

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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Date: 2 July 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**

**Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused'**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr Ekkehard Withopf

**Counsel for the Defence**

Ms Catherine Mabilie  
Mr Jean-Marie Biju-Duval

**Legal Representatives of the Victims**

Mr Luc Walley  
Mr Franck Mulenda  
Ms Carine Bapita Buyangandu

**Legal Representatives of the Applicants**

[1 name per team maximum]

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

[2 names maximum]

**The Office of Public Counsel for the Defence**

[2 names maximum]

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

Trial Chamber I (“Trial Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following Decision on the Prosecution’s Application for Leave to Appeal the ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’:

## I. BACKGROUND

1. On 13 June 2008 the Trial Chamber issued its ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused’ (the “impugned decision”).<sup>1</sup> This decision arose out of the significant history of difficulties created by the Office of the Prosecutor (“prosecution”) failing to discharge its disclosure obligations under Article 67(2) of the Rome Statute (“Statute”), despite repeated orders by the Trial Chamber.<sup>2</sup>
2. On 23 June 2008 the prosecution filed a request seeking leave to appeal the impugned decision (“prosecution request”) on the following issues:<sup>3</sup>

### The First Issue

- a) The Trial Chamber erred in the interpretation of the scope and nature of Article 54(3)(e) of the Statute and in its characterization of the Prosecution’s use of it as constituting “a wholesale and serious abuse,

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

<sup>2</sup> Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, ICC-01/04-01/06-1019, 9 November 2007; Order on the “Prosecution’s submission on undisclosed documents containing potentially exculpatory information”, 3 April 2008, ICC-01/04-01/06-1259

<sup>3</sup> 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’ [hereafter “Prosecution request”], 23 June 2008, ICC-01/04-01/06-1407.

and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances".<sup>4</sup>

### The Second Issue

- b) The Trial Chamber erred in the interpretation and exercise of its authority under Article 64 of the Statute and as a consequence imposed a premature and erroneous remedy in the form of a stay of all proceedings.<sup>5</sup>
3. The prosecution submitted that both of these issues have an impact on the fair and efficient conduct of the proceedings, which will be materially advanced by their immediate resolution.<sup>6</sup>
4. The legal representatives of victims a/0001/06 to a/0003/06 filed a response to prosecution's requests on 24 June 2008, agreeing with the prosecution request for leave to appeal, while noting that they did not, necessarily, accept the totality of the prosecution's arguments.<sup>7</sup> On 25 June 2008 the legal representative of victim a/0105/06 filed observations in which the Trial Chamber was requested to grant leave to appeal against the impugned decision.<sup>8</sup> The defence filed no substantive submissions on the prosecution request.<sup>9</sup>

## II. RELEVANT PROVISIONS

<sup>4</sup> Prosecution request, 23 June 2008, page 3

<sup>5</sup> *Ibid*

<sup>6</sup> *Ibid*, page 8, paragraphs 4 - 6

<sup>7</sup> Réponse à la demande du Procureur de faire appel contre la décision du 13 juin 2008, 24 June 2008, ICC-01/04-01/06-1410.

<sup>8</sup> Observations du Représentant Légal de la Victime a/105/06 sur la demande du Procureur de faire appel contre la décision du 13 mai 2008 relative à la suspension de la procédure dans l'affaire LUBANGA, 25 June 2008, ICC-01/04-01/06-1412.

<sup>9</sup> Réponse de la Défense à la « Prosecution's Application for Leave to Appeal "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Statute Conference on 10 June 2008" » datée du 23 juin 2008", 27 June 2008, ICC-01/04-01/06-1416

5. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered Article 82 of the Statute:

**Appeal against other decisions**

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

[ ]

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

Article 64 of the Statute provides:

**Functions and powers of the Trial Chamber**

[. .]

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 provides:

**Rights of the accused**

[...]

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.

### III. PROSECUTION OVERVIEW

6. By way of overview (set out in the introductory, unnumbered paragraphs), the prosecution submitted that the Trial Chamber erred in its interpretation and characterization of Article 54(3)(e) of the Statute, noting that there are no substantial or numeric restrictions within the article.<sup>10</sup> Further, the prosecution suggested the Chamber erred in its description of the prosecution's behavior, questioning the "harsh" approach of the Trial Chamber.<sup>11</sup> The prosecution submitted that it had properly received material subject to Article 54(3)(e) of the Statute and recalled that while it stated prior to the recess in the hearing of 6 May 2008 that agreements concerning Article 54(3)(e) of the Statute had been used generally to gather information, following the recess, in a restructured submission, it stated that the aim of the agreements was to obtain only lead-information.<sup>12</sup>
7. The prosecution further noted that confidentiality under Article 54(3)(e) of the Statute was the condition requested by the United Nations prior to providing the information, and that they were only willing to provide the materials under this restriction.<sup>13</sup> Additionally, the prosecution contended that contrary to the Trial Chamber's conclusion, their use of Article 54(3)(e) agreements allowed the prosecution to disclose potentially exculpatory material (if the information-providers agreed to lift the restrictions) which might otherwise not be available.<sup>14</sup>
8. As regards the second issue, by way of overview it was submitted that in deciding to stay the proceedings the Trial Chamber erred in its interpretation

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<sup>10</sup> Prosecution request, 23 June 2008, page 3.

<sup>11</sup> *Ibid.*, pages 4 -5.

<sup>12</sup> *Ibid.*, page 4.

<sup>13</sup> *Ibid.*, page 5

<sup>14</sup> *Ibid.*

of, as well as in the exercise of its authority under, Article 64 of the Statute.<sup>15</sup> The prosecution suggested that the Trial Chamber's interpretation of Article 54(3)(e) of the Statute did not take into account the solutions for disclosure that have been proposed, and in consequence it erred in its application of Article 64(3)(c) of the Statute.<sup>16</sup> The prosecution further submitted 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 dereliction of duties, or to curtail the options available to the Prosecution in a manner unsupported by the Statute or the Rules".<sup>17</sup>

9. Noting that a stay of proceedings is a measure of last resort, the prosecution contended that a fair trial remained possible at all times and, in the result, a stay of proceedings was not an appropriate remedy.<sup>18</sup>
10. The Trial Chamber notes that the prosecution's overview extends significantly beyond the matters that need to be raised for the purposes of seeking leave to appeal at this interlocutory stage. Rather, many of these submissions go to the merits of the proposed appeal, and as such will not be considered in the Trial Chamber's analysis and conclusions on this application.
11. However, in order to ensure there is an accurate record, the Trial Chamber has provided clarification of certain issues that are addressed in the overview, although for the purposes of resolving the application the Chamber has focused solely on those arguments which are relevant to it. If it had been appropriate to address the substantive content of the overview, the Trial Chamber would have rejected many of the arguments and the factual and legal propositions.

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<sup>15</sup> *Ibid*, page 6.

<sup>16</sup> *Ibid*

<sup>17</sup> *Ibid*, pages 6-7

<sup>18</sup> *Ibid*

12. Turning to the prosecution's submissions concerning its intentions when entering into agreements under Article 54(3)(e) of the Statute, while the prosecution advanced a restructured submission on the matter during the resumed hearing on 6 May 2008, the Trial Chamber notes the prosecution's numerous statements, beginning in October 2007, in relation to Article 54(3)(e) agreements and information collection. Consistently within those statements (save on one occasion) the prosecution set out that it was not always aware, prior to receiving the materials, whether their potential use was solely for the purpose of generating new evidence or for other purposes: indeed, the prosecution has repeatedly stated that its approach was that items received under these agreements could later be used as evidence.<sup>19</sup> Given this essentially unvarying stance on the part of the prosecution and notwithstanding the wholly inconsistent submission that was advanced during the resumption of the hearing of 6 May 2008, in the judgment of the Trial Chamber the only fair conclusion is that the prosecution has used the agreements made under Article 54(3)(e) of the Statute to obtain information for general use, and including

<sup>19</sup> ICC-01/04-01/06-T-52-ENG, 1 October, 2007, page 83, lines 12 to 16: "And, of course, the language we are usually using in this context, Article 54(3) protected documents, does not -- and I agree with the observation, does not necessarily reflect what Article 54(3) was meant to cover. It says: "Obtain materials under provisions of confidentiality and for lead purposes and solely for lead purposes."" ICC-01/04-01/06-T-52-ENG, 1 October, 2007, page 86, lines 10 to 15: "PRESIDING JUDGE FULFORD: So putting it shortly, agreements of this kind have been reached in relation to a large body of material which isn't springboard or lead material, but which is material which either inculcates or exculpates the accused. MR. WITHOPF: I believe, Mr President, you have very correctly summarised what I said." ICC-01/04-01/06-T-52-ENG, 1 October, 2007, page 94, lines 1 to 3: "So I cannot answer in the affirmative that we knew prior to receiving the materials that they are not only lead evidence." ICC-01/04-01/06-T-52-ENG, 1 October, 2007, page 94, lines 7 to 11: "PRESIDING JUDGE FULFORD: And it also means, therefore, that 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. MR. WITHOPF: I believe, Mr President, this summary comes closer to the reality at the time." ICC-01 04-01 06-T-55-CONF-EXP-ENG, 2 October 2007, pages 4, lines 22 -25 to page 5, line 1: "These materials, and all of these materials, whilst first instance being considered as lead materials, were always received, Mr. President, your Honours, were always received in the understanding that they could later on be used as evidence once the UN consented to its use, and in practice we are making this positive experience." ICC-01/04-01/06-T-78-CONF-ENG, 12 March 2008, page 91, lines 21 to 25: "In this regard, your Honours, we would encourage the Bench to read Article 54(3)(e) together with Rule 82 of the Rules of Procedure and Evidence, which if read together, in our view, do create the possibility that the OTP -- that the Prosecution would seek to rely on materials that were originally obtained under Article 54(3)(e)" ICC-01/04-01/06-T-86-ENG, 6 May 2008, page 23, lines 8 to 14: "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."



during the trial, and not solely for the purpose of generating new evidence. Although the statement during the resumed hearing on 6 May 2008 was the last chronologically, it stands alone and the prosecution never attempted to explain this apparent and wholesale reversal of its otherwise clear position consistently developed over the course of a number of hearings. Indeed, it is to be observed that this significant and seemingly irreconcilable inconsistency reinforces the need for the judges to be satisfied that the prosecution has discharged its disclosure obligations, having applied the correct criteria and approach.

13. In light of the matters raised in the application for leave to appeal, the Trial Chamber considers it necessary to clarify its own understanding of its duty and its authority when ensuring that the prosecution discharges these obligations. In summary, the Trial Chamber's role as regards this issue is an essential element of the trial process, first, by ensuring that the proceedings are fair and expeditious, and, second, by ensuring the rights of the accused are upheld throughout. This approach is clearly established by Article 64(2) of the Statute which provides that:

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.

Since Article 67 of the Statute addresses specifically the rights of the accused, it follows that Article 64(2) of the Statute places a primary responsibility on the Trial Chamber to ensure that the rights enshrined in Article 67 of the Statute (which include the right to disclosure) are upheld. Therefore, since disclosure (in the sense set out in Article 67(2) of the Statute) is a right of the accused, the Trial Chamber has a duty to ensure that the prosecution fulfills its obligations, and including by evaluating any alternative proposals to full disclosure that the prosecution may advance.

14. Furthermore, given that the prosecution has submitted that it has already furnished the Chamber with “adequate information” and that the Chamber should “refrain from interfering with the manner in which the Prosecution is discharging its disclosure duties”, the Trial Chamber notes that the prosecution advanced the proposal that the judges should view the potentially exculpatory material,<sup>20</sup> and, furthermore, this eventuality is consistent with Article 67(2) of the Statute which establishes that in cases of doubt the Trial Chamber shall decide whether disclosure of exculpatory material has been properly effected.
15. The prosecution criticizes the Trial Chamber for declining an offer to “confer” with an information-provider.<sup>21</sup> In the view of the Trial Chamber it would be wholly wrong for the Bench to engage in private discussions with an information-provider outside of the context of a court hearing, and in the absence of the defence: if the discussions merely concern the elements of a suggested solution, absent any good reason for deciding otherwise, it should occur in court in the presence of the defence; if the discussions involve the content of the material, this should also only occur with the critical safeguards that are provided by a court hearing (most especially a reliable, court-provided record).

#### IV. SUBMISSIONS AND ANALYSIS

##### A. General remarks

16. In its examination of the prosecution’s application, the Trial Chamber has considered Article 82(1)(d) of the Statute and the Appeals Chamber’s “Judgment on the Prosecutor's Application for Extraordinary Review of Pre-

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<sup>20</sup> ICC-01/04-01/06-T-86-ENG, 6 May 2008, page 15, lines 5-25, page 6, lines 1-10.

<sup>21</sup> Prosecution request, paragraph 24

Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" of 13 July 2006.<sup>22</sup>

17. Accordingly, it has been necessary to examine the respective applications for leave to appeal against the following criteria:
- a) Whether the matter is an "appealable issue";
  - b) Whether the issue at hand could significantly affect:
    - i) the fair and expeditious conduct of the proceedings, or
    - ii) the outcome of the trial,

**and**
  - c) Whether in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings.
18. The requirements a), b) and c) above are cumulative and therefore failure to fulfill one or more of them is fatal to an application for leave to appeal.<sup>23</sup>
19. Thus, the following two issues (as formulated by the prosecution) have been evaluated in order to decide whether or not the requirements under Article 82(1)(d) of the Statute are met:

### **The First Issue**

- a. Whether the Trial Chamber erred in the interpretation of the scope and nature of Article 54(3)(e) of the Statute 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".

<sup>22</sup> Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paragraphs 9-14.

<sup>23</sup> Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06, a/0111/06 to a/0127/06, 20 December 2007, ICC-02/04-112, paragraph 17.

## The Second Issue

- b. Whether the Trial Chamber erred in the interpretation and exercise of its authority under Article 64 of the Statute and as a consequence imposed a premature and erroneous remedy in the form of a stay of all proceedings.

### B. Whether the requirements of Article 82(1)(d) of the Statute are met

*First Issue: The interpretation of the scope and nature of Article 54(3)(e) of the Statute and the Trial Chamber's characterization of the prosecution's use of the article.*

#### *Prosecution Submission*

20. The prosecution submitted that the Trial Chamber's interpretation of Article 54(3)(e) of the Statute, together with its characterization of the prosecution's use of it, each affect the fairness of the proceedings by substantially impacting on the prosecution's ability to enter into agreements and to obtain information under Article 54(3)(e) of the Statute.<sup>24</sup> Further, the prosecution suggested that this issue affects the fairness of proceedings by directly impacting on the prosecution's ability to investigate fully pursuant to Article 54(1)(a) of the Statute, since without the guarantees of confidentiality under Article 54(3)(e) of the Statute the prosecution will not be able to collect a substantial body of relevant material.<sup>25</sup>
21. In its submissions on the second requirement under Article 82(1)(d) of the Statute, the prosecution submitted that its ability properly to obtain material under Article 54(3)(e) of the Statute in the course of investigations affects the prosecution's opportunity to make critical decisions on a timely and informed

<sup>24</sup> Prosecution request, 23 June 2008, paragraph 10

<sup>25</sup> *Ibid.*, paragraph 12.

basis, thereby affecting its ability to conduct focused investigations and to present its case at trial.<sup>26</sup>

22. As regards one of the requirements for granting leave to appeal – that an immediate resolution of the issue will materially advance the proceedings – the prosecution advanced the argument that since the proceedings have been stayed, there is no risk that the trial will be delayed by the proposed appeal.<sup>27</sup> Furthermore, the prosecution submitted that an immediate resolution of this issue by the Appeals Chamber is necessary to test the validity of the impugned decision.<sup>28</sup> Finally, the prosecution observed that the immediate resolution of this issue may also ensure that proceedings in other cases follow the right course.<sup>29</sup>

#### *Victims Representatives Submissions*

23. While the submissions from the Victims' Representatives addressed a number of policy issues, none of the submissions were directed at the elements for granting leave to appeal pursuant to Article 82(1)(d) of the Statute.<sup>30</sup> In consequence, they are not considered further.

#### *Analysis*

24. The impugned decision has had the effect of halting the proceedings, and the prosecution is accordingly unable to present its case against the accused. Underpinning the decision, in part, is the finding that the prosecution has inappropriately used Article 54(3)(e) of the Statute. As a matter of statutory

<sup>26</sup> *Ibid*, paragraph 15

<sup>27</sup> *Ibid*, paragraph 31.

<sup>28</sup> *Ibid.*, paragraph 32

<sup>29</sup> *Ibid*, paragraph 33

<sup>30</sup> Réponse à la demande du Procureur de faire appel contre la décision du 13 juin 2008, 24 June 2008, ICC-01/04-01/06-1410; Observations du Représentant Légal de la Victime a/105/06 sur la demande du Procureur de faire appel contre la décision du 13 mai 2008 relative à la suspension de la procédure dans l'affaire LUBANGA, 25 June 2008, ICC-01/04-01/06-1412

interpretation, this is an appealable issue: the prosecution is entitled to advance its arguments concerning the Chamber's interpretation of the section and its characterization of the prosecution's use of it before the Appeals Chamber. Given this is an issue that is appropriate for argument on appeal, the criterion as regards "fairness" is made out, given the result of the decision. Having halted the trial, the impugned decision has had an inevitable consequence on the expeditiousness of the proceedings and it is self-evident that a resolution of this issue will materially advance the proceedings, in the sense that if the stay is lifted, the trial will resume.

*Second Issue: The interpretation and exercise of the Trial Chamber's authority under Article 64 of the Statute and as a consequence the imposition of a stay of all proceedings.*

*Prosecution's Submissions*

25. The prosecution's submissions with regard to this second issue extend significantly beyond its scope, and to a real extent they address the merits of the substantive issues, rather than being confined to the elements necessary to satisfy the requirements for granting leave to appeal.
26. The prosecution submitted that the remedy chosen by the Trial Chamber was unwarranted in light of the prosecution's provision of alternative evidence, the nature of the material in question and "the Prosecution's transparent approach to disclosure and the availability of other, less drastic options that the Trial Chamber did not explore".<sup>31</sup> The prosecution suggested that it has already served the defence with a significant amount of alternative evidence.<sup>32</sup> Further, the prosecution submitted that the substantive exonerating value of the material (or lack of it) is relevant for the purposes of assessing the impact of

<sup>31</sup> Prosecution request, 23 June 2008, paragraph 16

<sup>32</sup> *Ibid*, paragraph 17.

non-disclosure on the fairness of the proceedings and the appropriate remedies.<sup>33</sup> The prosecution set out the argument as follows:

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.<sup>34</sup>

27. The prosecution conceded in its substantive submissions that the Trial Chamber has an independent duty to ensure the overall fairness of the proceedings.<sup>35</sup> However, it submitted that the prosecution's assessment of the situation was a factor to be weighed when reaching an adequate and proportionate remedy.<sup>36</sup>

28. Finally, the prosecution suggested that other remedies were available to the Trial Chamber.<sup>37</sup> These included that the Chamber should:

- meet privately with the UN's Legal Counsel in order for him to explain the position of the UN and why it is not willing to lift the confidentiality agreements;<sup>38</sup>
- review 32 documents from other information providers;
- review summaries of the non disclosed material; and
- commence the trial without full disclosure having taken place, affording the prosecution further time to resolve

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<sup>33</sup> *Ibid*, paragraph 18.

<sup>34</sup> *Ibid*, paragraph 20.

<sup>35</sup> *Ibid*, paragraph 22.

<sup>36</sup> *Ibid*

<sup>37</sup> *Ibid*, paragraph 24

<sup>38</sup> 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 and solely for the purpose of generating new evidence and that potentially contain evidence that falls under Article 67(2), 11 June 2006, ICC-01/04-01/06-1391-Conf, paragraph 8.

these issues, and that if thereafter no satisfactory solution is reached, then at that point the Chamber could order a stay.<sup>39</sup>

29. In addressing the elements necessary for granting leave to appeal, the prosecution submitted that fairness vis-à-vis the prosecution, acting, it suggested, on behalf of the interests of the international community, has been affected in that the prosecution has been prevented from presenting its case at trial.<sup>40</sup> Further, in addressing whether the expeditiousness of proceedings has been affected by the Trial Chamber's decision, the prosecution observed that a stay of proceedings will self-evidently delay the proceedings.<sup>41</sup> The prosecution also noted that a stay of proceedings may mean that there will be no determination of the guilt or innocence of the accused, thereby affecting the outcome of the trial.<sup>42</sup> Finally, the prosecution asserted that a resolution of this issue will materially advance the proceedings.<sup>43</sup>

#### *Victims Representatives Submissions*

30. While the submissions from the Victims' Representatives addressed a number of policy issues, none of the submissions were focused on the test for granting leave to appeal pursuant to Article 82(1)(d) of the Statute.<sup>44</sup>

<sup>39</sup> Prosecution request, 23 June 2008, paragraph 24

<sup>40</sup> *Ibid*, paragraphs 27, 28

<sup>41</sup> *Ibid*, paragraph 30.

<sup>42</sup> *Ibid*, paragraph 31

<sup>43</sup> *Ibid*, paragraph 32.

<sup>44</sup> Réponse à la demande du Procureur de faire appel contre la décision du 13 juin 2008, 24 June 2008, ICC-01/04-01/06-1410, Observations du Représentant Légal de la Victime a/105/06 sur la demande du Procureur de faire appel contre la décision du 13 mai 2008 relative à la suspension de la procédure dans l'affaire LUBANGA, 25 June 2008, ICC-01/04-01/06-1412.



*Analysis*

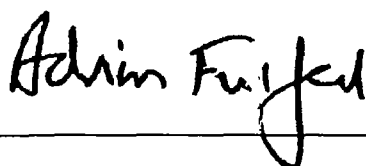
31. The two issues advanced by the prosecution are interrelated, and since the Chamber has concluded that the first issue (the correct interpretation and the correct use of Article 54(3)(e) of the Statute) is arguable, it follows that the Chamber's overarching conclusion, as encapsulated in the second issue (that in order to ensure a fair trial pursuant to Article 64(2) of the Statute, it was necessary to impose a stay) is also arguable. For the reasons set out above, a resolution of this second issue is necessary to ensure that the proceedings are fair and expeditious, and for their material advancement. Overall, the issue of the extent of the Trial Chamber's obligation to ensure the accused receives a fair trial needs to be resolved by the Appeals Chamber in the context of a determination of the prosecution's obligations to disclose potentially exculpatory evidence to the defence under Article 67(2) of the Statute, and the extent to which, and the circumstances in which, the Trial Chamber should review and determine the prosecution's disclosure obligations "in case of doubt".

**V. CONCLUSIONS**

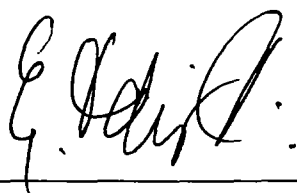
32. For these reasons leave is granted on the following issues:
- a. Whether the Trial Chamber erred in the interpretation of the scope and nature of Article 54(3)(e) of the Statute and in its characterization of the Prosecution's use of it as constituting "a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances".

- b. Whether the Trial Chamber erred in the interpretation and exercise of its authority under Article 64 of the Statute; whether the Chamber correctly determined that its obligation to ensure the accused receives a fair trial is dependent on the prosecution disclosing any potentially exculpatory evidence to the defence under Article 67(2) of the Statute (having first delivered the evidence in full to the Chamber for review and decision in case of doubt); and whether it imposed a premature and erroneous remedy in the form of a stay of the proceedings.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 2 July 2008

At The Hague, The Netherlands