adopted”¹³⁴, these cannot extend to denying him or her a fair trial. For instance, the ICTY in *Talic* emphasised that although it may be “necessary in some cases to withhold certain material from the defence, so as to safeguard an important public interest” nonetheless “the public interest [...] is excluded where its application would deny to the accused the opportunity to establish his or her innocence.”¹³⁵

¹³² ICTY, Trial Chamber, *The Prosecutor v Oric*, IT-03-68-T, Decision on ongoing complaints about prosecutorial non-compliance with Rule 68 of the Rules, 13 December 2005, paragraph 20.

¹³³ ECHR, *Jespers v Belgium*, no 8403/78, Commission’s report of 14 December 1981, DR 27, paragraph 58. See also Article 67 (2) of the Statute.

¹³⁴ ICTY, *The Prosecutor v Brdanin and Talic*, IT-99-36-T, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, 23 May 2002, paragraph 19. See also ECtHR, *Jasper v United Kingdom*, no 27052/95, Judgment of 16 February 2000, paragraph 52, and ECtHR, *Fitt v United Kingdom*, no 29777/96, Judgment of 16 February 2000, paragraph 45 in which the ECtHR emphasised that ‘only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6(1).’ (footnotes omitted). The ECHR confirmed this more recently in regards to potentially exculpatory material in *V. v Finland*: See ECtHR, *V. v Finland*, no 40412/98, Judgment of 24 July 2007, paragraph 75 thereof.

¹³⁵ ICTY, *The Prosecutor v Brdanin and Talic*, IT-99-36-T, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, 23 May 2002, paragraph 19. This is consistent with human rights jurisprudence; see ECtHR, *Jasper v United Kingdom*, no 27052/95, Judgment of 16 February 2000, paragraph 52, and ECtHR, *Fitt v United Kingdom*, no 29777/96, Judgment of 16 February 2000, paragraph 45 in which the Court stated: “In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest.” (footnotes omitted).

81. On a linked issue, the Appeals Chamber of the ICTY has disapproved attempts by the prosecution to avoid disclosure when other, similar evidence has been served. In its judgment on the appeal in the *Blaskic* case, the Appeal Chamber observed:

... the Appeals Chamber reiterates that it cannot endorse the view that the Prosecution is not obliged to disclose material which meets the disclosure requirements provided for in Rule 68 if there exists other information of a generally similar nature.¹³⁶

The role of the judges

82. In *Rowe and Davis v U.K.*,¹³⁷ the European Court of Human Rights held that although Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) generally requires the prosecution to disclose to the defence all relevant evidence for or against the accused, considerations of national security or the protection of vulnerable witnesses may, in certain circumstances, justify an exception to this rule. The court decided that any departure from the principles of open adversarial justice must, however, be strictly necessary, and the consequent handicap imposed on the defence must be adequately counterbalanced by procedural safeguards, to protect the rights of the accused.

83. In *Rowe and Davis* it was decided that where the prosecution has withheld relevant evidence on public interest immunity grounds, without first submitting the material to the trial judge, the fair-trial requirements of Article 6 were not met. This principle was described by the European Court of Human Rights in *Rowe* as follows:

¹³⁶ ICTY, *The Prosecutor v Blaskic*, IT-95-14-A, Judgement, 29 July 2004, paragraph 266.

¹³⁷ ECtHR, *Rowe and Davis v United Kingdom*, no 28901/95, Judgment of 16 February 2000.

[T]he prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial.¹³⁸

84. It follows that under international jurisprudence it is clear that it is the judges and not the prosecution who are solely competent to decide upon this issue. As Judge Pettiti (albeit in a dissenting opinion) has noted, in relation to the non-disclosure of exonerating information:

Cases where evidence has been hidden from the trial court have left bitter memories in the history of justice.¹³⁹

85. Likewise, in *Jasper v United Kingdom*¹⁴⁰ in finding that there had been no miscarriage of justice by non-disclosure of potentially exculpatory material, the European Court of Human Rights stated:

The fact that the need for disclosure was at all times under assessment by the trial judge provided a further, important, safeguard in that it was his duty to monitor throughout the trial the fairness or otherwise of the evidence being withheld.

86. In deciding whether non-disclosure is justified, human rights law suggests that it is the evidence and not summaries which should be provided to the court. The European Court of Human Rights held in *V. v Finland* that as the courts (at first instance and on appeal) had been denied access to crucial detailed telephone metering information,

they were not therefore in a position to monitor the relevance to the defence of the withheld information.¹⁴¹

87. Accordingly, under international jurisprudence the judges are empowered to determine relevant issues concerning the disclosure of potentially exculpatory

¹³⁸ ECtHR, *Rowe and Davis v United Kingdom*, no 28901/95, Judgment of 16 February 2000, paragraph 66.

¹³⁹ ECtHR, *Edwards v United Kingdom*, no 13071/87, Judgment of 16 December 1992.

¹⁴⁰ ECtHR, *Jasper v United Kingdom*, no 27052/95, Judgment of 16 February 2000, paragraph 56.

¹⁴¹ ECtHR, *V. v Finland*, no 40412/98, Judgment of 24 July 2007, paragraph 78.

materials. Particularly given that with trials before the ICC the judges are also the ultimate fact-finders, they are in a position to know what effect the exculpatory evidence may have on their ultimate decision in the case. It follows that the Chamber rejects the suggestion, advanced by the prosecution, that it is entitled to decide whether or not potentially exculpatory evidence will only impact *in principle* on the Chamber's decision, rather than having a material impact *in fact* on the Chamber's determination of the guilt or innocence of the accused. This is not a decision for the prosecution but for the judges: once the prosecution believes that the evidence "shows or tends to show the innocence of the accused" (Article 67(2) of the Statute), it is to be disclosed to the defence, or in case of doubt put before the Court.

88. Although the prosecution, as a first stage in this procedure, must make the initial decision as to the exculpatory value or effect of any piece of evidence under Article 67(2) ("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"), once this threshold is passed and it is accepted that the material **has**, potentially, an exculpatory effect, 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 (Article 64(2) of the Statute) and these responsibilities cannot be delegated by, or removed from, the judges. 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,¹⁴² and the approach of the prosecution means, *inter alia*, that for the purposes of Article 67(2), the

¹⁴² Transcript of hearing on 6 May 2008, ICC-01/04-01/06-T-86-ENG, page 15, lines 21-25.

Chamber could never, “in case of doubt”, make a decision (because it will be unable to view the underlying material).

89. It has been stressed by the Appeals Chamber in relation to other issues, that any factor implicating the rights of the accused must be assessed on a case by case basis.¹⁴³ On the non-disclosure of potentially exculpatory information pursuant to Rule 81(2), the Appeals Chamber held “a thorough assessment will need to be made by the Pre-Trial Chamber of the potential relevance of the information to the Defence on a case by case basis. If the information is relevant or potentially exculpatory, the balancing exercise performed by the Pre-Trial Chamber between the interests at stake will require particular care.”¹⁴⁴ In the view of the Chamber, each individual document purporting to contain potentially exculpatory material must be individually examined by the Chamber in order to enable to it assess whether the trial will be “conducted with full respect for the rights of the accused” in accordance with Article 64(2) of the Statute.

Consequences of non-disclosure

90. If particular circumstances exist, the Court has the duty to halt or “stay” the proceedings. The Appeals Chamber of the ICC has addressed the issue of imposing a stay on criminal proceedings in the following way (in the context of an appeal from the Pre-Trial Chamber in this case):

36. The doctrine of abuse of process had *ab initio* a human rights dimension in that the causes for which the power of the Court to stay or discontinue proceedings were largely associated with breaches of the

¹⁴³ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-475, paragraphs 62, 64, 66 and 72 c); Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-476, paragraphs 52 and 58.

¹⁴⁴ Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-476, paragraph 57.

rights of the litigant, the accused in the criminal process, such as delay, illegal or deceitful conduct on the part of the prosecution and violations of the rights of the accused in the process of bringing him/her to justice.¹⁴⁵ and

39. Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. To borrow an expression from the decision of the English Court of Appeal in *Huang v. Secretary of State*, it is the duty of a court: "to see to the protection of individual fundamental rights which is the particular territory of the courts [...]" Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.¹⁴⁶

It is not a necessary precondition, therefore, for the exercise of this jurisdiction that the prosecution is found to have acted *mala fides*. It is sufficient that this has resulted in a violation of the rights of the accused in bringing him to justice.

91. This is an international criminal court, with the sole purpose of trying those charged with the "most serious crimes of concern to the international community as a whole"¹⁴⁷ and the judges are enjoined, in discharging this important role, to ensure that the accused receives a fair trial. If, at the outset, it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process, it is necessary – indeed, inevitable – that the proceedings should be stayed. It would be wholly wrong for a criminal court to begin, or to continue, a trial once it has become clear that the inevitable conclusion in the final judgment will be that the proceedings are vitiated because of unfairness which will not be rectified. In this instance, in its filing of 9 June 2008, the prosecution went no further than raising the possibility that the Chamber may be provided at

¹⁴⁵ Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, paragraph 36.

¹⁴⁶ *Ibid.*, paragraph 39 [footnotes omitted].

¹⁴⁷ Article 5(1) of the Statute.

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.

Conclusions

92. The Chamber's overall conclusions can be shortly described:

i) The disclosure of exculpatory evidence in the possession of the prosecution is a fundamental aspect of the accused's right to a fair trial;

ii) The prosecution has incorrectly used Article 54(3)(e) when entering into agreements with information-providers, with the consequence that a significant body of exculpatory evidence which would otherwise have been disclosed to the accused is to be withheld from him, thereby improperly inhibiting the opportunities for the accused to prepare his defence; and

iii) The Chamber has been prevented from exercising its jurisdiction under Articles 64(2), Article 64(3)(c) and Article 67(2), 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.

93. Adapting the language of the Appeals Chamber, the consequence of the three factors set out in the preceding paragraph has been that the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial.

94. In consequence a stay is imposed on these proceedings. Although the Chamber is not rendered without further authority or legal competence by this decision, it means that unless this stay is lifted (either by this Chamber or the Appeals Chamber), the trial process in all respects is halted. In the circumstances, a hearing will take place on Tuesday 24 June 2008 at 14.00 in order to consider the release of the accused.

95. Although the Chamber has no doubt that this stay of proceedings is necessary, it has nonetheless imposed it with great reluctance, not least because it means the Court will not make a decision on issues which are of significance to the international community, the peoples of the Democratic Republic of the Congo, the victims and the accused himself. When crimes, particularly of a grave nature, are alleged it is necessary for justice that, whenever possible, a final determination is made as to the guilt or innocence of the accused. The judicial process is seriously undermined if a court is prevented from reaching a verdict on the charges brought against an individual. One consequence is that the victims will be denied an opportunity to participate in a public forum, in which their views and concerns were to have been presented and their right to receive reparations will be affected. The judges are acutely aware that by staying these proceedings the victims have, in this sense, been excluded from justice.

Other issues

96. During the Status Conference on 10 June 2008 other matters were discussed, as follows. The defence sought **orders** from the Chamber: for the discontinuance of the prosecution and the release of the accused; for the immediate disclosure of potentially incriminatory material; that the defence is not obliged to notify the Court of its lines of defence; and that any potential charges currently being investigated in the context of the Situation in the

Democratic Republic of the Congo will not be brought against the accused. The Bench was addressed on the reliance by the prosecution on materials that have been communicated to the accused under Rule 77. Finally, the parties and the participants (principally in writing) addressed the consequences of the Appeal Chamber's "Decision on the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber 1's Decision on Victims Participation of 18 January"¹⁴⁸ and the further participation of victims pending a decision from the Appeals Chamber.¹⁴⁹

97. The decision set out above staying the proceedings renders it redundant for the Chamber to reach any further decision on any of these issues. However, if the stay on the proceedings is lifted hereafter, at that stage these matters will be resolved.


¹⁴⁸ 22 May 2008, ICC-01/04-01/06-1347.

¹⁴⁹ Transcript of hearing on 10 June 2008, ICC-01/04-01/06-T-89-ENG, page 43, line 22 to page 44, line 16; page 49, lines 2-16; page 49, line 25 to page 50, line 9.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 13 June 2008

At The Hague, The Netherlands