



Original: English

No.: ICC-01/04-01/06

Date: 23 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

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

Source: Office of the Prosecutor

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Introduction

On 13 June 2008 the Trial Chamber issued an urgent decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) restrictions (hereinafter the “Decision”), whereby the Chamber stayed all proceedings pertaining to the accused Thomas Lubanga Dyilo. The Chamber summarised its findings as follows:

- “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.”¹

The Prosecution fully supports the first finding of the Trial Chamber set out above (disclosure obligations and rights to a fair trial). However the Prosecution disputes the findings in subparagraphs ii) and iii), and hereby seeks leave to appeal the Decision on the following issues:

- a. the Trial Chamber erred in the interpretation of the scope and nature of Article 54(3)(e) and in its characterization of the Prosecution's use of it as constituting “a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances”² (“the First Issue”);
- b. The Trial Chamber erred in the interpretation and exercise of its authority under Article 64 and as a consequence imposed a premature and erroneous remedy in the form of a stay of all proceedings (“the Second Issue”).

Overview of the First Issue – Article 54(3)(e) and the Prosecution's conduct

In relation to the First Issue, the Prosecution submits that the Chamber erred in its interpretation and characterization of Article 54(3)(e). In contrast to the “highly restricted” and “exceptional” manner in which the Trial Chamber characterised any use of Article 54(3)(e),³ the Prosecution notes that there are no substantial or numeric restrictions in Article 54(3)(e).

Additionally, the Chamber erred in its appreciation of the Prosecution behaviour: the qualifications – “whole and serious abuses”, “violation of a provision of the Statute” – are

¹ Decision, para. 92.

² Decision, para. 73.

³ Decision, paras. 71, 72 and 73.

unfounded in the facts or in law. The use of such unnecessarily harsh language questions the integrity of the Prosecution.⁴

The Prosecution submits that it has properly received the information subject to confidentiality under Article 54(3)(e) solely for the purposes of generating new evidence.⁵ The Trial Chamber statement that the Prosecution conceded during the hearing of 6 May 2008 that agreements reached under Article 54(3)(e) have been used generally to gather information, unconnected with its springboard or lead potential is misplaced.⁶ The Prosecution regrets if there was any confusion, but respectfully recalls that later the same day, the Prosecution specifically clarified and stated that: “And my last remark in this context and then I’m going to stop, and solely for the purpose to avoid any misunderstanding and for the record, whenever the Office of the Prosecutor enters into 54(3)(e) agreements, the aim obviously of such agreements is to obtain only lead information”.⁷

The Prosecution further notes that Article 54(3)(e) does not limit the nature of the material to which it applies, but only the purposes for which that material may be used. In this regard, there are no separate categories of material which exist independently in the Statute – incriminatory or exculpatory evidence on the one hand; and lead or springboard materials on the other⁸ – only one of which may be legitimately gathered under Article 54(3)(e). The material remains the same, and the restrictions imposed under Article 54(3)(e) only affect the use to which the Prosecution may put it. This is emphasised by Rule 82(1), pursuant to which “material or information” shall not be introduced as “evidence” “without the prior consent of the provider of the material or information”.

The Prosecution reiterates that, under Article 54 (3)(e), there are no numeric limitations to the amount of material collected. In the present case, the quantity of documents was a function of the size⁹ and complexity of the situation under investigation and the Prosecution’s obligations

⁴ The Single Judge in the *Katanga et al.* case has recently stated that “the Prosecution, as the organ of the Court primarily entrusted by the International Community with the investigation of the most serious crimes of international concern, must be presumed not to conduct itself and not to conclude agreements in violation of the Statute and the Rules” - ICC-01/04-01/07-621, 20 June 2008, para. 62.

⁵ As recently stated by the Single Judge in *Katanga et al.*, “prior to accepting any given document under article 54(3)(e) of the Statute, the Prosecution cannot assess either or its incriminating or its potentially exculpatory value (*Prosecutor v. Katanga et al.*, ICC-01/04-01/07-621, 20 June 2008, para. 33; see also para. 34).

⁶ Decision, para. 72 referring to transcript.

⁷ ICC-01/04-01/06-T-86-ENG, 6 May 2008, p. 35, lines 13-17.

⁸ In this regard, the Prosecution submits that the dichotomy which the Chamber appeared to propose in certain hearings is misleading, and does not reflect the intent or operation of Article 54(3)(e): see e.g. ICC-01/04-01/06-T-52-ENG ET, 1 October 2007, p. 86, lines 11-13 (“a large body of material which isn’t springboard or lead material, but which is material which either inculpatates or exculpates the accused”); p. 94, lines 7-11 (“you entered into the agreements not knowing whether the material you were going to be receiving was lead or springboard material or material which was simply going to be freestanding and not being secured for the purposes of leading to other evidence.”)

⁹ i.e. the entire Democratic Republic of the Congo (DRC).

under Article 54(1) “to establish the truth”, to “extend the investigation to cover all facts and evidence relevant” and to “investigate incriminating and exonerating circumstances equally”. At the time of selecting cases to investigate in a situation, the Prosecution required information on mass crimes over broad geographic regions and timescales extending over many years. The lead information collected allowed the Prosecution to determine on an objective basis the focus of its investigation against those persons most responsible among the thousands of persons involved in the crimes, in full compliance with its obligations pursuant to Article 54(1). As this material was collected before and for the purpose of selecting cases, the Prosecution was not in a position at the time of collection to assess the evidentiary value, either incriminatory or exculpatory, of the material.¹⁰ This is not improper in law and is a practical implication of case selection in situations of massive criminality.

The Prosecution submits that confidentiality under Article 54(3)(e) was the condition requested by the United Nations to provide some information. The Statute recognises that providers may impose such conditions “when necessary”.¹¹ As previously recalled by the Court, violence still affects the Ituri region and it appears that persons assisting in domestic prosecutions of members of the militia formerly led by Thomas Lubanga Dyilo have been killed or threatened.¹²

The Prosecution further submits that the conclusion that “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”¹³ is erroneous. The provider was only willing to provide the material on the conditions of confidentiality and the understanding that it be used for lead purposes. In fact, and contrary to the Trial Chamber’s conclusion, the use of Article 54(3)(e) allowed the Prosecution to disclose to the defence, after the provider agreed to the lifting of the restrictions, 100 items of potentially exculpatory material by its most recent account which would not have been available to the Defence were it not for the Prosecution’s use of Article 54(3)(e).

¹⁰ See e.g. *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-621, 20 June 2008, paras. 33-34.

¹¹ Article 93(8)(b). While 93(8)(b) formally applies only to States, the Prosecution submits that this is further indicative of the manner in which Article 54(3)(e) as a whole is intended to operate. Commentators to the Statute have also confirmed that the imposition of the conditions is the prerogative of the provider, which “may require that these documents be kept strictly confidential and not be used as evidence in court or disclosed in any other manner.” – Prost and Schlunck, “Article 93” in Triffterer (ed) (1999), p. 1115 (emphasis added).

¹² See e.g. ICC-01/04-01/06-586, 18 October 2006, p. 6; ICC-01/04-01/06-517, 5 October 2006, p. 3; ICC-01/04-01/06-437 15 September 2006, p. 7; ICC-01/04-01/06-T-65-ENG, 13 December 2007, p. 5, line 20 – p. 6, line 1.

¹³ Decision, para. 92(ii).

Overview of the Second Issue – disproportionate and premature stay of proceedings

In relation to the Second Issue, the Prosecution respectfully submits that in deciding to stay the proceedings, the Chamber erred in its interpretation of and exercise of authority under Article 64. The Prosecution submits that the Trial Chamber was at all times in a position to ensure the right to a fair trial with full respect for the rights of the accused. Article 64(3)(c) specifies that the Trial Chamber shall provide for disclosure “subject to any other relevant provisions of this Statute”. The Trial Chamber, as it had incorrectly interpreted Article 54(3)(e) and did not take in account the solutions for disclosure proposed by the Prosecution or other available solutions, consequently also erred in its application of Article 64(3)(c).

The Prosecution has defined and applied stringent standards for harmonizing its duties under Article 54(3)(e) with its duties of disclosure. While the Prosecution has *discretion* to request the consent of the provider of Article 54(3)(e) incriminatory information, it has a *duty* to make such a request with respect to exonerating information.¹⁴ If consent cannot be secured, the Prosecution will explore all other available options to address the situation, including the following:

- (i) First, the Prosecution can use the material provided to identify new exculpatory evidence of a similar nature and quality. This is the scheme enshrined in Article 54(3)(e), which primarily and expressly contemplates the use of information or material provided under conditions of confidentiality to generate new evidence.
- (ii) Second, the Prosecution can resort to other avenues, such as exploring the possibility of providing the material in summarized form to the defence, or stipulating to the relevant facts.
- (iii) Third, the Prosecution can, if needed, amend or withdraw charges.

These are the standards governing the Prosecution’s conduct, and the practice consistently followed in the existing cases. In the instant case, the Prosecution has provided the Chamber with adequate information at its disposal, thus allowing the Chamber to fulfil its role as a custodian of fairness of the proceedings and the rights of the accused. The Prosecution further submits that a Chamber should refrain from interfering with the manner in which the Prosecution is discharging its disclosure duties, absent a clear indication of abuse or

¹⁴ See e.g. *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-621, 20 June 2008, paras. 61, 100.

derelection of duties, or to curtail the options available to the Prosecution in a manner unsupported by the Statute or the Rules.¹⁵

Furthermore, a stay of proceedings is an exceptional measure of last resort,¹⁶ which, as the Appeals Chamber has warned, must be used “sparingly”. Staying proceedings is appropriate only where other remedies have been exhausted, or are simply not available. The circumstances of the instant case, including the availability of alternative evidence, the modest exonerating value of the undisclosed material and the availability of different options for the Chamber to explore, did not justify such a drastic remedy, as a result of which, as the Chamber acknowledged, “the victims have been excluded from justice”.¹⁷ In this case, and contrary to the Trial Chamber’s assessment, a fair trial remained possible at all times.

The Prosecution submits that the stay of the proceedings in these circumstances impacts on the fair conduct of the proceedings, in particular the Prosecution’s ability to bring its case (one of its core responsibilities under the Statute¹⁸). The Decision recognises that this issue has a significant impact on the rights and interests of victims and the accused, and thus on the fairness of the proceedings *vis-à-vis* those participants, as well as on “the international community, the peoples of the Democratic Republic of the Congo”.¹⁹

It is respectfully submitted that a decision of such critical importance, impacting so directly on the rights of all parties and participants and related to the very exercise of criminal jurisdiction by the Court in its first case must impact on the fair and expeditious conduct of the proceedings, within the terms of Article 82(1)(d). For the same reasons, there can be no

¹⁵ The Appeals Chamber of the ICTY has stated that “[i]n accordance with the International Tribunal’s jurisprudence, the test to be applied for discovery under Rule 68 has two steps: first, if the Defence believes that the Prosecution has not complied with Rule 68, it must first establish that evidence other than that disclosed might prove exculpatory for the accused and is in the possession of the Prosecution; and second, it must present a *prima facie* case which would make probable the exculpatory nature of the materials sought”. The Appeals Chamber further ruled that only “if the defence satisfies the Chamber that the Prosecution has failed to comply with Rule 68”, the Chamber will then decide on an appropriate remedy pursuant to Rule 68bis. (*Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, para. 268; see also *Prosecutor v. Brđjanin et al.*, IT-99-36, Decision on “Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved”, 30 October 2002, para. 23). See also *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-621, 20 June 2008. In this decision, the Single Judge explicitly refers to the “inter partes nature of the disclosure process” (para. 121).

¹⁶ For example, the ICTY Appeals Chamber found that only in “exceptional circumstances” where a fair trial is not possible, and “after exhausting all the other measures”, is a motion seeking the stay of proceedings appropriate - see *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 55. See also *Prosecutor v. Lubanga*, ICC-01/04-01/06-772 OA4, 14 December 2006, para. 31, stating that “[t]he power to stay proceedings should be sparingly exercised”; and *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-PT, Decision on the Defence Motion for Continuance of Trial, 30 April 2005, para. 7, stating that “[t]he remedy of a continuance is not the only remedy for a violation of the Prosecution’s disclosure obligations”. See further, Don Mathias, “The Duty to Prevent an Abuse of Process by Staying Criminal Proceedings” (www.geocities.com/venezioiphile/OrchSA.pdf).

¹⁷ Decision, para. 95.

¹⁸ Article 42(1).

¹⁹ Decision, para. 95.

doubts that intervention by the Appeals Chamber is urgently needed in the present case. Accordingly, leave to appeal should be granted as expeditiously as possible, and before any other determination is made by the Trial Chamber.

Procedural Background

1. The Prosecution makes reference to the background in its previous filings²⁰ and to the submissions and discussions during the Status Conferences of 6 May 2008, 28 May 2008, and 10 June 2008,²¹ as well as to its written submissions filed on 11 June 2008.²²
2. On 11 June 2008, the Trial Chamber orally announced that the trial date of 23 June 2008 was vacated,²³ and on 13 June 2008, the Trial Chamber issued the “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”.²⁴
3. The Prosecution hereby seeks leave to appeal the Decision pursuant to Article 82(1)(d).

The issues for which leave to appeal is sought fulfil the criteria in Article 82(1)(d)

4. The First Issue significantly impacts on the Prosecution’s ability to validly collect material under Article 54(3)(e), and subsequently to both make use of its powers under Article 54 and fulfil its duties to conduct an objective and independent investigation. It thus affects the fairness *vis-à-vis* the Prosecution. Some of the material which the Prosecution has only been able to collect under Article 54(3)(e) has been potentially exculpatory, and the Decision also makes extensive reference to the rights of the defence: the issue thus also has a broader impact on fairness. This issue further impacts on the expeditious conduct of the proceedings, as it affects the Prosecution’s investigative methods, its ability to obtain necessary materials, and to make critical decisions on a timely and fully informed basis.
5. On the Second Issue, the Prosecution submits that the stay of the proceedings in these circumstances impacts on the fair conduct of the proceedings: the Prosecution’s ability to bring its case²⁵ and the jurisdiction of the Court have been frustrated. The Decision recognises that this issue has a significant impact on the rights and interests of victims and

²⁰ ICC-01/04-01/06-1281, 16 April 2008, paras. 1 to 5; ICC-01/04-01/06-1248, 28 March 2008, paras. 1-4.

²¹ ICC-01/04-01/06-T-86-ENG, at pp. 2 to 37, esp. p. 35, lines 20 to 25, p. 36 and p. 37, lines 1 to 23; ICC-01/04-01/06-T-88-ENG, at pp. 1 to 3, 43 to 46 and 47 to 48; ICC-01/04-01/06-T-89-ENG.

²² ICC-01/04-01/06-1391-Conf.

²³ ICC-01/04-01/06-T-90-ENG.

²⁴ ICC-01/04-01/06-1401 (the “Decision”).

²⁵ Article 42(1).

the accused, as well as on “the international community, the peoples of the Democratic Republic of the Congo”.²⁶

6. Finally the Prosecution submits that immediate resolution by the Appeals Chamber of both issues will materially advance the proceedings. This is especially so given that the proceedings in this case have been stayed: there is no risk of causing any delay; to the contrary, this may be the only means by which these critical issues can be resolved.

The First Issue affects the fair and expeditious conduct of the proceedings

*The context in which the issue arose*²⁷

7. As stated during the hearings of 2 October 2007 and 6 May 2008, the materials were gathered under a condition of non-disclosure imposed by the provider that the Prosecution accepts those materials on the condition of confidentiality and uses them solely for leads purposes, unless the information provider otherwise consents.²⁸ The Statute and Rules explicitly contemplate that material initially collected for limited purposes under Article 54(3)(e) may subsequently be used as evidence, with the consent of the provider. In this context, the Prosecution recalls that Article 54(3)(e) does not limit the *nature* of the material to which it applies, but only the *purposes* for which that material may be *used*.
8. As the Prosecution informed the Trial Chamber, if it had not accepted the restrictions placed on the use of that material by the providers, it would not have received the material at all.²⁹ The Prosecution rejects any suggestion that the agreements it has entered into with providers of information are improper.³⁰ Nor is it for the Prosecution to “choose not to” disclose the material in question,³¹ but rather this is an obligation placed on the Prosecution pursuant to the Statute.

The First Issue affects the fair conduct of the proceedings

²⁶ Decision, para. 95.

²⁷ The Prosecution recalls that “arguments [...] which pertain to the merits of a substantive issue rather than whether the matter meets the test for leave to appeal” are generally not relevant to an application under Article 82(1)(d) (see e.g. ICC-01/04-01/06-1191, 26 February 2008, para. 19; ICC-01/04-01/06-1313, 8 May 2008, para. 10). These submissions, along with those in the introduction, are presented to develop the manner in which the issue arises from the Decision, which may be relevant to the impact on the fairness of the proceedings. See further submissions in *Situation in the DRC*, ICC-01/04-141, 24 April 2006, paras. 55-56.

²⁸ ICC-01/04-01/06-T-55-CONF-EXP-ENG, 2 October 2007, p. 4, line 22 – p. 5, line 2 and p. 74, lines 12-15; ICC-01/04-01/06-T-86-ENG, 6 May 2008, p. 35, lines 13-17.

²⁹ See e.g. ICC-01/04-01/06-T-52-ENG ET, 1 October 2007, p. 85, lines 13-18, and p. 86, lines 4-9.

³⁰ See in particular Decision, paras. 70, 71 and 75; see also para. 64.

³¹ See Decision, para. 75.

9. The Prosecution submits that fairness requires that the procedural and substantive rights and obligations of all participants be respected.³² This includes fairness to the Prosecution,³³ which “means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in article 54.”³⁴
10. By characterising Article 54(3)(e) in this manner, and the Prosecution’s use of it in this case as “a wholesale and serious abuse, and a violation of an important provision”,³⁵ the First Issue primarily affects the fairness of the proceedings by substantially impacting on the Prosecution’s to “exercise the power” to enter agreements and obtain documents and information under Article 54(3)(e).³⁶
11. In the context of the investigation and prosecution of massive crimes, the ability to secure such information is a key tool at the disposal of the Prosecution: “this kind of information can be very significant to the preparation and prosecution of cases”.³⁷ The ICTY has also recognised that the purpose of its analogous provision is to encourage cooperation, without which the Prosecution would be unable to fulfil its mandate.³⁸
12. In contrast to the “highly restricted” and “exceptional” manner in which the Trial Chamber characterised any use of Article 54(3)(e),³⁹ the Prosecution submits that the realities of conducting investigations during ongoing conflicts or in regions of substantial instability reinforce the need to be able to accept material on a confidential basis, and for the limited purpose of pursuing further evidence. This is consistent with the Statute,

³² See further *Situation in the DRC*, ICC-01/04-141, 25 April 2006, para. 48; *Prosecutor v Kony et al*, ICC-02/04-01/05-212, 26 February 2007, paras. 10-11. This has been held to include respect for the norms of a fair trial (*Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 11), equality and the principle of adversarial proceedings (*Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, para. 38)

³³ *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, paras. 38-39; *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.

³⁴ *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, para. 39.

³⁵ Decision, para. 73.

³⁶ In this regard, the Prosecution recalls that the question is whether the underlying issue affects the fairness of the proceedings; not whether the Decision on the issue was correct – see footnote 27, above; submissions in *Situation in the DRC*, ICC-01/04-141, 24 April 2006, paras. 55-56. This characterisation will also affect the Prosecution’s ability to use Article 54(3)(e) in other investigations and proceedings, and will thus also impact on the fairness of those proceedings in the same manner. The Prosecution submits that such impact on other proceedings is properly an additional factor to consider in granting leave to appeal, see footnote 93, below; see also *Prosecutor v Kony et al*, ICC-02/04-01/05-20-US-Exp (reclassified pursuant to ICC-02/04-01/05-52), 19 August 2005, para. 54.

³⁷ Bergsmo and Kruger, “Article 54” in Triffler (ed) (1999), p. 724.

³⁸ The purpose of rule 70(B) “is to encourage States, organisations, and individuals to share sensitive information with the Tribunal. The Rule creates an incentive for such cooperation by permitting the sharing of information on a confidential basis and by guaranteeing information providers that the confidentiality of the information they offer and of the information’s sources will be protected.” - *Prosecutor v Milosevic*, IT-02-54-AR108bis & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 19 (references omitted, emphasis added)

³⁹ Decision, paras. 71, 72 and 73.

which recognises that providers may impose such conditions “when necessary”.⁴⁰ In situations of ongoing conflict, sometimes involving subjects of the Court’s investigation, the limitation of the conditions to situations where it is “necessary” does not mean that the imposition of such conditions will always be “exceptional”.⁴¹

The interpretation of the scope of Article 54(3)(e), and the characterisation of the Prosecution’s conduct, also affects the fairness of the proceedings by directly impacting on the Prosecution’s ability to fully investigate pursuant to Article 54(1)(a). Without the ability to receive materials under Article 54(3)(e) when providers insist on confidentiality, the Prosecution will not be able to collect a substantial body of relevant material.⁴² The Prosecution submits that it is a necessary condition for the fair conduct of the proceedings pursuant to Article 54(1)(a) that the greatest possible range of information,⁴³ both incriminating and exonerating, is available to the Prosecution in order to establish the truth and objectively make determinations regarding investigations and cases.

13. As mentioned, elements of the Decision appear to be based on the false premise that “if the exculpatory material was not covered by the agreements, it would have been provided to the defence”.⁴⁴ On the contrary: if the material had not been received under Article 54(3)(e) it would not have been provided to the Prosecution.⁴⁵ The Prosecution can only disclose potentially exculpatory information “in the Prosecutor’s possession or control”,⁴⁶ and the material in question thus would not have been disclosed.⁴⁷

⁴⁰ Article 93(8)(b). While 93(8)(b) formally applies only to States, the Prosecution submits that this is further indicative of the manner in which Article 54(3)(e) as a whole is intended to operate. Commentators to the Statute have also confirmed that the imposition of the conditions is the prerogative of the provider, which “may require that these documents be kept strictly confidential and not be used as evidence in court or disclosed in any other manner.” – Prost and Schlunck, “Article 93” in Triffterer (ed) (1999), p. 1115 (emphasis added).

⁴¹ Such may raise serious security risks for organisations and individuals operating in the field, or the specific mandate of an organisation may be of such a nature that it cannot be seen to be cooperating with the Court or providing it with evidence, and such organisations may thus consider that they can only provide material confidentially to be used as leads. Restrictions under Article 54(3)(e) have also been considered necessary by information providers where they required such restrictions in order for the provider to comply with their obligations towards a third party originator of the information, which the Prosecution notes that the Statute recognises the validity of such claims in other contexts – see e.g. Article 73.

⁴² See p. 5 and para. 8, above.

⁴³ This safeguards the fairness and integrity of the proceedings by allowing the Prosecution to identify the widest possible range of potentially exculpatory issues, minimising the chances that such issues remain beyond the scope of the Prosecution’s inquiry. In the present case, certain potentially exculpatory facts contained in material which was collected under Article 54(3)(e) formed the basis for the investigation of exonerating circumstances in subsequent interviews with witnesses – investigations which could not have been pursued without the initial receipt of this information under Article 54(3)(e).

⁴⁴ Decision, para. 70.

⁴⁵ See e.g. ICC-01/04-01/06-T-52-ENG ET, 1 October 2007, p. 85, lines 13-18, and p. 86, lines 4-9.

⁴⁶ Article 67(2).

⁴⁷ In the present case, this could include the 100 items of potentially exculpatory material which the Prosecution has disclosed to the defence after the provider agreed to the lifting of the restrictions – see p. 5, above.

14. In this sense, the Prosecution reiterates that the Chamber's conclusion that provision of alternative or derivative evidence to the defence is not an adequate measure⁴⁸ is in error: while the Prosecution recognizes that under Article 54(3)(e) it has a *duty* to make a request for consent for lifting of restrictions to the provider with respect to exonerating information, it submits that identification and disclosure of other exculpatory evidence of a similar nature and quality is precisely the scheme enshrined in Article 54(3)(e). This scheme primarily and expressly contemplates the use of information or material provided under conditions of confidentiality to generate new evidence, and therefore the use of alternative evidence in place of the original material. The Chamber's rejection of such alternative evidence is inconsistent with the underlying rationale of Article 54(3)(e).⁴⁹

*The First Issue affects the expeditious conduct of the proceedings*⁵⁰

15. In this instance, the issue of the Prosecution's ability to properly obtain material under Article 54(3)(e) in the course of its investigations, which it generally would otherwise be unable to obtain, significantly affects the Prosecution ability to investigate efficiently,⁵¹ to make critical decisions on a timely and fully informed basis, and to select and obtain materials.⁵² This, in turn, will also significantly affect the Prosecution's ability to conduct focussed investigations and trials. The Prosecution submits thus that it affects the expeditious conduct of the proceedings.

⁴⁸ Decision, para. 60.

⁴⁹ When dismissing the Prosecution's submissions that it had already disclosed other material with the same exculpatory value as the non-disclosed material, the Trial Chamber's reliance on the judgement of the Appeals Chamber of the ICTY in the *Blaškić* case also appears misplaced, as it does not relate to the facts and circumstances in this case. (Decision, paras. 60 and 81). First, the *Blaškić* case was not dealing with the question of material gathered under Rule 70(B) "which has been used solely for the purposes of generating new evidence". Further, the finding in the *Blaškić* case does not refer to a scenario where alternative information of a similar nature has been actively disclosed (like the Prosecution did in the present case), but to a situation where such material is publicly available (but not necessarily reasonably accessible to the defence) – the language of the *Blaškić* decision is "there exists other information", as opposed to "other information has been disclosed" (see *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, para. 294).

⁵⁰ The Prosecution recalls its position that once a party has demonstrated that an issue affects the fair conduct of the proceedings, a Chamber need not determine whether it also affects expeditiousness but should proceed to consider whether its immediate resolution may materially advance the proceedings – see e.g. *Prosecutor v. Lubanga*, ICC-01/04-01/06-125, 24 May 2006, footnote 30; *Prosecutor v. Katanga*, ICC-01/04-01/07-107, 14 December 2007, para. 21. While this Chamber has previously ruled that a party must demonstrate an impact on both the fair and the expeditious conduct of the proceedings (e.g. ICC-01/04-01/06-1191, 26 February 2008, para. 48-49), prior rulings are not binding (Article 21(2) – "The Court may apply"). The obligation is to ensure that proceedings are fair and expeditious (e.g. Article 64(2)). Once proceedings are no longer fair, or no longer expeditious, they are no longer "fair and expeditious". See further arguments and authorities set out in *Situation in the DRC*, ICC-01/04-141, paras. 49-52.

⁵¹ Pre-Trial Chamber I has stated that an issue which would "have a certain impact on the Prosecution's current investigative methods [...] would significantly affect the fair and expeditious conduct of the proceedings" – see *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-484, 20 May 2008, pp. 8-9; *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-365, p. 7.

⁵² See e.g. *Prosecutor v. Katanga*, ICC-01/04-01/07-116, 19 December 2007, p. 6.

The Second Issue fulfils the criteria for leave to appeal

The context in which the Second Issue arose

The Decision fails to consider all relevant factors

16. The Prosecution is fully aware of the Trial Chamber's critical role as the custodian of the fairness of the trial, and consequently of the importance of the Chamber having before it all the material needed to make an informed decision as to whether the rights of the accused and the fairness of trial are adversely affected. The Prosecution has worked, and continues to work, to find satisfactory avenues for the Chamber to be in a position to discharge its duties adequately and guarantee that the accused's right to obtain disclosure of exonerating material is respected. The Prosecution nonetheless submits that the remedy chosen by the Chamber to deal with the current situation was unwarranted in light of the Prosecution's provision of alternative evidence, the nature of the material in question, the Prosecution's transparent approach to disclosure and the availability of other, less drastic options that the Trial Chamber did not explore.

Alternative evidence

17. The Prosecution has already served the Defence with a significant amount of alternative evidence of the same exculpatory nature as the information that is covered by Article 54(3)(e) restrictions.⁵³ The Prosecution recalls that the very purpose of Article 54(3)(e) and the purpose of gathering "lead material" is that it be used to generate other evidence, i.e. to obtain, disclose and use alternative evidence for the same facts or issues. The Trial Chamber's failure to consider and give due weight to the Prosecution's active disclosure of other evidence which provided the same types of potentially exculpatory information⁵⁴ was premised on an erroneous interpretation of the relevant provisions of the Statute;⁵⁵

⁵³ See ICC-01/04-01/06-1248, 28 March 2008, paras. 9 and 18. This alternative evidence refers both to protected information, which in the view of the Prosecution falls into categories of evidence which by their nature do not materially impact on the Court's determination of the guilt or innocence of the accused (paras. 9-17), as well as to information falling into categories which by their nature could materially impact on the Court's determination of the guilt or innocence of the accused (paras. 18-26).

⁵⁴ See e.g. ICC-01/04-01/06-T-52-ENG, 1 October 2008, p 18, lines 1-10; ICC-01/04-01/06-T-79-ENG, 13 March 2008, p 7, lines 18-24; ICC-01/04-01/06-1248, 28 March 2008, in particular paras 9 and 18 and footnotes 22, 23, 28-33, 36-37, 39, 41-43 (further providing the alternative evidence in 23 annexes); ICC-01/04-01/06-T-89-ENG, 10 June 2008, p 7, line 18 to p 8, line 2. The Prosecution proposed that the Trial Chamber "should consider whether the non-disclosed confidential materials materially impact on the guilt or innocence of the accused person and whether they are available to the accused and his Defence in the form of disclosed alternative evidence" (status conference of 6 May 2008, ICC-01/04-01/06-T-86-ENG, p 12, line 24, to p 13, line 3). The same applies to the Trial Chamber's "grave reservations as to whether serving other, similar evidence can ever provide an adequate substitute for disclosing a particular piece of exculpatory evidence" (Decision, para. 60). See further, para. 14 and footnote 49, above.

⁵⁵ See para. 14 and footnote 49, above. Note also the recent ruling of the Single Judge in *Katanga et al.*, finding that the provision of analogous information is, for the purpose of the confirmation hearing, an adequate alternative measure to actual disclosure (*Prosecutor v. Katanga et al.*, ICC-01/04-01/07-621, 20 June 2008, paras. 77-86 and p. 52).

moreover, the Prosecution submits that by so doing, the Chamber “disregarded relevant facts”, and invalidated its Decision.⁵⁶

The nature of the material in question

18. The question put by the Trial Chamber to the Prosecution was whether there was any exculpatory material in the Prosecution’s possession “which it is unable to disclose and which may *materially impact on the Court’s determination of guilt or innocence*”; indicating that if such material existed the Prosecution would be “under an obligation to withdraw any charges which the non-disclosed exculpatory material impacts upon. If the prosecution is in doubt as to *whether or not the material falls into this category*, it should be put before the bench for the Trial Chamber’s determination”.⁵⁷ Thus, it was the *Chamber* which first referred to this specific category of exonerating material. The Prosecution submits that the real exonerating value of the material is, and always was, relevant to assessing the impact of any non-disclosure on the fairness of the proceedings; and therefore any appropriate remedies. The prior decision of the Chamber set the roadmap for the Prosecution’s approach, including resorting to the Chamber if the Prosecution had doubts as to whether the information materially impacted on the guilt or innocence of the accused. The Decision omits any reference to the Chamber’s instructions, which the Prosecution sought to implement to the best of its abilities.⁵⁸
19. The Prosecution also informed the Chamber that a number of categories of materials, though falling within the Prosecution’s broad definition of potentially exonerating information related to issues which *per se* could not “materially impact” on the determination of the case.⁵⁹ The Prosecution explained that while certain further materials fell into categories which *by their nature* could potentially “materially impact” on the guilt or innocence of the accused, *in fact*, based on the Prosecution’s close assessment, there was *no doubt* that the materials concerned did *not* meet this threshold.⁶⁰ The Prosecution set out its analysis and reasons for these assessments. The Decision rejected this information, without any consideration of the different categories or the Prosecution’s

⁵⁶ *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-572 OA 4, 9 June 2008, para. 25.

⁵⁷ ICC-01/04-01/06-1019, 9 November 2007, para. 28 (emphasis added).

⁵⁸ On 13 March 2008 the Prosecution stated in clear terms its understanding of the ruling, and was at no time corrected by the Chamber: “Mr. Withopf: And of course that also reminds me of the decision - I believe it’s the one of the end of November - which says that whenever there is potentially exculpatory nature of key importance which would undermine the Prosecution’s case, that in such a situation we would need to go back to the Trial Chamber. In light of that order, we have scrutinised material and I can affirm to the Trial Chamber that at this stage there is not such potentially exculpatory information within the scope of documents the Office of the Prosecutor has in its possession where we believe it would require us to go back to the Chamber.” (see ICC-01/04-01/06-T-79-ENG)

⁵⁹ ICC-01/04-01/06-1248, 28 March 2008, paras. 9-17.

⁶⁰ *Ibid.*, paras. 18-26.

analysis, and stated that the Chamber ought to still decide, even though the Prosecution did not have doubts as to the impact of the material.⁶¹

20. Leaving aside the question of whether adequate discharge of the Chamber's duties truly required examining all of the original material, it is respectfully submitted that at a minimum the Chamber should also have taken into account the Prosecution's assessment of the real exonerating quality of the material for the purposes of determining the appropriate remedy at this particular juncture. This was not a situation where a trial was about to start with critical exculpatory evidence, going to the heart of the Prosecution's case, being withheld from the accused. It is submitted that the extent to which evidence may exculpate an accused was a crucial factor that the Chamber ought to have considered for the purposes of determining an adequate and proportionate remedy.⁶² For example, the Chamber was fully aware that the undisclosed material included 46 documents solely of a *tu quoque* nature,⁶³ which the Chamber had dismissed as an irrelevant category.⁶⁴ The non-disclosure of these 46 documents thus could in no sense render the trial materially unfair, especially when other material of a similar nature had been provided.⁶⁵
21. The Prosecution further notes that the Chamber had at its disposal various means to assist in verifying the manner in which the Prosecution determined whether a given item did materially impact on the guilt or innocence of the accused or not. For example, the Chamber had been given around 30 documents previously covered by Article 54(3)(e).⁶⁶ The Chamber also had a description of the different categories of information.⁶⁷ Finally, the Prosecution notes that the Chamber could and should have requested further details from the Prosecution as to the reasons underpinning its assessment of the material, if needed.⁶⁸

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

22. An overarching element of the Decision appears to be a reluctance to accept the Prosecution's good faith assessment of material and its impact on the proceedings.⁶⁹ The

⁶¹ Decision, paras. 87-88.

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

⁶³ ICC-01/04-01/06-T-89-ENG, 10 June 2008, p. 46, lines 1-13; ICC-01/04-01/06-1400, 13 June 2008, para. 4.

⁶⁴ See ICC-01/04-01/06-T-71-ENG, 18 January 2008, p. 8, line 13 to p. 9, line 3.

⁶⁵ See ICC-01/04-01/06-1248, 28 March 2008, footnote 28, informing the Chamber that over 100 items containing *tu quoque* information have been provided to the Defence.

⁶⁶ ICC-01/04-01/06-1373, 3 June 2008; ICC-01/04-01/06-1385, 9 June 2008. The Decision acknowledges that those documents were received by the Chamber (para. 64).

⁶⁷ ICC-01/04-01/06-1248, 28 March 2008, and annexes.

⁶⁸ The Prosecution notes that it did provide to the Chamber on 15 April 2008 further information on the reasons why the undisclosed evidence did not in fact materially impact on the Court's determination of guilt or innocence of the accused. See ICC-01/04-01/06-1281.

⁶⁹ See in particular Decision, paras. 60, 68, 87 and 88.

Chamber has an independent duty to verify the overall fairness of the proceedings, and for these purposes it may consider assurances coming from the Prosecution to be insufficient. However, it is submitted that the Prosecution's assessment of the situation was a factor to be weighed when determining the adequate and proportionate remedy.

23. The Prosecution stresses that its approach to disclosure has been completely transparent. From the outset of pre-trial proceedings before the Trial Chamber, the Prosecution has explained to the Chamber in detail its approach, the efforts that it had undertaken, and the issues that had to be resolved.⁷⁰ The Chamber had before it numerous examples of the Prosecution having scrupulously exercised its disclosure obligations. The Prosecution has consistently demonstrated willingness and flexibility in seeking solutions, including through the possible use of concessions.⁷¹ In relation to the undisclosed material at issue in the Decision, the Prosecution has provided the Chamber with clear information as to the existence of the problem, relevant developments and the manner in which it was proceeding.⁷² At no time has the Prosecution concealed facts from the Chamber or the defence, misrepresented the facts, or otherwise acted in bad faith in its disclosure duties.

The availability of other, more proportionate, remedies

24. The Prosecution submits that a stay of the proceedings must always be a measure of last resort.⁷³ Only if other remedies have been unsuccessfully attempted, or are simply not available, should a Chamber take the extraordinary step of staying proceedings. Yet, the Chamber decided on this extraordinary step without fully exploring the range of alternative measures at the Chamber's disposal:

- On the face of the Decision, the Chamber has not even considered the proposal of the Prosecution on 11 June 2008, which provided additional information on a provider's reasons for non-disclosure; and included an offer from a provider to confer with the Chamber, an option that the Prosecution stressed could provide an opportunity for the Chamber to explore alternative possibilities, including an *in situ* examination of the

⁷⁰ See ICC-01/04-01/06-T-52-ENG ET, 1 October 2007, regarding a detailed overview of the disclosure situation (pp. 10-26, 62-68, 83-94); Article 54(3)(e) matters (pp. 13-19 and 83-94); and the keyword list developed for the purposes of identifying Article 67(2) material (pp. 23-26).

⁷¹ See e.g. ICC-01/04-01/06-1311-Anx2, 8 May 2008, paras. 90-91.

⁷² ICC-01/04-01/06-951, 11 September 2007; ICC-01/04-01/06-T-52-ENG, pp 10-20 and 62-68; ICC-01/04-01/06-1248, 28 March 2008; ICC-01/04-01/06-T-81-CONF-EXP-ENG, see pp 19-29; ICC-01/04-01/06-1267, 7 April 2008; ICC-01/04-01/06-1281, 16 April 2008; ICC-01/04-01/06-T-86-ENG, 6 May 2008, esp pp 14-24; ICC-01/04-01/06-T-88-ENG, 28 May 2008, pages 1 to 3, 43 to 46 and 47 to 48; ICC-01/04-01/06-1364, 2 June 2008; ICC-01/04-01/06-1373, 3 June 2008; ICC-01/04-01/06-1385, 9 June 2008; ICC-01/04-01/06-T-89-ENG, 10 June 2008; ICC-01/04-01/06-1391-Conf, 11 June 2008; ICC-01/04-01/06-1400, 13 June 2008.

⁷³ The Prosecution recalls that the ICTY Appeals Chamber found that only in "exceptional circumstances" where a fair trial is not possible, and "after exhausting all the other measures", is a motion seeking the stay of proceedings appropriate (*Prosecutor v. Tadić*, IT-94-I-A, Judgement, 15 July 1999, para. 55), and the ICC Appeals Chamber has ruled that "[t]he power to stay proceedings should be sparingly exercised" (*Prosecutor v. Lubanga*, ICC-01/04-01/06-772 OA4, 14 December 2006, para. 31). See further, footnote 16, above..

documents.⁷⁴ The Prosecution thus submits that the conclusion that there was “no prospect” of the material being viewed by the Chamber⁷⁵ is startling, considering that a tangible and fully available option of direct contact with the provider was not even explored.⁷⁶

- The Trial Chamber also appears to have failed to consider the acknowledged offer by some information providers to allow the Chamber to review 32 of the documents in question.⁷⁷ It further ruled out *ab initio* the possibility of examining the summaries of the undisclosed materials before making any other decision, if only to assess the type of exonerating information in question; whether the summaries, on their face, were insufficient; and whether the system was workable. At a minimum, the Chamber could have viewed the summaries for the purposes of narrowing the set of documents that it considered required closer examination, instead of assuming that it had to look at the totality of the material.
- The Chamber could have commenced the trial and simultaneously instructed the Prosecution to solve the matter within a specific time frame, after which a stay could have been ordered if no satisfactory solution had been reached.⁷⁸ The Chamber could have instructed the Prosecution to determine whether any of the material was critical for the cross-examination of any Prosecution witness, and if so to re-arrange the presentation of evidence. The Prosecution notes that progressive disclosure of

⁷⁴ The Chamber did also not consider intervening by requesting, pursuant to the general cooperation scheme, the information provider to lift the restrictions (an analogous suggestion has been made by the Single Judge in the Katanga et al. case: *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-621, 20 June 2008, paras. 38, 104-105).

⁷⁵ Decision, para. 91.

⁷⁶ Direct contact with the provider should be viewed as a particularly suitable avenue to solve any problems arising due to the protection of information. See for instance the case *Prosecutor v. Haradinaj et al.*, where UNMIK suggested a review of documents covered by Rule 70 restrictions by the Trial Chamber to allow it to assess their evidentiary value and consider appropriate security measures: See “Submission by the United Nations Mission in Kosovo (UNMIK) to Motion by Defendant Idriz Balaj Requesting the Chamber to order UNMIK to lift Rule 70(b) Confidentiality Measures,” 12 February 2007”; see also “Prosecution report on UNMIK Rule 70 Material Subject to Rule 68”, 5 April 2007; “Decision on the Prosecution’s 5 April Request for Chamber Review of Rule 70 UNMIK Files Potentially Subject to Rule 68”, 19 April 2007, court hearing of 10 May with representatives of UNMIK, pp. 2883-3885; Trial Judgement, 3 April 2008, para. 18.

⁷⁷ See Decision, para. 64.

⁷⁸ Once the problem of access to the exculpatory information was solved, the Chamber would have been in a position to compensate any arguable prejudice by deciding to have witnesses re-called, adjournments granted, or resort to any other remedies that the Chamber deemed adequate. *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-PT, Decision on the Defence Motion for Continuance of Trial, 30 April 2005, para. 7; *Prosecutor v. Brima et al.*, SCSL-04-16-T, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators’ Notes Pursuant to Rule 66 and/or 68, 4 May 2005, para. 16; *Prosecutor v. Brdjanin*, IT-99-36-T, Decision on “Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed pursuant to Rule 68bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved”, 30 October 2002, para. 26; *Prosecutor v. Oric*, IT-93-68-T, Judgement, 30 June 2006, para. 76; *Prosecutor v. Stakic*, IT-97-24-A, Judgement, 22 March 2006, para. 185.

exculpatory evidence has happened in the *ad hoc* Tribunals, and that the fairness of trial has not been considered automatically compromised, much less irreparably.⁷⁹

- Finally, and if satisfied that none of the above-referred options were adequate, the Chamber could have decided a confined postponement of the trial date pending a suitable solution of the issue, and instructed the Prosecution to focus all its efforts on solving the problem before the newly scheduled date for commencement of trial.

25. Instead of exploring any of these available and viable alternatives, either individually or in combination, the Chamber rushed to a harsh decision, adversely impacting on the rights of the Prosecution, of victims and on the interest of the international community as a whole.

26. In light of the disclosure of alternative evidence, the nature of the undisclosed material, and the range of options available to the Chamber, the Prosecution disputes that in this case the process had been ruptured “to an extent making it impossible to piece together the constituent elements of a fair trial”⁸⁰ - a formula that the Prosecution considers should be reserved for cases of severe breaches of the rights of the accused and the fairness of trial.

The stay of the proceedings affects the fair conduct of the proceedings

27. The Prosecution submits that the indefinite stay of proceedings clearly impacts upon the fairness of those proceedings. Fairness *vis-à-vis* the Prosecution have been affected, as the Prosecution has been prevented from presenting its case at trial,⁸¹ and from thus fulfilling its core statutory duty.⁸² More broadly, as the Decision recognises, “[t]he judicial process is seriously undermined if a court is prevented from reaching a verdict on the charges”.⁸³

28. Furthermore, the Decision itself also recognises the impact which this stay has on the rights of a range of participants and other interested actors: notably to “the accused himself”; to victims, who have “been excluded from justice”; and to “the international community, the peoples of the Democratic Republic of the Congo”.⁸⁴ This is supported by the jurisprudence of the *ad hoc* international criminal tribunals, which have granted

⁷⁹ See the ICTY case *Prosecutor v. Brdjanin et al.*, IT-99-36-T, “Decision on “Motion for relief from Rule 68 violations by the prosecutor and for sanctions to be imposed pursuant to rule 68bis and motion for adjournment while matters affecting justice and a fair trial can be resolved”, 30 October 2002, denying a stay of proceedings and imposing a deadline to the prosecution to complete disclosure of exculpatory material.

⁸⁰ ICC-01/04-01/06-772, para. 39.

⁸¹ Fairness has also been linked to the ability of a party to present its case - see *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.

⁸² See e.g. Articles 42(1), 54(1)(b). As noted above (see para. 9), the fair conduct of the proceedings requires that the procedural and substantive rights and obligations of all participants be respected, including “that the Prosecutor must be able to exercise the powers and fulfil the duties listed in article 54” (*Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, para. 39).

⁸³ Decision, para. 95.

⁸⁴ Decision, para. 95.

leave to appeal issues of stay of proceedings,⁸⁵ and have recognised that the stay of a trial affects both the rights of the accused to a fair and expeditious trial,⁸⁶ and also the Prosecution, who “acts on behalf of and in the interests of the international community.”⁸⁷

The stay of the proceedings affects the expeditious conduct of the proceedings

29. The impact of the present, indefinite, stay of proceedings on the expeditious conduct of the proceedings is equally clear.⁸⁸ The Appeals Chamber has indicated that expeditious conduct involves the conduct of proceedings without undue impediment or delay.⁸⁹ It is apparent that the stay of proceedings will unavoidably delay proceedings.

The stay of the proceedings affects the outcome of the trial

30. The Prosecution also submits that the stay of the proceedings may affect the outcome of the trial in the most serious possible manner, as it may mean that there is no determination of guilt or innocence. The Decision itself recognises the degree to which this issue will affect the outcome of trial.⁹⁰

The immediate resolution of both issues will materially advance the proceedings

31. The Prosecution submits that immediate resolution of both issues will materially advance the proceedings.⁹¹ Given that the proceedings have been stayed, there is no risk that the trial will be delayed by the reference of these issues for immediate appellate resolution.⁹²

⁸⁵ *Prosecutor v Kvočka et al*, IT-98-30/1, “Decision on the Defense ‘Motion Regarding Concurrent Procedures Before ICTY and ICJ on the Same Questions’”, 5 December 2000; *Prosecutor v Kvočka et al*, IT-98-30/1, “Decision on Interlocutory Appeal by the Accused Zoran Zigic against the Decision of Trial Chamber I dated 5 December 2000”, 25 May 2001, paras. 19-21.

⁸⁶ *Prosecutor v Kvočka et al*, IT-98-30/1, “Decision on Application by the Accused Zoran Zigic for Leave to Appeal the Decision of Trial Chamber I dated 5 December 2000”, 16 February 2001.

⁸⁷ *Prosecutor v Kvočka et al*, IT-98-30/1, “Decision on Interlocutory Appeal by the Accused Zoran Zigic against the Decision of Trial Chamber I dated 5 December 2000”, 25 May 2001, para. 21.

⁸⁸ The Prosecution has previously submitted that expeditiousness requires that decisions at all stages not unduly or unnecessarily delay the overall determination of responsibility - see further *Situation in the DRC*, ICC-01/04-103, 23 January 2006, para. 29 and authorities cited therein.

⁸⁹ Referring to “the unimpeded and expeditious conduct” of the relevant proceedings: ICC-01/04-01/06-1335 OA9 OAI0, 16 May 2008, para. 14.

⁹⁰ As a result of the stay, “the Court will not make a decision on issues which are of significance to” a range of interested actors - Decision, para. 95.

⁹¹ As stated by the Appeals Chamber, this requirement means that “prompt reference of the issue to the court of appeal” and its “authoritative determination” will help the proceedings “move forward”; by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.” - *Situation in the DRC*, ICC-01/04-168, 13 July 2006, paras. 14-15, 18.

⁹² The Prosecution recalls that the Trial Chamber has based its assessment of the exceptional nature of interlocutory appeals, at least in part, on the fact that they have the capacity to significantly delay proceedings – see e.g. ICC-01/04-01/06-1191, 26 February 2008, para. 13; ICC-01/04-01/06-1313, 8 May 2008, para. 9. The Prosecution recalls that the purpose of article 82(1)(d) is not to regulate whether a party may appeal an issue at all; but rather whether an issue should be appealed at this stage of proceedings or whether it should be left to be raised (if necessary) as part of a final appeal (see e.g. *Prosecutor v Strugar*, IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 6; see further *Situation in the DRC*, ICC-01/04-103, 23 January 2006, paras. 37-38 and authorities cited therein). The Prosecution notes that this is consistent with the Trial

32. In addition, to the extent that the findings on the First Issue influenced the stay of the proceedings, or may be relevant to any lifting of the stay or further limited determinations in this case, the immediate resolution of this issue by the Appeals Chamber is the only way to ensure that such determinations are taken on the correct basis. Furthermore, the immediate resolution of this issue may also ensure that proceedings in other cases “follow the right course.”⁹³
33. The Prosecution finally submit that the manner in which immediate resolution of the Second Issue will materially advance those proceedings is manifest. Indeed, the Decision itself contemplates that the Appeals Chamber might make such an order.⁹⁴

The upcoming hearing on release

34. The Decision also schedules a hearing to consider the release of the accused.⁹⁵ It is apparent that in the context of the Decision, any discussion on release is inextricably linked to the ruling on stay of the proceedings and its underlying rationale. Since the Prosecution is currently challenging the Decision in its entirety, including all constituent elements which could be of relevance for any discussion on release, it considers that, prior to any decision on release, the Chamber should first, out of reasons of judicial economy, consider the current application for leave to appeal.

Conclusion

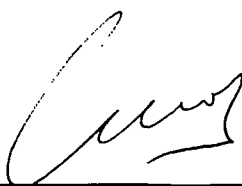
35. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal the Decision, and defer consideration of release until after determining whether to grant leave to appeal and, if leave to appeal is granted, the resolution of the appeal.

Chamber’s recognition that an appeal against an issue may be legitimate or even necessary at a later stage - see e.g. ICC-01/04-01/06-1191, 26 February 2008, para. 12; ICC-01/04-01/06-1313, 8 May 2008, para. 9 and 17.

⁹³ The findings of the Trial Chamber on the First Issue may impact upon determinations, and the Prosecution’s activities, in other cases; yet as proceedings in this case are stayed the Prosecution has no other means of remedying this situation. The Appeals Chamber has confirmed that proceedings are “not confined to the proceedings in hand but extends to the proceedings prior and subsequent thereto.” - *Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 17. The Trial Chamber has stated that “it is irrelevant for these purposes that the issue for which leave is sought is of general interest or that it may arise in future pre-trial or trial proceedings” (ICC-01/04-01/06-1313, 8 May 2008, para. 9; see also ICC-01/04-01/06-1191, 26 February 2008, para. 11). While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under Article 82(1)(d), it is a factor which can be weighed in deciding whether to grant leave - see *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on the Prosecutor’s Motion for Certification to Appeal the Trial Chamber’s Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005, para. 4; *Prosecutor v. Mrskic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.

⁹⁴ “unless this stay is lifted (either by this Chamber or the Appeals Chamber), the trial process in all respects is halted” - Decision, para. 94 (emphasis added).

⁹⁵ Decision, para. 94.



Luis Moreno-Ocampo,
Prosecutor

Dated this 23rd day of June, 2008
At The Hague, The Netherlands