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International Criminal Court

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No.: **ICC-01/04-01/06 OA 13**
Date: **21 October 2008**

THE APPEALS CHAMBER

Before: **Judge Sang-Hyun Song, Presiding Judge**
Judge Philippe Kirsch
Judge Georghios M. Pikis
Judge Erkki Kourula
Judge Daniel David Ntanda Nsereko

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

Judgment

on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008"

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

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence
Ms Catherine Mabille
Mr Jean-Marie Biju-Duval

Legal Representatives of Victims
Mr Luc Walleyn
Mr Franck Mulenda

REGISTRY

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor pursuant to the decision of Trial Chamber I of 2 July 2008 entitled "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'" (ICC-01/04-01/06-1417) against the decision of Trial Chamber I of 13 June 2008 entitled "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" (ICC-01/04-01/06-1401),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The decision of Trial Chamber I of 13 June 2008 entitled "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" is confirmed. The appeal is dismissed.

REASONS

I. KEY FINDINGS

1. The Prosecutor may only rely on article 54 (3) (e) of the Statute for a specific purpose, namely in order to generate new evidence.

2. The use of article 54 (3) (e) of the Statute by the Prosecutor must not lead to breaches of his obligations vis-à-vis the suspect or the accused person. Therefore, whenever the Prosecutor relies on article 54 (3) (e) of the Statute he must bear in mind his obligations under the Statute and apply that provision in a manner that will allow

the Court to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial.

3. If the Prosecutor has obtained potentially exculpatory material on the condition of confidentiality pursuant to article 54 (3) (e) of the Statute, the final assessment as to whether the material in the possession or control of the Prosecutor would have to be disclosed pursuant to article 67 (2) of the Statute, had it not been obtained on the condition of confidentiality, will have to be carried out by the Trial Chamber and therefore the Chamber should receive the material. The Trial Chamber (as well as any other Chamber of this Court, including this Appeals Chamber) will have to respect the confidentiality agreement and cannot order the disclosure of the material to the defence without the prior consent of the information provider.

4. A conditional stay of the proceedings may be the appropriate remedy where a fair trial cannot be held at the time that the stay is imposed, but where the unfairness to the accused person is of such a nature that a fair trial might become possible at a later stage because of a change in the situation that led to the stay.

5. If the obstacles that led to the stay of the proceedings fall away, the Chamber that imposed the stay of the proceedings may decide to lift the stay of the proceedings in appropriate circumstances and if this would not occasion unfairness to the accused person for other reasons, in particular in light of his or her right to be tried without undue delay (see article 67 (1) (c) of the Statute).

II. PROCEDURAL HISTORY

6. On 13 June 2008, Trial Chamber I rendered 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" (ICC-01/04-01/06-1401; hereinafter: "Impugned Decision"), staying the proceedings before that Chamber in respect of Mr. Lubanga Dyilo and halting the trial process in all respects (Impugned Decision, paragraph 94) because in the view of the Trial Chamber, the non-disclosure of certain documents by the Prosecutor to the defence made a fair trial impossible.

7. The Prosecutor sought leave to appeal the Impugned Decision (ICC-01/04-01/06-1407), which the Trial Chamber granted in the "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'" (ICC-01/04-01/06-1417; hereinafter: "Decision Granting Leave to Appeal") in respect of the following issues:

> Whether the Trial Chamber erred in the interpretation of the scope and nature of Article 54(3)(e) of the Statute and 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" [and] [w]hether 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 [Decision Granting Leave to Appeal, paragraph 32]

8. The Prosecutor filed his document in support of the appeal on 14 July 2008 (ICC-01/04-01/06-1434). As this document did not comply with certain formal requirements stipulated in the Regulations of the Court, the Prosecutor was ordered to re-file it (see ICC-01/04-01/06-1445); on 24 July 2008 the Prosecutor filed the corrected "Prosecution's Document in Support of Appeal against Decision to Stay Proceedings" (ICC-01/04-01/06-1446-Anx1; hereinafter: "Document in Support of the Appeal").

9. Mr. Lubanga Dyilo filed the "Defence Response to the Prosecution's Document in Support of Appeal against 13 June 2008 Decision to Stay Proceedings" on 25 July 2008 (ICC-01/04-01/06-1447-tENG; hereinafter: "Response to the Document in Support of the Appeal").

10. Following a decision of the Appeals Chamber allowing their participation in the present appeal (ICC-01/04-01/06-1453), victims a/0001/06, a/0002/06 and a/0003/06 filed the "Victims' Observations on the Prosecutor's Appeal of the Decision of 13 June 2008 Ordering a Stay of the Proceedings" on 12 August 2008 (ICC-01/04-01/06-1456-tENG; hereinafter: "Observations"). On 18 August 2008, the Prosecutor filed the "Prosecution's Response to Observations of Participating Victims on Appeal

against Decision to Stay Proceedings" (ICC-01/04-01/06-1459; hereinafter: "Response of the Prosecutor"). On the same day, Mr. Lubanga Dyilo submitted the "Defence Response to the Observations of Victims a/0001/06 to a/0003/06 on the Prosecutor's Appeal Against the Decision of 13 June 2008 Ordering a Stay of the Proceedings" (ICC-01/04-01/06-1461-tENG; hereinafter: "Response of Mr. Lubanga Dyilo").

11. On 13 October 2008, the Appeals Chamber rendered the "Decision on the 'Prosecution's Application under Regulation 28 to provide Clarification or Additional Details which Impact on the Appeals against the Decisions to Stay the Proceedings and Release the Accused'" (ICC-01/04-01/06-1476), rejecting an application by the Prosecutor of 15 September 2008 (ICC-01/04-01/06-1470) to be granted leave to provide additional information and clarification pursuant to regulation 28 of the Regulations of the Court.

12. The Prosecutor filed the "Prosecution's Notice to the Registrar of its Discontinuance, as Moot, of the First and Second Grounds of Appeal in its Appeal against Decision to Stay Proceedings" dated 14 October 2008 (ICC-01/04-01/06-1479; hereinafter: "Notice of Discontinuance").

III. EFFECT OF THE NOTICE OF DISCONTINUANCE

13. The Appeals Chamber notes the Notice of Discontinuance, in which the Prosecutor informs the Appeals Chamber that he wishes to discontinue his first and second grounds of appeal. He recalls that these two grounds of appeal concern the interpretation of article 54 (3) (e) of the Statute and the characterisation by the Trial Chamber of his use of this provision. In his submission, these questions "no longer present an issue whose resolution is necessary to decide the case" because he recently informed the Trial Chamber that the information providers have now agreed to grant the Trial Chamber, and, if necessary, the Appeals Chamber, "complete and unfettered access to all the Article 54(3)(e) documents" (Notice of Discontinuance, paragraph 5). He submits that rule 157 of the Rules of Procedure and Evidence allows a party to discontinue an appeal at any time before a judgment has been delivered and refers to jurisprudence of this Appeals Chamber, indicating that such discontinuance requires neither approval nor acknowledgment by the Chamber (Notice of Discontinuance,

paragraph 4). In a footnote, he refers the Appeals Chamber to jurisprudence of the International Criminal Tribunal for Rwanda (hereinafter: "ICTR"), recognising the right of an appellant to withdraw a ground of appeal.

14. In spite of the Notice of Discontinuance, the Appeals Chamber has decided, for the following reasons, to consider the arguments of the Prosecutor raised under the first and second grounds of appeal.

15. The discontinuance of appeals is regulated by the first sentence of rule 157 of the Rules of Procedure and Evidence, pursuant to which "[a]ny party who has filed an appeal under rule 154 or who has obtained the leave of a Chamber to appeal a decision under rule 155 may discontinue the appeal at any time before the judgment has been delivered."

16. The Appeals Chamber notes that this provision, on its face, only provides for the discontinuance of an appeal in its entirety, and not for the discontinuance of certain grounds of appeal. Had the Prosecutor discontinued the appeal in its entirety, pursuant to rule 157 of the Rules of Procedure and Evidence, that would have been the end of the matter. However, that is not the course the Prosecutor chose to follow. The Appeals Chamber considers that it is not necessary for the purpose of the present case to determine whether such partial discontinuance could ever be based on rule 157 of the Rules of Procedure and Evidence. The Notice of Discontinuance can in any event be treated as an indication by the Prosecutor to the Appeals Chamber of a desire to withdraw his first two grounds of appeal.

17. In the present case, however, the Notice of Discontinuance is without effect because the questions raised under the first two grounds are inextricably linked to the third ground of appeal, which the Prosecutor wishes to maintain. Even if the Prosecutor had never raised the first and second grounds of appeal, the Appeals Chamber would have had to consider the issues raised thereunder as part of its consideration of the arguments raised under the third ground of appeal. This link between the arguments under the grounds of appeal was acknowledged by the Trial Chamber at paragraph 31 of the Decision Granting Leave to Appeal, where that Chamber noted that 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."

18. The link between the grounds of appeal is also apparent from the Document in Support of the Appeal of the Prosecutor. At paragraph 25 and in relation to the third ground of appeal the Prosecutor submits that he had provided the Trial Chamber with a detailed assessment of the undisclosed documents and that he was continuing to address the matter with the information providers. He goes on to argue that "[d]espite these options and factors, the Trial Chamber held there was 'no prospect [...] that the present deficiencies will be corrected'...". At paragraph 40 of his Document in Support of the Appeal, and again in relation to the third ground of appeal, the Prosecutor submits that the decision to stay the proceedings "was based, in part, on findings regarding the Prosecution's use of Article 54(3)(e). Thus, to the extent that these findings were erroneous, then the stay was based on a faulty legal premise." The Prosecutor, therefore, has made his arguments under the first and second grounds of appeal an integral part of his submissions under the third ground of appeal.

IV. MERITS

19. The Prosecutor raises three grounds of appeal, all of which are covered by the issues in respect of which leave to appeal was granted (see above, paragraph 7). He requests the Appeals Chamber to overturn the Impugned Decision (Document in Support of the Appeal, paragraph 41). The Appeals Chamber is persuaded by none of the grounds raised.

A. First and second grounds of appeal – interpretation of nature and scope of article 54 (3) (e) of the Statute and characterisation of the conduct of the Prosecutor

20. As his first ground of appeal, the Prosecutor submits that the Trial Chamber erred in law in its interpretation of the nature and scope of article 54 (3) (e) of the Statute. As his second ground of appeal, the Prosecutor avers that the Trial Chamber erred in the characterisation of his conduct under the said article. As both grounds of appeal are closely related, the Appeals Chamber shall address them jointly.

1. Relevant part of the Impugned Decision

21. The part of the Impugned Decision relevant to the first and second grounds of appeal may be summarised as follows: at paragraphs 63 *et seq.* of the decision, the Trial Chamber noted that in the case of Mr. Lubanga Dyilo, the Prosecutor was unable to disclose to the defence more than 200 documents that contain potentially exculpatory information or information that is potentially material to the preparation of the defence because the Prosecutor had obtained the documents on condition of confidentiality and the information providers had not subsequently given the consent to their disclosure to the defence and, in most cases, to the Trial Chamber. Thirty-two of these documents had been supplied to the Trial Chamber, albeit in a redacted form and from undisclosed providers (Impugned Decision, paragraph 64). As regards documents obtained from the United Nations Organization (hereinafter: "United Nations" or "UN"), the information provider who had made available to the Prosecutor the majority of the documents in question, the Trial Chamber noted that in relation to 33 documents, the Chamber would not be able to see the documents themselves, but only "elements of information", and that in respect of the other documents, discussions between the Prosecutor and the UN were ongoing (Impugned Decision, paragraphs 67 to 69). The Trial Chamber explained that according to article 67 (2) of the Statute it "is left to the Chamber to decide whenever there is a doubt as to the application of this provision" (Impugned Decision, paragraph 61). The Trial Chamber recalled article 18 (3) of the Relationship Agreement between the International Criminal Court and the United Nations[1] (hereinafter: "ICC-UN Relationship Agreement"), which stipulates that the Prosecutor may agree that the United Nations provide him with documents and information on the condition of confidentiality, and that such documents and information may not, without the prior consent of the United Nations, be shared with third parties or with other organs of the Court, and referred in a footnote to the "Memorandum of Understanding between the United Nations and the International Criminal Court concerning Cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court" (ICC-01/04-01/06-1267-Anx2; hereinafter: "MONUC Memorandum of Understanding") (Impugned Decision,

[1] Adopted by the Assembly of States Parties on 7 September 2004 (ICC-ASP/3/Res 1) and entered into force on 4 October 2004.

paragraph 65). The Trial Chamber noted that it had not been furnished with the agreements concluded with other information providers (Impugned Decision, paragraph 66).

22. The Trial Chamber analysed whether the Prosecutor had correctly applied article 54 (3) (e) of the Statute to the agreements with the information providers and concluded that he had given the provision a "broad and incorrect interpretation" because he had used the provision "routinely, in inappropriate circumstances, instead of resorting to it exceptionally, when particular, restrictive circumstances apply" (Impugned Decision, paragraph 72). The Trial Chamber found that the Prosecutor had used article 54 (3) (e) of the Statute to obtain evidence to be used at trial, instead of using the material obtained to generate new evidence. According to the Trial Chamber, this constituted "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" (Impugned Decision, paragraph 73). The Trial Chamber emphasised that the agreements between the Prosecutor and the information providers should not be allowed to "operate in a way that subverts the Statute" and that the Prosecutor has the choice between disclosing all potentially exculpatory material to the defence or not to do so in order to comply with the confidentiality agreements (Impugned Decision, paragraph 75). The Trial Chamber noted furthermore that if the Prosecutor had applied article 54 (3) (e) of the Statute appropriately, and limited its use to material that would lead to new evidence, the problem would not have arisen (Impugned Decision, paragraph 76).

23. The Trial Chamber explained that in its view, the right to a fair trial included the right to disclosure of exculpatory evidence, relying *inter alia* on decisions of the International Criminal Tribunal for the former Yugoslavia (hereinafter: "ICTY") and of the European Court of Human Rights (hereinafter: "ECHR") (Impugned Decision, paragraphs 77 to 81). The Trial Chamber underlined that the jurisprudence of the ECHR and of this Appeals Chamber also indicated that any decisions as to whether information that normally would have to be disclosed may exceptionally be withheld from the defence must be made by a Chamber, and not by the Prosecutor (Impugned Decision, paragraphs 82 to 89).

2. Arguments of the Prosecutor

24. The Prosecutor submits that the Trial Chamber erred in the interpretation of the nature and scope of article 54 (3) (e) of the Statute. In the view of the Prosecutor, the Trial Chamber created two categories of material, namely "lead" or "springboard" evidence on the one hand, which could be covered by article 54 (3) (e) of the Statute, and incriminating or exculpatory evidence on the other hand, which could not be covered by this provision (Document in Support of the Appeal, paragraphs 6 and 7). The Prosecutor submits that this categorisation was erroneous, as article 54 (3) (e) of the Statute does not establish to what uses "material might be put, but only the uses to which the material can be put without further consent from the provider" (Document in Support of the Appeal, paragraph 7). The Prosecutor emphasises that the providers, and not the Prosecutor, impose this restriction, and that the incriminating or exonerating character of the information provided may only become apparent at a later stage (Document in Support of the Appeal, paragraph 8). Certain restrictions may only be necessary for a limited period of time, as is evidenced by rule 82 of the Rules of Procedure and Evidence (Document in Support of the Appeal, paragraph 9).

25. The Prosecutor underlines that the ability to be provided with confidential information is "at the core of the Prosecution's ability to fulfil its mandate" (Document in Support of the Appeal, paragraph 10) and refers the Appeals Chamber to the Rules of Procedure and Evidence of the ICTY, which contain a similar provision, and which served as a basis for the drafting of article 54 (3) (e) of the Statute (Document in Support of the Appeal, paragraph 11). The Prosecutor submits that contrary to the findings of the Trial Chamber, article 54 (3) (e) of the Statute is not numerically limited, nor only applicable in highly restricted or exceptional circumstances. Instead, in his submission, the realities of investigations in situations of ongoing conflict make it necessary that information may be provided on a confidential basis and that this ability "actually serves as a safeguard to the fairness and integrity of the proceedings" (Document in Support of the Appeal, paragraph 12).

26. The Prosecutor submits furthermore that the Trial Chamber erred when characterising his use of article 54 (3) (e) of the Statute as being "a wholesale and serious abuse, and a violation of an important provision". The Prosecutor argues that this finding of the Trial Chamber was based on a misinterpretation of the provision

(Document in Support of the Appeal, paragraph 13). The Prosecutor avers that when deciding to investigate the situation in the DRC, he required the material to focus his investigations. When receiving material on a confidential basis, it was always clear that the Prosecutor would only use this material for the purpose of gathering new evidence, but that the Prosecutor might later seek the consent of the providers that the material in question be used as evidence (Document in Support of the Appeal, paragraphs 14 and 15). Given that the material was collected before cases had been selected, he could not, at that point in time, assess the exculpatory nature of some of the material. In his view, such an approach is justified in situations of mass criminality (Document in Support of the Appeal, paragraph 20). In light of the ongoing nature of the conflict in the DRC, it is, in the view of the Prosecutor, understandable that the providers would only give him access to the material on the condition of confidentiality, this being another indication that he did not abuse article 54 (3) (e) of the Statute (Document in Support of the Appeal, paragraph 21).

27. The Prosecutor maintains that "[i]n most instances" the Prosecutor had only relied on article 54 (3) (e) of the Statute once it had become clear that the information provider would otherwise not make the material in question available to him, the only exception being material collected under the MONUC Memorandum of Understanding, which had been signed by the Registrar under the authority of the President of the Court (Document in Support of the Appeal, paragraph 16 and footnote 38). The Prosecutor notes furthermore that if he had not relied on article 54 (3) (e) of the Statute, he would not have received the material in question. Thus, the assertion of the Trial Chamber that, but for the confidentiality agreements, the material would have been disclosed to the defence, is incorrect (Document in Support of the Appeal, paragraph 16).

28. The Prosecutor states that in the event that potentially exculpatory information is covered by article 54 (3) (e) of the Statute, he is under an obligation to request the information provider to consent to the lifting of the confidentiality; if such consent is not given, the Prosecutor will explore all other options, including the identification of new, similar exculpatory material, providing the material in summarised form, stipulating the relevant facts, or amending or withdrawing the charges (Document in Support of the Appeal, paragraph 17).

3. Arguments of Mr. Lubanga Dyilo

29. Mr. Lubanga Dyilo refutes the arguments of the Prosecutor. He submits that the interpretation of article 54 (3) (e) of the Statute in the Impugned Decision was correct and notes that article 54 (1) (a) of the Statute obliges the Prosecutor to investigate incriminating and exonerating circumstances in order to establish the truth, with a view to submitting the results of his investigation to the defence and to the Judges (Response to the Document in Support of the Appeal, paragraphs 19 and 20). Thus, any restrictions to disclosure must be strictly construed, in particular if a third party is given the opportunity to determine whether or not material is disclosed to the defence and to the Judges (Response to the Document in Support of the Appeal, paragraphs 20 to 22). Confidentiality agreements inhibit the Prosecutor from publicly establishing the truth and therefore should only be relied upon if there is no other opportunity to obtain the material (Response to the Document in Support of the Appeal, paragraph 23). Given that recourse to article 54 (3) (e) of the Statute may also put in peril the right of the defence to disclosure of material pursuant to article 67 (2) of the Statute and to rule 77 of the Rules of Procedure and Evidence, even more caution is necessary (Response to the Document in Support of the Appeal, paragraph 25).

30. In the opinion of Mr. Lubanga Dyilo, the interpretation of article 54 (3) (e) of the Statute proposed by the Prosecutor results in the Court and, in particular, its Prosecutor, being dependent on the information providers because it leaves it in their discretion to consent to the lifting of the confidentiality of the documents that they have supplied (Response to the Document in Support of the Appeal, paragraph 29). This puts the independence of the Prosecutor at risk and results in the non-disclosure of exculpatory material to the defence, and in the inability of the Judges to ensure that the trial is fair and to order the production of additional evidence, should this become necessary (Response to the Document in Support of the Appeal, paragraph 30). Therefore, it is submitted, the argument of the Prosecutor that a broad interpretation of article 54 (3) (e) of the Statute is appropriate in order to allow him to fulfil his mandate is misguided and leads to an abandonment of his functions (Response to the Document in Support of the Appeal, paragraphs 27 and 31).

31. Mr. Lubanga Dyilo argues furthermore that the systematic and generalised recourse to article 54 (3) (e) of the Statute was based on a misinterpretation of that

provision and that therefore article 10 of the MONUC Memorandum of Understanding was illegal (Response to the Document in Support of the Appeal, paragraphs 39 and 40). He notes that the Prosecutor has not established that reliance on article 54 (3) (e) of the Statute was the only means to obtain the material in question. Thus, the submission of the Prosecutor that he could not have obtained the material otherwise is unsubstantiated (Response to the Document in Support of the Appeal, paragraph 41).

32. Mr. Lubanga Dyilo underlines that the Prosecutor does not contest that a large part of the evidence which he has collected is covered by article 54 (3) (e) of the Statute, namely approximately 55% of the material relating to the investigation into the situation in the DRC, and about 8000 documents in the case of Mr. Lubanga Dyilo. He recalls that the Prosecutor informed the Trial Chamber in October 2007 that he would have to analyse more than 750 documents which he had received from the United Nations (Response to the Document in Support of the Appeal, paragraph 42). In such circumstances, Mr. Lubanga Dyilo submits, it is appropriate to speak of an abuse of article 54 (3) (e) of the Statute, in particular since none of the sources had specified the reasons for which it had requested that the material be treated confidentially (Response to the Document in Support of the Appeal, paragraphs 43 and 44).

33. Mr. Lubanga Dyilo avers that the abuse of article 54 (3) (e) of the Statute is aggravated by the lack of diligence on the part of the Prosecutor to seek a timely lifting of the confidentiality agreements and recalls that the question of the disclosure of material covered by article 54 (3) (e) of the Statute had first been addressed before the Pre-Trial Chamber on 26 April 2006 and that the Trial Chamber had repeatedly reminded the Prosecutor of his obligation in this respect (Response to the Document in Support of the Appeal, paragraphs 45 to 48).

4 Observations of the victims and responses thereto

34. The victims agree with the arguments of the Prosecutor in relation to the first and second grounds of appeal, and repeat several of his arguments. Furthermore, they submit that material covered by article 54 (3) (e) of the Statute does not have to be disclosed under article 67 (2) of the Statute, even if such material contains

exculpatory information. In their view, the disclosure obligation exists only in respect of "evidence". Material covered by article 54 (3) (e) of the Statute cannot become evidence unless and until the information provider consents to the lifting of the confidentiality (Observations, paragraph 8). The victims argue that in case of conflict between the rights of the accused person and the rights of the Prosecutor, the former do not necessarily have to prevail, in particular because the "right" of the Prosecutor to keep information confidential is but an obligation, which is meant to protect the rights of third parties such as victims, witnesses and other information providers (Observations, paragraph 9). They note that disclosure is not an absolute right, and that national jurisdictions also provide for limitations to disclosure and refer the Appeals Chamber to the situation in England and Wales (Observations, paragraphs 10 and 11), although they accept that in that jurisdiction a court, and not the prosecution, takes the decision on non-disclosure. In their view, it is regrettable, but not wrong in law, that the Prosecutor had not obtained the consent of the information providers that the material in question could at least be disclosed to the Chambers (Observations, paragraph 14).

35. The Prosecutor states that he agrees with many of the submissions of the victims (Response of the Prosecutor, paragraphs 12 and 16). He underlines, however, that he has promptly negotiated with the information providers with a view to obtaining their consent to the disclosure of the material in question to the Trial Chamber and that in general, his approach to disclosure has been transparent (Response of the Prosecutor, paragraph 14).

36. Mr. Lubanga Dyilo refutes the arguments of the victims. Regarding the argument that article 54 (3) (e) of the Statute constituted an exception to the disclosure obligation under article 67 (2) of the Statute, Mr. Lubanga Dyilo notes that the national jurisdictions cited by the victims indicate the exceptional character of the non-disclosure of exculpatory information to the defence (Observations of Mr. Lubanga Dyilo, paragraph 20). He underlines furthermore that the Prosecutor has agreed to obtain the documents in question on the condition of confidentiality not for the purpose of victim or witness protection, but in order to have access to the documents as quickly as possible (Response of Mr. Lubanga Dyilo, paragraphs 11 to 15).

5. Determination by the Appeals Chamber

37. For the reasons summarised below, the Appeals Chamber is not persuaded by the arguments raised by the Prosecutor under the first and second grounds of appeal.

38. The Appeals Chamber cannot identify an appealable error of law in the interpretation of article 54 (3) (e) of the Statute by the Trial Chamber. In particular, the Appeals Chamber is not persuaded by the argument that the Trial Chamber misconceived the nature and operation of the provision.

39. Article 54 (3) (e) of the Statute provides that the Prosecutor may:

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

40. Pursuant to article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969[2], article 54 (3) (e) of the Statute must be interpreted in accordance with its ordinary meaning and in light of its object and purpose, as well as in the context of other provisions of the Statute regulating the functions and obligations of the Prosecutor.

41. A textual interpretation of article 54 (3) (e) of the Statute indicates that the Prosecutor may only rely on the provision for a specific purpose, namely in order to generate new evidence. This interpretation is confirmed by the context of article 54 (3) (e) of the Statute. It follows from article 54 (1) of the Statute that the investigatory activities of the Prosecutor must be directed towards the identification of evidence that can eventually be presented in open court, in order to establish the truth and to assess whether there is criminal responsibility under the Statute.

42. The Appeals Chamber acknowledges the arguments of the Prosecutor as to the importance of article 54 (3) (e) of the Statute, in particular in the early stages of an investigation. Undoubtedly, article 54 (3) (e) of the Statute may be an important tool for the Prosecutor in the conduct of his investigations, which often will take place in

[2] 1155 United Nations Treaty Series 331.

challenging circumstances.[3] The Appeals Chamber accepts that the Prosecutor, when receiving material on the condition of confidentiality, may not be able to predict with certainty how this material can be used. Nevertheless, the use of article 54 (3) (e) of the Statute must not lead to breaches of the obligations of the Prosecutor vis-à-vis the suspect or the accused person; article 54 (1) (c) of the Statute expressly provides that the Prosecutor shall "[f]ully respect the rights of persons arising under this Statute." A fundamental right of the accused person in proceedings before the Court is the right to disclosure of "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" (article 67 (2), first sentence, of the Statute) and the right "to inspect any book, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence" (rule 77 of the Rules of Procedure and Evidence).

43. As the present case demonstrates, the reliance by the Prosecutor on article 54 (3) (e) of the Statute may lead to tensions with his disclosure obligations under article 67 (2) of the Statute and rule 77 of the Rules of Procedure and Evidence: by accepting material on the condition of confidentiality, the Prosecutor potentially puts himself in a position where he either does not disclose material that he normally would have to disclose, or breaches a confidentiality agreement entered into with the provider of the material in question. The Appeals Chamber is not persuaded by the submission of the participating victims that article 67 (2) of the Statute does not *per se* apply to material that is provided to the Prosecutor under article 54 (3) (e) of the Statute. While it is true that article 67 (2) of the Statute refers to "evidence" and material obtained under article 54 (3) (e) of the Statute may only be introduced into evidence once the information provider has consented, the interpretation proposed by the participating

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[3] The Appeals Chamber is aware that the drafting of article 54 (3) (e) of the Statute was influenced by rule 70 of the Rules of Procedure and Evidence of the ICTY, which contains a similar provision. In this context, this Chamber notes the findings of the Appeals Chamber of the ICTY that the "purpose of Rule 70(B) to (G) [of the Rules of Procedure and Evidence of the ICTY] 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" (ICTY, Appeals Chamber, "Public version of the confidential decision on the interpretation and application of rule 70", 23 October 2002, *Prosecutor v Slobodan Milošević*, IT-02-54-AR108bis & AR 73.3, paragraph 19; the decision is available at http //www.un org/icty/milosevic/appeal/decision-e/23102002.htm).

victims would mean that the Prosecutor could withhold potentially large amounts of information he has collected on the basis of confidentiality agreements, without any control by the Chamber. This would be incompatible with the requirements of a fair trial, which must guide the interpretation and application of the Statute.

44. Therefore, whenever the Prosecutor relies on article 54 (3) (e) of the Statute he must bear in mind his obligations under the Statute and apply that provision in a manner that will allow the Court to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial. There might be circumstances in which this tension can be resolved by reverting to some or all of the measures referred to by the Prosecutor in his Document in Support of the Appeal and summarised at paragraph 28 above, in particular if only small numbers of documents are concerned. In the present case, however, material has been collected on a large scale, in particular on the basis of the ICC-UN Relationship Agreement and the MONUC Memorandum of Understanding. It appears from the record that when agreeing to receive the material on the condition of confidentiality the Prosecutor was aware that the material could contain exculpatory information (see ICC-01/04-01/06-1387-Conf-Exp-Anx1, page 4, and ICC-01/04-01/06-1387-Conf-Exp-Anx2, page 3). He relied on the expectation that the information providers would, at a later stage, agree to the lifting of the confidentiality, should this become necessary.

45. The Appeals Chamber is particularly concerned that when accepting large amounts of material from the United Nations, the relevance of which for future cases he could not appreciate at that time, the Prosecutor agreed that he would not disclose the material even to the Chambers of the Court without the consent of the information providers. By doing so, the Prosecutor effectively prevented the Chambers from assessing whether a fair trial could be held in spite of the non-disclosure to the defence of certain documents, a role that the Chamber has to fulfil pursuant to the last sentence of article 67 (2) of the Statute.

46. The last sentence of article 67 (2) of the Statute provides that "[i]n case of doubt as to the application of [article 67 (2) of the Statute], the Court shall decide." This indicates that the final assessment as to whether material in the possession or control of the Prosecutor has to be disclosed under that provision will have to be carried out

by the Trial Chamber and that therefore the Chamber should receive the material. This understanding of the last sentence of article 67 (2) of the Statute coincides with the overall role ascribed to the Trial Chamber in article 64 (2) of the Statute to guarantee that the trial is fair and expeditious, and that the rights of the accused are fully respected. It is furthermore confirmed by the jurisprudence of the ECHR, to which the Trial Chamber referred at paragraphs 82 to 86 of the Impugned Decision. The Appeals Chamber recalls in this context that article 21 (3) of the Statute stipulates that the Statute must be interpreted and applied consistently with internationally recognised human rights. The Appeals Chamber notes in particular that the Grand Chamber of the ECHR held at paragraph 60 of its judgment of 16 February 2000 in the case of *Rowe and Davis v. United Kingdom* (Application no. 28901/95; hereinafter: "Judgment in Rowe and Davis") that the right to a fair trial requires that "the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused". While the ECHR accepted that the right to disclosure is not an absolute right, it emphasised at paragraph 63 of the Judgment in Rowe and Davis that:

> A procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh it against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 § 1 [right to a fair trial]

47. This approach has been confirmed in several subsequent decisions of the ECHR.[4] At paragraph 56 of its judgment of 16 February 2000 in the case of *Jasper v. United Kingdom* (Application no. 27052/95), the ECHR noted that "[t]he fact that the need for disclosure was at all times under assessment by the trial judge provided a further, important, safeguard in that it was his duty to monitor throughout the trial the fairness or otherwise of the evidence being withheld", emphasising the need for judicial control of decisions restricting the disclosure of evidence.

48. In situations such as the present, where the material in question was obtained on the condition of confidentiality, the Trial Chamber (as well as any other Chamber of this Court, including this Appeals Chamber) will have to respect the confidentiality

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[4] See *Condron v United Kingdom*, judgment, 2 May 2000, Application no. 35718/97, paragraph 65; *Atlan v United Kingdom*, judgment, 19 June 2001, Application no. 36533/97, paragraphs 38 *et seq*; *Dowsett v United Kingdom*, judgment, 24 June 2003, Application no. 39482/98, paragraphs 44 *et seq*; see also *V v Finland*, judgment, 24 April 2007, Application no. 40412/98, paragraph 78.

agreement concluded by the Prosecutor under article 54 (3) (e) of the Statute and cannot order the disclosure of the material to the defence without the prior consent of the information provider (see article 64 (6) (c) of the Statute and rule 81 (3), first sentence, of the Rules of Procedure and Evidence). Instead, the Chamber will have to determine, in *ex parte* proceedings open only to the Prosecutor, whether the material would have had to be disclosed to the defence, had it not been obtained under article 54 (3) (e) of the Statute. If the Chamber concludes that this is the case, the Prosecutor should seek the consent of the information provider, advising the provider of the ruling of the Chamber. If the provider of the material does not consent to the disclosure to the defence, the Chamber, while prohibited from ordering the disclosure of the material to the defence, will then have to determine whether and, if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of the non-disclosure of the information.

49. In light of the above, the Appeals Chamber is not persuaded by the argument that the approach of the Prosecutor to article 54 (3) (e) of the Statute was correct because he could rely on article 18 (3) of the ICC-UN Relationship Agreement.

50. Article 18 (3) of the ICC-UN Relationship Agreement reads as follows:

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

51. While article 18 (3) provides that the Prosecutor may agree that material may not be disclosed to other organs of the Court, including to the Chambers, this does not mean that reliance by the Prosecutor on this provision would be appropriate in all circumstances. The wording of article 18 (3) ("may agree") leaves room for other arrangements between the United Nations and the Prosecutor. Whenever material is offered to the Prosecutor on the condition of confidentiality, he will have to take into account the specific circumstances, including the expected content and nature of the documents, and its potential relevance to the defence. On that basis he will have to determine under what exact conditions he may accept the material in question,

bearing in mind his obligations under the Statute, and in particular under its article 67 (2).

52. In contrast, article 10 (6) of the MONUC Memorandum of Understanding provided for a broad application of article 18 (3) of the ICC-UN Relationship Agreement, which, in this form, was inappropriate. According to the first sentence of article 10 (6) of the MONUC Memorandum of Understanding,

> Unless otherwise specified in writing by the Under-Secretary-General for Peacekeeping Operations or an Assistant Secretary General for Peacekeeping Operations, documents held by MONUC that are provided by the United Nations to the Prosecutor shall be understood to be provided in accordance with and subject to the arrangements envisaged in Article 18, paragraph 3, of the Relationship Agreement.

53. The Prosecutor received large amounts of documents under this provision as confidential, without knowing beforehand whether they might have to be disclosed at a later stage pursuant to article 67 (2) of the Statute or rule 77 of the Rules of Procedure and Evidence, or even to which case the documents might pertain. Contrary to the impression gained from the submissions of the Prosecutor (see above, paragraph 27), the Appeals Chamber notes in this context that the MONUC Memorandum of Understanding was signed not only by the Registrar of the Court, but also by the Prosecutor, a fact that the Prosecutor should have mentioned in his Document in Support of the Appeal. Article 10 of the MONUC Memorandum of Understanding concerns primarily the relationship between the Prosecutor and the United Nations.

54. In light of the above, the Appeals Chamber is not persuaded by the submission of the Prosecutor that the Trial Chamber incorrectly created a category of "springboard" or "lead material", which it juxtaposed to evidence. The Trial Chamber accepted that material obtained under article 54 (3) (e) of the Statute may potentially be used as evidence at a later stage – at paragraph 71 of the Impugned Decision the Trial Chamber expressly referred to rule 82 (1) of the Rules of Procedure and Evidence.[5]

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[5] Rule 82 (1) of the Rules of Procedure and Evidence provides as follows: "1. Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3 (e), the Prosecutor may not subsequently introduce such material or information into

55. Furthermore, the Appeals Chamber sees no error in the finding of the Trial Chamber that the reliance on article 54 (3) (e) of the Statute should be "exceptional". The Chamber is not persuaded by the submission of the Prosecutor that the Trial Chamber incorrectly marginalised or numerically limited the potential use of article 54 (3) (e) of the Statute. If read in context, it is evident that the references of the Trial Chamber to the "highly restricted circumstances" in which recourse to article 54 (3) (e) of the Statute may be had (Impugned Decision, paragraph 71) and to the exceptional character of the provision was not meant to limit the number of documents that could be obtained on the condition of confidentiality, or otherwise to restrict inappropriately the use of the provision. Rather, the Trial Chamber recalled that the purpose for which material could be collected on the condition of confidentiality was limited to the generation of new evidence and that the provision must be applied in light of the other obligations of the Prosecutor.

B. Third ground of appeal – imposition of an excessive and premature remedy

56. As his third ground of appeal, the Prosecutor submits that the imposition of a stay of the proceedings was an excessive and premature remedy and that the Impugned Decision therefore was erroneous.

1. Relevant part of the Impugned Decision

57. As set out in the preceding section of this judgment, the Trial Chamber had come to the conclusion that a substantial amount of material containing potentially exculpatory information and information material to the preparation of the defence could not be disclosed to the defence because it had been obtained by the Prosecutor under article 54 (3) (e) of the Statute and because the information providers had not consented to the lifting of the confidentiality. Most of the material could also not be made available to the Trial Chamber.

58. As to the consequences of non-disclosure in the present case, the Trial Chamber referred to jurisprudence of this Appeals Chamber relating to the stay of proceedings

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evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused."

(see Impugned Decision, paragraph 90). At paragraph 91 of the Impugned Decision the Trial Chamber stated that:

> If, at the outset, it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process, it is necessary – indeed, inevitable – that the proceedings should be stayed. It would be wholly wrong for a criminal court to begin, or to continue, a trial once it has become clear that the inevitable conclusion in the final judgment will be that the proceedings are vitiated because of unfairness which will not be rectified. In this instance, in its filing of 9 June 2008, the prosecution went no further than raising the possibility that the Chamber may be provided at some stage in the future with no more than incomplete and insufficient materials. There is, therefore, no prospect, on the information before the Chamber, that the present deficiencies will be corrected.

59. The Trial Chamber, at paragraph 92 of the Impugned Decision, concluded that:

> 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.

60. According to the Trial Chamber, "the consequences of the three factors … has been that the trial process has been ruptured to such a degree that it is now impossible to piece together the elements of a fair trial" (Impugned Decision, paragraph 93). Consequently, the Trial Chamber ordered the stay of the proceedings (Impugned Decision, paragraph 94).

61. As to the consequences of the stay of the proceedings, the Trial Chamber explained at paragraph 94 of the Impugned Decision:

> Although the Chamber is not rendered without further authority or legal competence by this decision, it means that unless this stay is lifted (either by this Chamber or the Appeals Chamber), the trial process in all respects is halted.

2. Arguments of the Prosecutor

62. The Prosecutor submits that the decision of the Trial Chamber to stay the proceedings in respect of Mr. Lubanga Dyilo was premature and excessive and notes that it "was solely based on the fact that the Prosecution was not, at that time, able to put all relevant material (171 items) before the Trial Chamber, for it to assess the impact of any non-disclosure and proposed alternatives on the fairness of the proceedings" (Document in Support of the Appeal, paragraph 22, footnote omitted). The Prosecutor recalls that he had provided the Trial Chamber with a "detailed and reasoned assessment that none of the information would materially impact on the determination of guilt or innocence" and had informed the Chamber that he was continuing to address the issue with the information providers, who had indicated their willingness to explore solutions and to meet with the Chamber (Document in Support of the Appeal, paragraph 23). In light of the transparency of the behaviour of the Prosecutor in respect of the confidentiality agreements and the availability of less severe measures, which the Trial Chamber, in the view of the Prosecutor, failed to explore, the stay of the proceedings amounted to an unreasonable exercise of the discretion of the Trial Chamber (Document in Support of the Appeal, paragraphs 24 and 25).

63. The Prosecutor submits that the Trial Chamber failed to apply properly the standard for a stay of proceedings developed by the Appeals Chamber as Mr. Lubanga Dyilo had not been prejudiced and as a fair trial had never been "impossible". He notes that the Trial Chamber itself had considered that the stay might be lifted at a later stage (Document in Support of the Appeal, paragraph 26). In the opinion of the Prosecutor, a stay of proceedings may only be imposed if all other possibilities to achieve a fair trial have been exhausted (Document in Support of the Appeal, paragraph 26), whereas in the present case, the Trial Chamber had various options at hand, which it failed to explore (Document in Support of the Appeal, paragraph 27).

64. The Prosecutor argues furthermore that the Trial Chamber failed to take into account relevant factors, namely, first of all, the nature of the material in question, which, in the opinion of the Prosecutor, could not materially impact on the determination of guilt or innocence of Mr. Lubanga Dyilo (Document in Support of the Appeal, paragraph 29). All critical material would have been disclosed prior to the

commencement of the trial. Secondly, the Trial Chamber failed to consider that the Prosecutor had provided the defence with alternative exculpatory material (Document in Support of the Appeal, paragraph 31). Thirdly, the Prosecutor submits that the Trial Chamber did not take into consideration properly the fact that his approach to disclosure had been transparent and that he had provided the Chamber with clear information regarding the undisclosed material (Document in Support of the Appeal, paragraphs 32 and 33).

65. The Prosecutor emphasises that at the time the Impugned Decision was rendered, the discussions with the United Nations were still ongoing and that the United Nations had indicated its willingness to address the issue directly with the Chamber, an offer which the Chamber failed to address in the Impugned Decision (Document in Support of the Appeal, paragraphs 34 and 35). In light of this offer, the Prosecutor submits, the finding that there was "no prospect" of fair proceedings was erroneous, in particular in view of the developments subsequent to the Impugned Decision in the course of which "the Prosecution has been able to secure the agreement of the providers to place all relevant material before the Trial Chamber" (Document in Support of the Appeal, paragraph 37). Furthermore, the Prosecutor submits that the Trial Chamber failed to explore the availability of other, less extreme measures or procedures, such as the provision of summaries as a basis for the assessment of the Trial Chamber of the character of the material in question, or the postponement of the trial (Document in Support of the Appeal, paragraphs 38 and 39). Finally, the Prosecutor submits that the Trial Chamber relied on irrelevant factors, namely its – in his view erroneous – characterisation of the use of article 54 (3) (e) of the Statute by the Prosecutor (Document in Support of the Appeal, paragraph 40).

3. Arguments of Mr. Lubanga Dyilo

66. Mr. Lubanga Dyilo refutes the arguments of the Prosecutor in respect of the third ground of appeal. He notes that the Prosecutor does not contest that the accused has a right to receive all exculpatory material in the possession of the Prosecutor, and that the Trial Chamber has the power to stay the proceedings (Response to the Document in Support of the Appeal, paragraph 49). In the opinion of Mr. Lubanga Dyilo, the Prosecutor has implicitly recognised that a fair trial cannot take place

without the disclosure of the material in question (Response to the Document in Support of the Appeal, paragraph 50).

67. As to the character of the material in question, which, according to the Prosecutor, does not materially affect the determination of guilt or innocence, Mr. Lubanga Dyilo submits that the accused has the right to see all exculpatory material and that in any event, the characterisation of the material in the Document in Support of the Appeal is in contradiction to the characterisation of the material by the Prosecutor in the "Prosecution's submission on undisclosed documents containing potentially exculpatory information" of 28 March 2008 (ICC-01/04-01/06-1248; hereinafter: "Submission of 28 March 2008") (Response to the Document in Support of the Appeal, paragraphs 53 and 54). Mr. Lubanga Dyilo submits furthermore that it is for the Chamber, and not for the Prosecutor, to determine whether or not the material in question would materially affect the determination of guilt or innocence (Response to the Document in Support of the Appeal, paragraph 56).

68. Mr. Lubanga Dyilo recalls that the Trial Chamber had explored several alternatives before deciding to stay the proceedings, but that none of these alternatives proved to be sufficient (Response to the Document in Support of the Appeal, paragraph 59). Mr. Lubanga Dyilo submits that the Prosecutor's good faith is irrelevant, as long as a fair trial objectively cannot be conducted in the absence of full disclosure of exculpatory material (Response to the Document in Support of the Appeal, paragraphs 61 and 62).

69. Regarding the willingness of the United Nations to engage in further discussions with the Prosecutor on the lifting of the confidentiality, Mr. Lubanga Dyilo submits, first of all, that the Appeals Chamber should not take into consideration developments that have taken place after the Trial Chamber rendered the Impugned Decision because otherwise the Appeals Chamber would assume the role of the Trial Chamber (Response to the Document in Support of the Appeal, paragraphs 63 and 65). Given that at the time the Impugned Decision was rendered the United Nations and the other information providers had clearly expressed that they would not consent to the lifting of the confidentiality of the material, the Trial Chamber rightly found that there was no prospect that the deficiencies would be corrected (Response to the Document in Support of the Appeal, paragraph 64).

4. Observations of the victims and responses thereto

70. The participating victims align themselves with most of the arguments raised by the Prosecutor. They emphasise that the non-disclosure of certain documents to the defence was not the result of a deliberate decision of the Prosecutor to hide these documents, but the result of conditions imposed by third parties. In such a situation, the Trial Chamber should carefully balance all the interests that are at stake in the course of hearings in which all participants take part (Observations, paragraph 19). In their view, it is the primary responsibility of the Trial Chamber to carry out the trial; only in the case of a lack of jurisdiction or inadmissibility should the trial be stopped. If the Prosecutor does not respect his obligations, a decision to stay the proceedings may only be imposed once the entire case file has been examined (Observations, paragraph 21). The victims emphasise furthermore that neither the Prosecutor nor the defence submit that the documents in question would prove the innocence of Mr. Lubanga Dyilo (Observations, paragraph 17).

71. The Prosecutor agrees with many of the arguments of the victims (Response of the Prosecutor, paragraph 16). However, he expresses doubt that all participants should take part in hearings regarding the non-disclosure of certain documents, in particular because of restrictions imposed by certain information providers (Response of the Prosecutor, paragraph 18).

72. Mr. Lubanga Dyilo refutes the observations of the victims. Regarding the argument that neither the defence nor the Prosecutor have submitted that the documents in question would prove the innocence of Mr. Lubanga Dyilo, Mr. Lubanga Dyilo underlines that he has not had access to the documents and therefore could not make submissions on their content; in any event, the disclosure obligation under article 67 (2) of the Statute not only covers documents that would *prove* the innocence of the accused, but extends to a larger category of documents (Response of Mr. Lubanga Dyilo, paragraphs 16 to 19).

5 Determination by the Appeals Chamber

73. For the reasons summarised below, the Appeals Chamber is not persuaded by the arguments raised by the Prosecutor under the third ground of appeal.

(a) Effect of the stay of proceedings and purported misapplication of the standard for the stay of proceedings

74. The Appeals Chamber is not persuaded by the argument of the Prosecutor that the acknowledgement by the Trial Chamber that the stay could be lifted (see above, paragraph 61) indicates that a fair trial remained possible and that therefore, the Trial Chamber misapplied the standard for a stay of the proceedings developed by the Appeals Chamber. For the reasons summarised below, the arguments of the Prosecutor fail to take into consideration the effect of the stay of the proceedings in the present case.

75. It is clear that the Trial Chamber intended to impose a stay that was conditional and therefore potentially only temporary: as set out above, the Trial Chamber imposed the stay of the proceedings because it had come to the conclusion that in the circumstances of the case, where a large number of potentially exculpatory information or information material to the preparation of the defence had neither been disclosed to the accused person nor to the Chamber, there was no prospect of a fair trial. The Trial Chamber acknowledged, however, that circumstances might change, in particular should the information providers alter their position and give their consent to the disclosure of the documents in question. At paragraph 91 of the Impugned Decision, the Trial Chamber underlined that "*on the information before the Chamber*, [there is no prospect] that the present deficiencies will be corrected" (emphasis added). At paragraph 94 of the Impugned Decision, the Trial Chamber referred to its "authority or legal competence" to lift the stay. The Trial Chamber also stated at paragraph 97 of the Impugned Decision that it would address certain other issues that had been pending "if the stay of the proceedings is lifted hereafter". Already at the status conference on 10 June 2008, the Presiding Judge of the Trial Chamber distinguished "a final decision halting the proceedings ... forever" from "imposing a stay ... which doesn't terminate the proceedings once and for all but which recognises [that] at present it is not possible for there to be a fair trial, but in due course, depending on changed circumstances, it may be possible for there to be a fair trial" (ICC-01/04-01/06-T-89-ENG, page 40, lines 8 to 13). Thus, the Trial Chamber envisaged that the stay it imposed may not be irreversible and absolute.

76. The Appeals Chamber cannot identify an appealable error in this approach of the Trial Chamber. The Trial Chamber correctly noted its responsibility under article

64 (2) of the Statute to ensure the fairness of the proceedings and the obligation under article 21 (3) of the Statute to apply and to interpret the Statute consistently with internationally recognised human rights. The Appeals Chamber agrees with the finding of the Trial Chamber at paragraph 91 of the Impugned Decision that "[i]f, at the outset, it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process, it is necessary … that the proceedings should be stayed."

77. Neither the Rome Statute nor the Rules of Procedure and Evidence provides for a "stay of proceedings" before the Court. Nevertheless, in its Judgment of 14 December 2006, the Appeals Chamber explained at paragraph 37 that it follows from article 21 (3) of the Statute that:

> Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and must be stopped.

78. At paragraph 39 of the Judgment of 14 December 2006, the Appeals Chamber noted that:

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

79. The above statements in the Judgment of 14 December 2006 were made in the context of allegations by the appellant in that case that he had been illegally detained and ill-treated by the Congolese authorities and that the Prosecutor had illegally colluded with these authorities, in contravention of the rights of the appellant. The nature of the allegations was such that, if established, the breaches of the rights of the appellant might have led to an objectively irreparable and incurable situation.

Accordingly, the Judgment of 14 December 2006 envisaged that a stay of proceedings imposed on such a basis would be absolute and permanent.

80. The Judgment of 14 December 2006, however, did not rule out the imposition of a conditional stay of proceedings in suitable circumstances. If the unfairness to the accused person is of such nature that – at least theoretically – a fair trial might become possible at a later stage because of a change in the situation that led to the stay, a conditional stay of the proceedings may be the appropriate remedy. Such a conditional stay is not entirely irreversible: if the obstacles that led to the stay of the proceedings fall away, the Chamber that imposed the stay may decide to lift it in appropriate circumstances and if this would not occasion unfairness to the accused person for other reasons, in particular in light of his or her right to be tried without undue delay (see article 67 (1) (c) of the Statute). If a trial that is fair in all respects becomes possible as a result of changed circumstances, there would be no reason not to put on trial a person who is accused of genocide, crimes against humanity or war crimes – deeds which must not go unpunished and for which there should be no impunity (see paragraphs 4 and 5 of the Preamble to the Statute).

81. At the same time, the right of any accused person to be tried without undue delay (article 67 (1) (c) of the Statute) demands that a conditional stay cannot be imposed indefinitely. A Chamber that has imposed a conditional stay must, from time to time, review its decision and determine whether a fair trial has become possible or whether, in particular because of the time that has elapsed, a fair trial may have become permanently and incurably impossible. In the latter case, the Chamber may have to modify its decision and permanently stay the proceedings. The Appeals Chamber notes in this context that in the Impugned Decision, the Trial Chamber did not make any finding that the right of Mr. Lubanga Dyilo under article 67 (1) (c) of the Statute had been breached.

82. The Appeals Chamber notes furthermore that procedural remedies similar to a conditional stay of the proceedings, as defined in the preceding paragraphs, are known in other international criminal jurisdictions. At the ICTY and the ICTR, a stay of the proceedings of a non-permanent nature has been imposed *inter alia* when witnesses

central to the defence case did not appear due to the obstructionist efforts of a State[6] and when questions relating to the legal representation of an accused person[7] or to the resources allocated for the preparation of the defence[8] had to be resolved.

83. Thus, the finding of the Trial Chamber that it could potentially lift the stay of the proceedings is not in itself an indication that the decision to impose a stay was incorrect. The reference to the power to lift the stay was merely an acknowledgement of the fact that the stay of the proceedings in the present case was conditional and therefore potentially only temporary.

(b) Prospects of a fair trial as of 13 June 2008

84. The Appeals Chamber is not persuaded by the argument of the Prosecutor that the Trial Chamber incorrectly found that there was no prospect of a fair trial. A Trial Chamber ordering a stay of the proceedings enjoys a margin of appreciation, based on its intimate understanding of the process thus far, as to whether and when the threshold meriting a stay of proceedings has been reached. For the reasons summarised below, the Appeals Chamber in the present case is not persuaded that the

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[6] See ICTY, *Prosecutor v Tadić*, "Judgement", 15 July 1999, Case No. IT-94-1-A (available at http://www.un.org/icty/tadic/appeal/judgement/index.htm), where the ICTY Appeals Chamber explained at paragraph 55 that it "can conceive of situations where a fair trial is not possible because witnesses central to the defence case do not appear due to the obstructionist efforts of a State. In such circumstances, the defence, after exhausting all the other measures mentioned above, has the option of submitting a motion for a stay of proceedings. The Defence opined during the oral hearing that the reason why such action was not taken in the present case may have been due to trial counsel's concern regarding the long period of detention on remand. The Appeals Chamber notes that the Rules envision some relief in such a situation, in the form of provisional release, which, pursuant to Sub-rule 65(B), may be granted 'in exceptional circumstances'."

[7] See ICTR, *Prosecutor v Nahimana et al*, "Decision on Ngeze's Motion for a Stay of Proceedings", 4 August 2004, Case No ICTR-99-52-A (available at http://69.94.11.53/ENGLISH/cases/Nahimana/decisions/040804.htm), where a pre-appeal judge stayed the proceedings against an appellant "to preserve the fairness and efficiency of the proceedings ... until a new lead counsel has been assigned to represent him"; and ICTY, *Prosecutor v Blagojević*, "Public and Redacted Reasons for the Decision on Appeal by Vidoje Blagojević to Replace his Defence Team", 7 November 2003, Case No. IT-02-60-AR73 4 (available at http://www.un.org/icty/blagojevic/appeal/decision-e/031107.pdf), where the ICTY Appeals Chamber explained at paragraph 7 that "[t]he only inherent power that a Trial Chamber has is to ensure that the trial of an accused is fair, it cannot appropriate for itself a power which is conferred elsewhere As such, the only option open to a Trial Chamber, where the Registrar has refused the assignment of new Counsel, and an accused appeals to it, is to stay the trial until the President has reviewed the decision of the Registrar "

[8] See ICTY, *Prosecutor v Brdjanin and Talić*, "Decision on Second Motion by Brdjanin to Dismiss the Indictment", 16 May 2001, (available at http://www.un.org/icty/brdjanin/trialc/decision-e/10516DC215720.htm), where a pre-trial judge of the ICTY found at paragraph 5 that if a "Trial Chamber is satisfied that the absence of such resources will result in a miscarriage of justice, it has the inherent power and the obligation to stay the proceedings until the necessary resources are provided, in order to prevent the abuse of process involved in such a trial".

conclusion of the Trial Chamber that the proceedings must be stayed exceeded this margin of appreciation and therefore was erroneous.

85. In this context, the Appeals Chamber agrees with the submission of Mr. Lubanga Dyilo that in circumstances such as the present, the developments that occurred after the Impugned Decision cannot be taken into account for evaluating whether the Impugned Decision was correct. Under article 82 (1) (d) of the Statute, the Appeals Chamber is vested with jurisdiction to review certain decisions of the Pre-Trial and Trial Chambers. Any new developments will have to be assessed and evaluated by the Pre-Trial or Trial Chambers. Thus, for the determination of whether the conclusion of the Trial Chamber was erroneous, the Appeals Chamber has not examined the developments after 13 June 2008, the date of the Impugned Decision.

86. The question of disclosure of material obtained by the Prosecutor on the condition of confidentiality had first arisen in proceedings before the Pre-Trial Chamber.[9] In the proceedings before the Trial Chamber, the Prosecutor raised the question of potentially exculpatory information or information relevant to the preparation of the defence in submissions of the Prosecutor of 11 September 2007 (ICC-01/04-01/06-951, paragraph 25). At a status conference on 1 October 2007, the Prosecutor notified the Trial Chamber of the number of documents in question and that he was seeking the consent of the information providers to lift the confidentiality of the material (see ICC-01/04-01/06-T-52, pages 13 *et seq.*). He also indicated that experience thus far had shown that the United Nations were "very well prepared to lift the restrictions" (see ICC-01/04-01/06-T-52, page 85, lines 11 to 12). In a decision of 9 November 2007 the Trial Chamber, noting *inter alia* the submissions of the

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[9] See, for instance, page 4 of the "Decision on the Prosecution's Information in respect of the Second Decision on Rule 81 Motions" of 28 September 2006 (ICC-01/04-01/06-490), where Pre-Trial Chamber I ordered the Prosecutor *inter alia* to file no later than 15 days prior to the confirmation hearing in respect of Mr. Lubanga Dyilo "a detailed report indicating how many article 54 (3) (e) documents have not been disclosed to the Defence because the Prosecution has been unable to secure the consent of the providers despite having been identified by the Prosecution as falling under article 67 (2) of the Statute or rule 77 of the Rules"; paragraph 12 of the "Prosecution's Information pursuant to the 28 September 2006 Decision on the Prosecution Information in respect of the Second Decision on Rule 81 Motions" of 25 October 2006 (ICC-01/04-01/06-611), where the Prosecutor informed the Pre-Trial Chamber at paragraph 12 that "[a]s of 25 October 2006, the Prosecution has identified thirty-three Article 54(3)(e) documents that have not been disclosed to the Defence as the Prosecution has [been] unable to secure the consent of the information providers"; and page 4 of the "Décision suite aux informations fournies par le Procureur le 25 Octobre 2006" of 30 October 2006 (ICC-01/04-01/06-629), where the Pre-Trial Chamber ordered the Prosecutor to do his utmost to obtain the consent of the information providers to the confidentiality of the above-mentioned 33 documents being lifted.

Prosecutor at the status conference on 1 October 2007 regarding material covered by confidentiality agreements under article 54 (3) (e) of the Statute, decided that the trial should commence on 31 March 2008 and determined that all exculpatory material should be disclosed by 14 December 2007 (see ICC-01/04-01/06-1019, paragraphs 29 and 25). On 10 December 2007, the Prosecutor applied for an extension of the time limit for the disclosure *inter alia* of material covered by confidentiality agreements (ICC-01/04-01/06-1072-Conf-Exp; paragraphs 6 and 43; a public redacted version of this application is filed under ICC-01/04-01/06-1073). On 13 December 2007, the Trial Chamber decided to grant such extension until 31 January 2008 in respect of some material (see ICC-01/04-01/06-T-65-ENG, pages 14 *et seq.*).

87. On 12 March 2008, the Trial Chamber decided to postpone the commencement of the trial to 23 June 2008 (see ICC-01/04-01/06-T-78-ENG, pages 4 to 5). At a status conference on 13 March 2008, the Presiding Judge raised once again the issue of exonerating information covered by confidentiality agreements (ICC-01/04-01/06-T-79-ENG, page 6). The representative of the Prosecutor informed the Trial Chamber that where potentially exculpatory information was covered by confidentiality agreements, the Prosecutor would enter into further negotiations with the information providers, with a view to lifting the restrictions (*ibid.*, page 7). In his Submission of 28 March 2008 the Prosecutor informed the Trial Chamber that 216 documents[10] containing potentially exculpatory information or information relevant for the preparation of the defence had not yet been disclosed to the defence because of confidentiality agreements (Submission of 28 March 2008, paragraph 7).

88. On 3 April 2008, the Trial Chamber issued the "Order on the 'Prosecution's submission on undisclosed documents containing potentially exculpatory information'" (ICC-01/04-01/06-1259; hereinafter: "Order of 3 April 2008"), ordering the Prosecutor to disclose to the Trial Chamber the 216 documents in question, so as to "enable the Chamber to consider the issue fully" (Order of 3 April 2008, paragraph 3). On 7 April 2008, the Prosecutor informed the Chamber that he was unable to comply with the Order of 3 April 2008 because the information providers had not consented to disclosure to the Chamber (ICC-01/04-01/06-1267, paragraphs 6 *et seq.*). At a hearing on 9 April 2008, the Prosecutor averred furthermore that without

[10] This number was subsequently corrected to 212 documents; see ICC-01/04-01/06-1267, paragraph 5.

prior consent of the information providers, he could not even provide the Trial Chamber with summaries of the documents in question (see Impugned Decision, paragraph 44).

89. At a status conference on 6 May 2008, the Prosecutor notified the Trial Chamber that the information providers might be willing to consent to the disclosure of the documents to the Chamber if it undertook not to disclose the documents any further without the prior consent of the providers; the Trial Chamber gave such undertaking in the course of the same status conference (see ICC-01/04-01/06-T-86-ENG, pages 17, 35 and 36). The Trial Chamber also gave the Prosecutor four weeks to resolve the matter (*ibid.*, page 37). On 2 June 2008, the Prosecutor reported to the Trial Chamber that the United Nations "will not respond favorably" to the procedure contemplated at the status conference of 6 May 2008 (ICC-01/04-01/06-1364). On 3 and 9 June 2008, the Prosecutor informed the Trial Chamber that five information providers, which did not include the United Nations, had agreed to the disclosure to the Trial Chamber of the documents which they had provided to the Prosecutor, subject to certain restrictions; one information provider had rejected the proposed procedure (ICC-01/04-01/06-1373 and ICC/01-04-01/06-1385). In a filing of 9 June 2008, the Prosecutor notified the Trial Chamber that the United Nations had agreed to lift the confidentiality in respect of two documents, which subsequently were disclosed to Mr. Lubanga Dyilo, and that the United Nations and the Prosecutor were currently exploring ways in which elements of information contained in 33 documents could be made available to the Trial Chamber (Impugned Decision, paragraph 67). The Prosecutor reported furthermore that the negotiations regarding the remaining documents that had been supplied by the United Nations were ongoing (Impugned Decision, paragraph 69). At a status conference on 10 June 2008, the Prosecutor informed the Trial Chamber that 156 documents had been provided by the United Nations on the condition of confidentiality, two of which had been communicated to the defence on 9 June 2008 (see ICC-01/04-01/06-T-89-ENG, page 5, lines 8 to 12 and 14 to 15). The Prosecutor furthermore alerted the Chamber to the complexities of the negotiations with the United Nations (see ICC-01/04-01/06-T-89-ENG, page 6, lines 16 to 23). In a filing of 11 June 2008, the Prosecutor informed the Trial Chamber that the United Nations was willing to discuss its position with the Trial Chamber,

which, in the view of the Prosecutor, provided an opportunity to explore alternatives (see Document in Support of the Appeal, paragraph 34).

90. Thus, by the time the Trial Chamber rendered the Impugned Decision – nine months after the issue had been first raised before the Trial Chamber and one week before the trial was due to start – it had become obvious that the assurances that the Prosecutor had given to the Chamber in October 2007, namely that the information providers were prepared to consent to the disclosure of the material in question, had proved to be wrong. The information providers were reluctant to consent to the disclosure of the material that they had provided and in spite of negotiations between the Prosecutor and the information providers, there had been only very limited results. The reaction of the providers to the Order of 3 April 2008 demonstrated that they would not consent to the disclosure of the material even to the Chamber, although some of the providers changed their position following the undertaking by the Trial Chamber at the status conference on 6 May 2008.

91. The United Nations, from which the Prosecutor had obtained most of the documents in question, had responded negatively to the procedure contemplated at that status conference and to the undertaking of the Trial Chamber. By the time of the Impugned Decision only two of the 156 documents provided by the United Nations had been disclosed to the defence. In relation to 33 other documents, the United Nations had indicated their willingness to consider making available "elements of information" to the Trial Chamber. In relation to 121 documents, however, there were no tangible developments. To the contrary, the submissions of the Prosecutor at the status conference of 10 June 2008 indicated that it might not be possible to find a solution in respect of these documents. Thus, at the time the Trial Chamber rendered the Impugned Decision, and after lengthy discussions between the Prosecutor and the United Nations, it was not even clear that the Trial Chamber would be given access to all or the majority of the documents obtained from the UN, let alone that the documents could be disclosed to the defence. In such a situation, the Appeals Chamber does not consider it erroneous that the Trial Chamber concluded that in spite of the ongoing discussions between the Prosecutor and the United Nations, there was no prospect that the difficulties would be overcome.

92. The Appeals Chamber does not consider that the failure of the Trial Chamber to make reference to the Prosecutor's submissions of 11 June 2008 (see above, paragraph 89) amounted to an error on the part of the Trial Chamber. These submissions did not indicate a substantial change in the position of the information providers; they only alerted the Trial Chamber to the willingness of the United Nations to explain their position further, which – in the view of the Prosecutor – might have been an opportunity to explore alternative possibilities. Given that the consultations between the Prosecutor and the United Nations over several months had not led to satisfactory results, the Appeals Chamber does not consider it erroneous that the Trial Chamber did not pursue this proposal, which was not made in concrete terms, any further. In the view of the Appeals Chamber, the Trial Chamber cannot be faulted for not liaising with the United Nations directly; it was for the Prosecutor to find a solution to a situation that had arisen because of his reliance on article 54 (3) (e) of the Statute.

93. The Appeals Chamber is not persuaded by the argument of the Prosecutor that the Trial Chamber failed to take into account the nature of the material in question. In the Submission of 28 March 2008, the Prosecutor submitted that the material which had not yet been disclosed could be divided into ten categories: six categories of evidence that did not materially impact upon the determination of the guilt or innocence of the accused, and four categories of evidence that could materially impact on the guilt or innocence of the accused (Submission of 28 March 2008, paragraphs 8 *et seq.*). These four categories were identified as information relating to "[g]rounds for excluding criminal responsibility", "[e]fforts to demobilise", "[i]nsufficient command and control" and the "[r]ole of Uganda and Rwanda" (Submission of 28 March 2008, paragraphs 19 *et seq.*).

94. It is evident that material relating, for example, to the purported insufficient command and control of Mr. Lubanga Dyilo over the troops allegedly directly responsible for the recruitment of the child soldiers could have a fundamental impact on the finding of guilt or innocence of the accused. The Appeals Chamber notes that the Prosecutor sought to explain in the Submission of 28 March 2008 and later in a submission dated 15 April 2008 (see ICC-01/04-01/06-1281) that the information was nevertheless immaterial. The Trial Chamber, however, was not in a position to verify

this assurance by the Prosecutor because it had not been given access to most of the documents in question. As has been explained at paragraphs 45 *et seq.* above, such verification would have been necessary.

95. For the same reason, the Appeals Chamber is not persuaded that the provision of purported alternative exculpatory evidence by the Prosecutor to the defence was sufficient to ensure the fairness of the trial. While the Appeals Chamber cannot exclude that the provision of alternative evidence may, in appropriate circumstances, be one way of ensuring fairness in spite of the non-disclosure of material obtained on the condition of confidentiality under article 54 (3) (e) of the Statute, this would require an assessment by a Chamber of the adequacy of the alternative evidence proposed by the Prosecutor, which was not possible in the present case.

96. Nor is the Appeals Chamber persuaded by the argument that the Trial Chamber should have trusted the assessment by the Prosecutor, given the transparent approach of the Prosecutor to the challenges in the disclosure process. The Appeals Chamber has no reason to doubt the good faith of the Prosecutor and acknowledges that his approach has been transparent. This, however, is to be expected of the Prosecutor in any event and does not take away from the fact that in the present case and because of the confidentiality agreements concluded by the Prosecutor, the Trial Chamber was unable to assess whether in the absence of the disclosure to the defence of the material in question, a fair trial could be held.

97. In sum, as of 13 June 2008, the Trial Chamber was faced with a situation in which a large number of documents containing potentially exculpatory information or information relevant to the preparation of the defence was in the possession of the Prosecutor, but could not be disclosed to Mr. Lubanga Dyilo. Nor could the Trial Chamber have access to the documents in order to assess whether a fair trial could be held even without the disclosure of the documents. As explained above, the Appeals Chamber has no reason to fault the assessment of the Trial Chamber on 13 June 2008 that this situation would continue. If the trial of Mr. Lubanga Dyilo had taken place in such circumstances, there would always have been a lurking doubt as to whether the disclosure of the documents in question would have changed the course of the trial.

(c) Alternative measures short of a stay of the proceedings

98. The Appeals Chamber is not persuaded by the argument that the Trial Chamber failed to explore alternatives before resorting to the stay of the proceedings. Prior to staying the proceedings, the Trial Chamber had explored several alternatives, including by ordering the submission of summaries of the documents on 3 April 2008 and by giving an undertaking that it would not disclose the material without the consent of the providers. None of these attempts to find a solution proved to be successful.

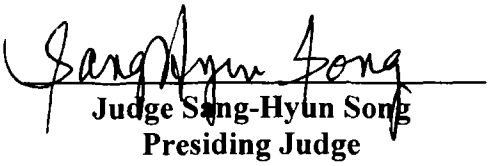
99. Nor is the Appeals Chamber persuaded by the submission of the Prosecutor that the Trial Chamber should have considered the documents of other information providers to establish that the material which had been obtained from the United Nations was not necessary for the trial. The former documents would not have allowed the Trial Chamber to come to any conclusions regarding *other* documents obtained from a *different* provider.

100. Given that Mr. Lubanga Dyilo had been surrendered to the Court in March 2006 and that the Prosecutor from that point in time should have sought the consent of the information providers to disclose exculpatory material and information material to the preparation of the defence, it was also not erroneous for the Trial Chamber to conclude that a further postponement of the trial would not be a viable option.

V. APPROPRIATE RELIEF

101. On an appeal pursuant to article 82 (1) (d) of the Statute the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case it is appropriate to confirm the Impugned Decision because no appealable error has been identified.

Judge Georghios M. Pikis appends a separate opinion to this judgment.



Judge Sang-Hyun Song
Presiding Judge

Dated this 21st day of October 2008

At The Hague, The Netherlands

Separate Opinion of Judge Georghios M. Pikis

I. PROCEEDINGS BEFORE THE TRIAL CHAMBER

1. In June 2004, the Prosecutor commenced investigations into crimes within the jurisdiction of the Court reportedly committed in the Democratic Republic of the Congo.[1] Before initiating his investigations, he received from the United Nations a mass of documents informing on the commission of crimes, the persons seemingly implicated, as well as evidence tending to exonerate a person or persons apparently involved in their commission.[2] In the process, more documents were provided to the Prosecutor after the initiation of the investigation.[3] The documents and information were provided to the Prosecutor in confidence under the provisions of article 54 (3) (e) of the Statute,[4] which reads:

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

In the same spirit, rule 82 (1) of the Rules of Procedure and Evidence prohibits the Prosecutor from disclosing material passed to him in confidence without the prior authorisation of the provider.

2. Under similar conditions, the Prosecutor received documents and information from Non-Governmental Organizations, at a time that cannot be specified with exactitude. Such documents contained, as in the case of the United Nations, both

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[1] See *Situation in the Democratic Republic of the Congo* "Decision assigning the situation in the Democratic Republic of Congo to Pre-Trial Chamber I" 6 July 2004 (ICC-01/04-1), Annex of the decision.

[2] See *Prosecutor v Lubanga Dyilo* "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) (hereinafter the "Impugned Decision"), paras 26, 63, 64; see also See *Prosecutor v Lubanga Dyilo* "Decision Regarding the Timing and Manner of Disclosure and the Date of Trial" 9 November 2007 (ICC-01/04-01/06-1019), paras. 6 and 7.

[3] See Impugned Decision, paras. 26 and 27, transcript of the status conference of 1 October 2007 (ICC-01/04-01/06-T-52-ENG), pages 13 to 19.

[4] See Impugned Decision, paras. 24 to 36, 62 to 65; transcript of the status conference of 1 October 2007 (ICC-01/04-01/06-T-52-ENG), pages 13 to 19

incriminating and exonerating material in relation to the accused, Mr. Lubanga Dyilo.[5]

3. On the application of the Prosecutor, Pre-Trial Chamber I (hereinafter "Pre-Trial Chamber") issued on 10 February 2006 a warrant for the arrest of Mr. Lubanga Dyilo.[6] The warrant was executed on 17 March 2006[7] and the arrestee was brought before the Pre-Trial Chamber on 20 March 2006.[8]

4. The charge sheet, i.e. the document containing the charges, formulated by the Prosecutor, was submitted on 28 August 2006.[9] The hearing to confirm the charges was held between 9 and 28 November 2006.[10] On 29 January 2007, the Pre-Trial Chamber issued its decision confirming the charges.[11] It emerges therefrom that the Pre-Trial Chamber did address the question of disclosure of exculpatory evidence to the person under charge, affirming that, "[...] the Prosecutor repeatedly stated that it had fulfilled its obligations and had effectively disclosed to the defence the bulk of potentially exculpatory evidence or evidence which could be material to the preparation of the defence. Moreover, nothing has been presented to contradict these submissions"[12]. The inference is that the Prosecutor made no reference to exculpatory material, in the sense of article 67 (2) of the Statute, provided in confidence by third parties.

5. Shortly afterwards (in March 2007), Trial Chamber I (hereinafter "Trial Chamber") charged to try Mr. Lubanga Dyilo was constituted[13] pursuant to the provisions of article 61 (11) of the Statute.[14] There was a lull in the proceedings for

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[5] See Impugned Decision, paras. 64 and 66.
[6] See *Prosecutor v Lubanga Dyilo* "Mandat d'Arrêt" 10 February 2006 (ICC-01/04-01/06-2).
[7] See *Prosecutor v Lubanga Dyilo* "Order scheduling the first appearance of Mr Thomas Lubanga Dyilo" 17 March 2006 (ICC-01/04-01/06-38); transcript of the first appearance (ICC-01/04-01/06-T-3-ENG).
[8] See transcript of the first appearance (ICC-01/04-01/06-T-3-ENG).
[9] See *Prosecutor v Lubanga Dyilo* "Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3)" 28 August 2006 (ICC-01/04-01/06-356).
[10] See *Prosecutor v Lubanga Dyilo* "Decision on the confirmation of charges" 29 January 2007 (ICC-01/04-01/06-803-tEN), para. 30.
[11] See *Prosecutor v Lubanga Dyilo* "Decision on the confirmation of charges" 29 January 2007 (ICC-01/04-01/06-803-tEN).
[12] See *ibid*, para 154.
[13] See *Prosecutor v Lubanga Dyilo* "Decision constituting Trial Chamber I and referring to it the case of The Prosecutor v. Thomas Lubanga Dyilo" 6 March 2007 (ICC-01/04-01/06-842).
[14] See also Rule 130 of the Rules of Procedure and Evidence.

some months necessitated by the prelude to and subsequent withdrawal of counsel for the defence. Former counsel of the accused was replaced by new counsel in June 2007.[15]

6. In September 2007, the Trial Chamber held its first status conference under the provisions of article 64 of the Statute in order to pave the ground for the trial.[16] Article 64 (3) (c) of the Statute binds the Chamber to ensure disclosure of documents or information, not previously disclosed, sufficiently in advance to enable adequate preparation for the trial. Disclosure of exculpatory evidence to the defence is an element at every stage of the process intended to enable the accused or the person facing charges at the confirmation stage to prepare his/her defence and advance it in time before the court.

7. At the status conference of 1 October 2007, the Prosecutor informed the Trial Chamber that he had secured, under article 54 (3) (e) of the Statute, a mass of documents containing both inculpatory and exculpatory evidential material relating to the accused, and of his inability to disclose them in the absence of the consent of the providers.[17] The documents in question emanated primarily from the United Nations. The Prosecutor explained, he would be seeking the consent of the providers for the disclosure of the material in his possession to the defence, being hopeful that he would soon be in a position to do so.[18] The United Nations and some other information providers flatly refused to agree to the disclosure of documents provided to the Prosecutor.

8. On 9 November 2007, the Trial Chamber went so far as to issue an order directing that charges in relation to which there was exculpatory material that could not be disclosed to the accused should be withdrawn.[19] This was one way of overcoming the inability of the Prosecutor to disclose to the accused exonerating

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[15] See *Prosecutor v. Lubanga Dyilo* "Enregistrement de la désignation et de la déclaration d'acceptation de Maître Catherine Mabille comme conseil de M. Thomas Lubanga Dyilo" 22 June 2007 (ICC-01/04-01/06-928).
[16] See transcript of the status conference of 4 September 2007 (ICC-01/04-01/06-T-50-ENG), see also *Prosecutor v Lubanga Dyilo* "Request for submissions on the subjects that require early determination" 18 July 2007 (ICC-01/04-01/06-936).
[17] See transcript of the status conference of 1 October 2007 (ICC-01/04-01/06-T-52-ENG), pages 13 to 19.
[18] See *ibid*
[19] See *Prosecutor v Lubanga Dyilo* "Decision Regarding the Timing and Manner of Disclosure and the Date of Trial" 9 November 2007 (ICC-01/04-01/06-1019), para. 28

evidence to which the accused was entitled in virtue of the provisions of article 67 (2) of the Statute. There was no movement on the part of the Prosecutor in that direction, leaving the gap in the disclosure of exculpatory evidence wide open.[20] By the same decision, the case was fixed for hearing on 31 March 2008. On 13 December 2007, the Chamber directed the Prosecutor to make full disclosure by the following day.[21] As there was no compliance, the directive was put off more than once to a future date. Sequentially, on 12 March 2008, the date of trial was moved to 23 June 2008.[22]

9. And so matters stood until 13 March 2008. On that date, the Trial Chamber asked the Prosecutor to inform it about the number of documents containing exculpatory evidence that might be disclosed and be opened to inspection by the accused (rule 77 of the Rules) if the providers consented.[23] In answer, the Prosecutor informed the Trial Chamber that a) the documents numbered 216[24] and b) the United Nations had withheld their consent in relation to 181 of them while their answer with regard to the remaining 35 was still awaited.[25]

10. On 3 April 2008, the Pre-Trial Chamber directed the Prosecutor to disclose, in *ex parte* proceedings, the relevant documents to the Trial Chamber itself, coupled with the submission of a report of the Prosecutor on the value and significance of exonerating evidence contained in the documents.[26] As this proved impossible owing to the refusal of the United Nations and other information providers to disclose the documents even to the Trial Chamber,[27] the court at a subsequent stage offered an undertaking not to disclose material put before it to the defence or anybody else.[28] I shall not go into the propriety of the Chamber giving such an undertaking, confining

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[20] See transcript of the status conference of 13 March 2008 (ICC-01/04-01/06-T-79-ENG), pages 8 to 9.
[21] See transcript of the status conference of 13 December 2007 (ICC-01/04-01/06-T-65-ENG).
[22] See transcript of the status conference of 12 March 2008 (ICC-01/04-01/06-T-78-ENG), pages 4 to 5.
[23] See transcript of the status conference of 13 March 2008 (ICC-01/04-01/06-T-79-ENG), pages 8 to 9.
[24] Later corrected to number 112, see *Prosecutor v Lubanga Dyilo* "Prosecution's submission on Article 54(3)(e) confidentiality agreements" 7 April 2008 (ICC-01/04-01/06-1267), para. 5.
[25] *Prosecutor v Lubanga Dyilo* "Prosecution's submission on undisclosed documents containing potentially exculpatory information" 28 March 2008 (ICC-01/04-01/06-1248), para. 7.
[26] *Prosecutor v Lubanga Dyilo* "Order on the 'Prosecution's submission on undisclosed documents containing potentially exculpatory information'" 3 April 2008 (ICC-01/04-01/06-1259).
[27] See *Prosecutor v Lubanga Dyilo* "Prosecution's submission on Article 54(3)(e) confidentiality agreements" 7 April 2008 (ICC-01/04-01/06-1267); "Prosecution's additional information on the Undisclosed Evidence" 15 April 2008 (ICC-01/04-01/06-1281).
[28] See transcript of the status conference of 6 May 2008 (ICC-01/04-01/06-T-86-ENG), pages 35 to 36.

myself to expressing doubts as to its legal foundation. To my mind, it is for the accused to evaluate the significance and implications of exculpatory evidence and the way it may aid in the preparation and presentation of his/her defence. Be that as it may, there was no real response to this offer of the Trial Chamber either.[29] I shall not explore the field further, except notice the stalemate in the disclosure of exculpatory material. The United Nations refused point-blank to authorize the disclosure of documents containing exculpatory evidential material either to the accused or to the Trial Chamber. The Trial Chamber had no authority under the Statute to review either the reasons for or the justification of the refusal of the providers. The stark fact is that evidential material tending to exculpate the accused, known to the Prosecutor, could not be disclosed to defence.

11. Matters came to a head on 2 June 2008 with the accused petitioning the Chamber to stay the prosecution,[30] i.e. the proceedings, on the ground that a fair trial was impossible in the absence of disclosure to him of exculpatory evidence in the possession of the Prosecutor. The Prosecutor, on the other hand, was unable to assure the Trial Chamber that evidence in his possession would be disclosed, nor was he in a position to predict with any certainty whether this would become feasible at any future time, not to mention at a near or early date. This was the state of affairs facing the Trial Chamber at the status conference of 10 June 2008 convened to examine the viability of the proceedings.[31] It cannot be denied that it was the Prosecutor who disclosed the existence of exculpatory evidence in conformity with his duty to the Chamber and the defence.

II. THE IMPUGNED DECISION

12. The picture emerging is that the Trial Chamber nine months after the first status conference was confronted with the inability of the Prosecutor to disclose not only to the accused but to the Trial Chamber too exculpatory material in his possession. The reasons for the inability of the Prosecutor to disclose material in his possession and

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[29] See *Prosecutor v Lubanga Dyilo* "Prosecution's information on documents that were obtained by the Office of the Prosecutor from the United Nations pursuant to Article 54(3)(e) on the condition of confidentiality and solely for the purpose of generating new evidence and that potentially contain evidence that falls under Article 67(2)" 2 June 2008 (ICC-01/04-01/06-1364).

[30] *Prosecutor v Lubanga Dyilo* "Requête de la Défense aux fins de cessation des poursuites" 2 June 2008 (ICC-01/04-01/06-1366)

[31] See transcript of the status conference of 10 June 2008 (ICC-01/04-01/06-T-89-ENG).

make the documents available for inspection founded on confidentiality agreements did not lessen the consequences of failure to disclose, entailing breach of the fundamental right of the accused, safeguarded by article 67 (2) of the Statute. The Trial Chamber underlined in the impugned decision:

> On 10 June 2008, the Chamber was told that there are "approximately" 95 items of potentially exculpatory material and 112 items which are "material to defence preparation", pursuant to Rule 77, making a total of 207 items of evidence. Of these 207 items, 156 were provided by the UN.[32] *[footnotes omitted]*

13. The Trial Chamber laid stress on the explanation of the Prosecutor that the exculpatory material had a bearing on the guilt or innocence of the accused, including evidence tending to suggest that the accused had acted in self-defence, that he was acting under duress or compulsion and that he had insufficient control over the persons who allegedly perpetrated the crimes for which he is charged.[33] Moreover, the Trial Chamber adverted to the definition of article 67 (2) of the Statute and the breadth of the notion of "exculpatory evidence" articulated therein.[34]

14. The Trial Chamber analysed article 54 (3) (e) of the Statute. In its view, authority to enter into confidentiality agreements under its provisions is limited to what is characterized as "lead material"[35], that is, information tending to suggest the existence of evidence that can be brought to light by the investigations of the Prosecutor. The only purpose of collecting such material or information is to generate evidence. In this case, the Prosecutor, according to the Trial Chamber, collected material constituting evidence in itself. The Prosecutor's approach to the application of article 54 (3) (e) of the Statute and the gathering of new evidence envisaged therein constitute, as the Trial Chamber found:

> a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances. The logic of the prosecution's position is that all of

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[32] Impugned Decision, para. 63, see also para. 19.
[33] See Impugned Decision, para. 22.
[34] See Impugned Decision, para. 59.
[35] See Impugned Decision, para. 71, where it is stated "[...] in other words, the only purpose of receiving this material should be that it is to lead to other evidence (which, by implication, can be utilised), unless Rule 82(1) applies." and para. 72.

> the evidence that it obtains from information-providers can be the subject of Article 54(3)(e) agreements.[36]

15. The clear inference is that the Prosecutor transgressed the provisions of article 54 (3) (e) of the Statute by receiving in confidence under its provisions not "lead material" but evidence that he would be unable to disclose to the accused except with the consent of a third party unconnected with the proceedings.[37]

16. The right to disclosure, more so to disclosure of exonerating evidence, is a fundamental right of the accused, denial of which makes trial according to law unattainable.[38] The importance of this right is underlined in decisions of the European Court of Human Rights to which reference is made in the decision of the Trial Chamber.[39] Reference is also made to decisions of the Appeals Chamber of the International Criminal Tribunal of the Former Yugoslavia relevant to the subject.[40]

17. Breach of the fundamental rights of the accused and generally inability to hold a fair trial were subjects specifically addressed by the Appeals Chamber in its judgment of 14 December 2006[41] (hereinafter "judgment of 14 December 2006"). In that case, the Appeals Chamber determined that a Chamber of the International Criminal Court is vested with power to stay proceedings if it is impossible to hold a fair trial. The Trial Chamber referred to the above judgment adding:

> If at the outset, it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process, it is necessary – indeed, inevitable – that the proceedings should be stayed.[42]

18. In the final analysis, non-disclosure of exculpatory evidence in the possession of the Prosecutor thwarts a fundamental right of the accused, raising, as I comprehend

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[36] Impugned Decision, para. 73.
[37] See Impugned Decision, para. 73.
[38] See Impugned Decision, paras. 80, 81.
[39] See the decisions of the European Court of Human Rights: *Jespers v Belgium*, application no. 8403/78, Commission's Report of 14 December 1981, *Jasper v United Kingdom*, application no. 27052/95, Judgment of 16 February 2000, *Fitt v. United Kingdom*, application no. 29777/95, Judgment of 16 February 2000; *V v Finland*, application o. 40412/98, Judgment of 24 July 2007.
[40] See International Tribunal for the Former Yugoslavia, *The Prosecutor v. Bradnin and Talic*, IT-99-36-T, Public Version of the confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, 23 May 2002, para. 19; *The Prosecutor v Blaskic*, IT-95-14-A, Judgement, 29 July 2004, para. 266.
[41] *Prosecutor v Lubanga Dyilo* "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006" 14 December 2006 (ICC-01/04-01/06-772).
[42] Impugned Decision, para. 91.

the decision of the Trial Chamber, a barrier to the holding of a fair trial. Article 54 (3) (e) of the Statute was wrongly employed by the Prosecutor, giving rise to obstacles in the way of performing his duty to disclose "a significant body of exculpatory evidence." Not even the Trial Chamber itself was allowed to gain knowledge of material and information necessary to assess the impact of potentially exculpatory material. In such circumstances, no fair trial could be held, as reflected in the final passage of the Trial Chamber's decision:

> Adapting the language of the Appeals Chamber, the consequence of the three factors set out in the preceding paragraph has been that the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial.[43]

In consequence the proceedings were stayed.

19. Notwithstanding the order made, staying the proceedings and the reasons founding it – impossibility to hold a fair trial –, the Trial Chamber did not rule out the possibility of stay being lifted at an unspecified future time. This is reflected in the following extract from its decision:

> Although the Chamber is not rendered without further authority or legal competence by this decision, it means that unless this stay is lifted (either by this Chamber or the Appeals Chamber), the trial process in all respects is halted.[44]

III. APPEAL PROCEEDINGS

20. On the application of the Prosecutor the following two issues were certified by the Trial Chamber as the subjects of appeal:[45]

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

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[43] Impugned Decision, para. 93.
[44] Impugned Decision, para 94.
[45] See *Prosecutor v Lubanga Dyilo* "Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused'" 2 July 2008 (ICC-01/04-01/06-1417).

> 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.[46]

21. The Prosecutor raised three grounds of appeal that expose in his view errors in the *sub judice* decision that invalidate the order to stay the proceedings.[47] Grounds one and two touch upon the same subject, namely the interpretation attached to article 54 (3) (e) of the Statute and sequentially its invocation and application in this case. These are:

> First Ground – the Chamber erred in law in interpretation of the nature and scope of Article 54(3)(e)[48]
>
> Second Ground – the Chamber erred in characterization of the Prosecutions' conduct under article 54(3)(e)[49]

22. The third ground relates directly to the imposition of the order to stay, couched as follows:

> Third Ground – the Chamber erred by imposing an excessive and premature remedy[50]

23. Contrary to the interpretation of article 54 (3) (e) of the Statute adopted by the Trial Chamber, the Prosecutor argues that its terms do not confine him to receiving in confidence documents and information consisting of what has been termed "lead material" to the exclusion of material constituting evidence in itself. The interpretation attached by the Trial Chamber to article 54 (3) (e) of the Statute cannot be reconciled with its wording. In relation to stay, the gravamen of the Prosecutor's argument is that the possibility of disclosure at a future date was not explored to the degree necessary before concluding that it was unattainable. In such circumstances stay, which has a long-term perspective, was a premature and unwarranted measure; a

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[46] *Ibid.*, para 32
[47] See *Prosecutor v Lubanga Dyilo* "Prosecution's Document in Support of Appeal against Decision to Stay Proceedings" 24 July 2008 (ICC-01/04-01/06-1446-Anx1).
[48] *Ibid*, page 5.
[49] *Ibid*, page 8.
[50] *Ibid*, page 13.

fact also borne out by what the Trial Chamber itself visualises – that the lifting of the stay of the proceedings could not be ruled out. While he agrees that stay may be imposed if there is no prospect of a fair trial, this prospect had not vanished in this case.

24. The defence counters the position of the appellant,[51] submitting that the interpretation of article 54 (3) (e) of the Statute adopted by the Trial Chamber is warranted by its provisions and was rightly applied in this case. The accused supports the conclusion of the Trial Chamber that the Prosecutor abused the power vested in him by article 54 (3) (e) of the Statute by receiving evidential material in confidence. Stress is laid on the fact that the Prosecutor was guilty of delay in seeking the consent of the providers to disclose the evidential material handed over to him. Consequently, he could not discharge the obligation cast upon him to disclose to the accused exonerating evidence as required by article 67 (2) of the Statute. The disinclination of the United Nations to give their consent to the disclosure of the evidence was repeatedly affirmed, "hence the Chamber had no other choice than to rule that '(...) *the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process* (...)'"[52].

25. The victims[53] support by-and-large the position of the Prosecutor, disputing as he does the construction placed upon article 54 (3) (e) of the Statute by the Trial Chamber.[54] In their contention, material received pursuant to article 54 (3) (e) of the Statute does not rank as evidence itself, but only as material apt to generate evidence. Regrettable as it is, they submit, that the Prosecutor failed to negotiate with the providers of confidential information an agreement that would allow the Trial Chamber to be apprised of the documents passed to him (containing potentially exculpatory evidence), the Prosecutor is under no legal obligation to disclose the material in his possession.

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[51] See *Prosecutor v. Lubanga Dyilo* "Réponse de la Défense au mémoire déposé par le Procureur au soutien de son appel contre la Décision du 13 juin 2008 ordonnant la suspension des procédures" 25 July 2008 (ICC-01/04-01/06-1447)
[52] *Ibid.*, para. 65.
[53] Victims a/0001/06, a/0002/06 and a/0003/06 were granted leave to participate in the appeal by the decision of the Appeals Chamber "Decision on the participation of victims in the appeal" of 6 August 2008 (ICC-01/04-01/06-1453).
[54] See *Prosecutor v. Lubanga Dyilo* "Victims' Observations on the Prosecutor's Appeal of the Decision of 13 June 2008 Ordering a Stay of the Proceedings" 12 August 2008 (ICC-01/04-01/06-1456-tENG)

26. It must be noticed that neither the Prosecutor nor the defence or the victims doubted the power of the Trial Chamber to order stay of the proceedings in face of impossibility to ensure a fair trial or disputed the parameters of such power, as depicted by the Appeals Chamber in its judgment of 14 December 2006. Also, they do not dispute that without disclosure to the accused a fair trial would be impossible. What must also be noticed is that neither the parties nor the victims touch upon or address the implications of the Prosecutor failing to generate new evidence from the mass of material that came into his possession long ago.

IV. DETERMINATION

A. Judgment of the Appeals Chamber of 14 December 2006

27. It is instructive to begin with a recitation of the principles emerging from the judgment of the Appeals Chamber of 14 December 2006, relied upon by the Trial Chamber in its decision. At issue in that case was the power of a Chamber of the Court to stay proceedings for abuse of process as understood and applied in common law jurisdictions. The Appeals Chamber reviewed the jurisprudence of English courts and that of other common law jurisdictions as to the ambit, parameters, and range of application of this doctrine. As the Appeals Chamber says:

> The power to stay proceedings is *par excellence* a power assumed by the guardians of the judicial process, the judges to see that the stream of justice flows unpolluted.[55]

28. There is a reminder of the decision of the House of Lords in *Connelly v. DPP* and the words of Lord Devlin, who speaks of the importance of the court accepting what is referred to as its "inescapable duty to secure fair treatment for those who come or are brought before them"[56]. The doctrine of abuse of process, as known to the common law, has no direct parallel in the Romano-Germanic systems of law. The following passage from the aforementioned judgment reflects the position in that field of law:

> The doctrine of abuse of process as known to English law finds no application in the Romano-Germanic systems of law. The principle encapsulated in the

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[55] Judgment of 14 December 2006, para 28.
[56] House of Lords, 21 April 1964, [1964] 2 All ER (All England Law Reports), page 401, quotation at page 422.

> Latin maxim *male captus bene detentus* has received favourable reception in the French case of *re Argoud* but not an enthusiastic one in the old case of *re Jollis*. The German Constitutional Court too appears to have endorsed like principles to those approved in *re Argoud*. But where serious violations of the fundamental rights of the accused or international law are involved, the rule is mitigated.[57] *[footnotes omitted]*

29. The Appeals Chamber determined that the doctrine of abuse of process, as practised in common law jurisdictions, finds no application as such under the Statute. But to the extent it aims to stem breaches of fundamental principles of justice, it is endorsed by the Statute as a means of protecting the individual from violations of his/her fundamental rights and in order to ensure a fair trial that earmarks the parameters of the administration of justice. The following passage from the aforesaid judgment is to the point:

> 36. The doctrine of abuse of process had *ab initio* a human rights dimension in that the causes for which the power of the Court to stay or discontinue proceedings were largely associated with breaches of the rights of the litigant, the accused in the criminal process, such as delay, illegal or deceitful conduct on the part of the prosecution and violations of the rights of the accused in the process of bringing him/her to justice. The Statute safeguards the rights of the accused as well as those of the individual under interrogation and of the person charged. Such rights are entrenched in articles 55 and 67 of the Statute. More importantly, article 21 (3) of the Statute makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights. It requires the exercise of the jurisdiction of the Court in accordance with internationally recognized human rights norms.[58]

Further down in the same judgment, the Appeals Chamber added significantly:

> Where a fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done.[59]

The conclusion of the Appeals Chamber on this chapter of its judgment is set out below:

> 39. Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. To borrow an expression from the decision of the English Court of Appeal in *Huang v.*

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[57] Judgment of 14 December 2006, para. 33.
[58] Judgment of 14 December 2006, para. 36.
[59] Judgment of 14 December 2006, para. 37.

> *Secretary of State,* it is the duty of a court: "to see to the protection of individual fundamental rights which is the particular territory of the courts [...]" Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice. *[footnote 86 omitted]*

B. Delay

30. The reasonableness of the time within which judicial proceedings are conducted and concluded and the absence of undue delay constitute an inseverable element of a fair trial, forming part of internationally recognized human rights.[60] The Statute assures the trial of the accused without undue delay as his/her fundamental right.[61] Delay in the trial of a case and sequentially breach of the corresponding right of the accused to be tried without undue delay was identified among the causes that may warrant stay of the proceedings.[62]

31. The timeliness of the proceedings is singled out in mandatory terms as a distinct element of a trial under the Statute, not only as an attribute of a fair trial. Article 64 (2) of the Statute lays down:

> 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.

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[60] See Article 14 (3) of the *International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A (XXI), U.N. Document A/6316 (1966), entered into force 23 March 1976, 999 United Nations Treaty Series 171, provides: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] 3. To be tried without undue delay", Article 6 (1) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950), 213 United Nations Treaty Series 221 et seq , registration no. 2889, provides "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."; Article 7 of the *African Charter on Human and Peoples' Rights*, signed on 27 June 1981, entered into force on 21 October 1986, 1520 United Nations Treaty Series 26363, provides: "Every individual shall have the right to have his cause heard. This comprises.[...] d) the right to be tried within a reasonable time by an impartial court or tribunal.; Article 8 (1) of the *American Convention on Human Rights, "Pact of San José, Costa Rica"*, signed on 22 November 1969, entered into force on 18 July 1978, 1144 United Nations Treaty Series 17955, provides: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

[61] See article 67 (1) (c) of the Statute.

[62] See judgment of 14 December 2006, para 36.

32. I deem it instructive in this connection to refer to two decisions of the Supreme Court of Cyprus as to the implications of delay in the administration of justice. In the first, *Agapiou v. Panayiotou*,[63] it was said, "Justice delayed is justice denied. This aphorism must be in the forefront of judicial thought and actions." In the second, *Victoros v. Christodoulou*[64], the Supreme Court underlined, that "[...] the value of the rights of man is directly dependent upon the efficacy of the mechanisms for their protection and the time within which justice bears fruition"[65].

33. In its decision of 9 November 2007, the Trial Chamber stated that, "from the moment the prosecution entered into the agreements and was thereafter presented with exculpatory materials, it has been under an obligation to act in a timely manner to lift the agreements in order to ensure a fair trial without undue delay"[66]. This statement recounted in the impugned decision associates a fair trial to a trial held without undue delay and reflects the concern of the Trial Chamber about the timeliness of the proceedings.[67]

34. On a review of what preceded the impugned decision it transpires that despite the lapse of more than 9 months since the first status conference it proved impossible to assure disclosure of exonerating material to the accused. Furthermore, there was no firm indication that this would become possible at any future time, not to mention shortly. The United Nations persisted in their refusal to consent to the disclosure to the accused of the documents handed over to the Prosecutor, leaving little if any prospect of a change of stance in this connection.[68] The existence of evidential material of an exculpatory nature was known as a fact. The Trial Chamber admonished the Prosecutor for collecting in confidence evidential material without any certainty that he would be able to use and make disclosure of it.

35. The Prosecutor suggested to the Trial Chamber that the trial should commence notwithstanding the absence of disclosure, hoping that in the process disclosure would

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[63] *Agapiou v Panayiotou* (1988) 1 Cyprus Law Review, page 257.
[64] *Victoros v Christodoulou* (1992) 1 Cyprus Law Review, page 512.
[65] Translation from the Greek original.
[66] *Prosecutor v Lubanga Dyilo* "Decision Regarding the Timing and Manner of Disclosure and the Date of Trial" 9 November 2007 (ICC-01/04-01/06-1019), para. 7.
[67] See Impugned Decision, para. 5.
[68] See Impugned Decision, para. 49.

become possible.[69] The suggestion overlooks that the principal aim of disclosure of evidence is to enable the accused to prepare his defence. The availability of adequate time and facilities for the preparation of the defence is guaranteed as the right of the accused by article 67 (1) (b) of the Statute.

C. Interpretation of article 54 (3) (e) of the Statute

36. What must next be addressed is the soundness of the interpretation accorded to article 54 (3) (e) of the Statute by the Trial Chamber, especially whether the authority of the Prosecutor in obtaining documents and information is confined to "lead material," as earlier identified.[70]

37. The guide to the interpretation of the provisions of the Statute is the Vienna Convention on the Law of Treaties[71], Article 31 (1) in particular which reads:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

In its judgment of 13 July 2006, the Appeals Chamber analysed the principles governing the interpretation of the Statute in light of the provisions of the Vienna Convention. The following passage is instructive on this matter:

> The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.[72]

38. Article 54 of the Statute, of which paragraph 3 (e) forms a part, defines the duties and powers of the Prosecutor with respect to investigations. It would be helpful if we reproduce, be it at the expense of repetition, the provisions of article 54 (3) (e) of the Statute:

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[69] See Impugned Decision, para. 51.
[70] See supra para. 14
[71] 1155 United Nations Treaty Series 18232, signed on 23 May 1969 and entered into force on 27 January 1980.
[72] *Situation in the Democratic Republic of the Congo* "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), para 33.

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

39. Article 54 (3) (e) of the Statute does not in terms prescribe either the nature and content or the character of documents or information that the Prosecutor may receive in confidence. The only limitation is that the documents and the information received should be collected solely for the purpose of generating new evidence. The Prosecutor cannot receive such material for any other purpose. The documents and information received provide the basis for the collection of new evidence. Evidence other than documentary or real evidence is usually collected from persons who bear witness to events in the manner prescribed in rule 111 of the Rules of Procedure and Evidence. If a document provided to the Prosecutor constitutes evidence in itself, the duty of the Prosecutor is to gather evidence corresponding to its content. There is no express or implicit limitation of the power of the Prosecutor to gather evidence from persons mentioned or identified in oral or documentary material, or the suppliers or authors of such documents. What the confidentiality agreement prohibits the Prosecutor from doing is to disclose the content of the documents themselves and the information contained therein. Consequently, I cannot go along with the interpretation of article 54 (3) (e) of the Statute adopted by the Trial Chamber, confining authority to receiving documents or information to material providing a clue as to the existence of new evidence that the Prosecutor may gather.

D. Prosecutor's failures respecting the rights of the accused and their implications on the fairness of the proceedings

40. If the material constitutes evidence in itself and the Prosecutor fails to generate new evidence corresponding to it or reproducing it, he will be stranded with evidential material that he will be unable to disclose to the accused unless the providers agree to this course. The duty of the Prosecutor to disclose to the accused exculpatory material is not mitigated in such circumstances. Article 67 (2) of the Statute is specific on the subject. It lays down that "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"[73]. Consequently, inability to make disclosure because of a confidentiality agreement exposes him to failure to disclose, with all the consequences that such failure entails.

41. As may be gathered from the position of the Prosecutor advanced before the Trial Chamber, he is not free of responsibility for the failure to generate evidence reproducing or corresponding to evidential material collected from the providers. Article 54 (1) (a) of the Statute binds the Prosecutor to collect not only inculpatory but exculpatory evidence too. The omission of the Prosecutor in this case to gather exculpatory evidence of which he was aware is another reason marking the failure of the Prosecutor to make disclosure of exculpatory evidence to the defence.

42. A large number of the documents and information received by the Prosecutor pursuant to confidentiality agreements under article 54 (3) (e) of the Statute were received before June 2004, prior to the commencement of investigations. There is nothing to suggest that any consistent effort was made to generate evidence from the material received. On the contrary, the indications are that little, if anything, was done in that direction, resting on the hope that the providers would consent to the disclosure of such confidential material to the accused. At no time after it became clear that the United Nations and other information providers withheld their consent to disclosure of material did the Prosecutor suggest or hint at the existence of any possibility of seeking, be it belatedly, to generate new evidence that would enable him to discharge his duty to disclose. Understandably, after the lapse of a considerable time since the collection of the confidential material, it might not be easy to gather evidence reproducing the evidential material in his possession. A suggestion was made by the Prosecutor that he might be in a position to generate "alternative evidence",[74] which of course is no solution to the problem of disclosure of evidence in his possession.

43. The failure of the Prosecutor to bring forth and disclose evidence tending to exonerate the accused is not confined to the trial, but extends to the confirmation hearing too, where disclosure of exculpatory evidence to the person under investigation is also assured as his/her fundamental right. Rule 121 (1) of the Rules provides, *inter alia*:

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[73] Emphasis added.
[74] See Impugned Decision, para. 60

> Subject to the provisions of article 60 and 61, the person shall enjoy the rights set forth in article 67.

Disclosure of exculpatory evidence is, under the provisions of article 67 (2) of the Statute, a fundamental right of the accused and a corresponding duty of the Prosecutor. Confirmation of charges is neither automatic nor free from an evaluation of the evidence adduced, with a direct bearing on the decision of the Pre-Trial Chamber whether to confirm the charges or not. Under the provisions of article 61 (7) of the Statute, the test for confirming the charges is "whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged." At the confirmation hearing the person under investigation is entitled to challenge not only the charges but the evidence presented by the Prosecutor and, in addition thereto, to present evidence him/herself. Evidence tending to exonerate a person of the charges levied against him/her could have a bearing on the sufficiency of evidence before the Pre-Trial Chamber for the purpose of determining whether the standard for the confirmation of charges has been satisfied.

44. The guarantee of a fair trial is not confined to the trial itself but extends to the preparatory processes preceding the trial, indeed to every aspect of the proceedings.[75] This is affirmed by the judgment of the Appeals Chamber of 14 December 2006, acknowledging that if the fabric of a fair trial is shattered before its commencement, no fair trial can be held. Attention may also be drawn to the provisions of article 82 (1) (d) of the Statute, making decisions involving issues that would significantly affect "the fair and expeditious conduct of the *proceedings*"[76] a ground for stating an appellate issue for consideration by the Appeals Chamber.

45. It is unnecessary to ponder the implications of the failure of the Prosecutor to generate and disclose to the person under investigation as well as make available for inspection under rule 77 (1) of the Rules evidence, especially exculpatory evidence, in his possession. The omission is yet another knot in the chain of failures of the Prosecutor to apprise the defendant of exculpatory evidence and sequentially a breach of his corresponding duty under article 67 (2) of the Statute.

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[75] See *inter alia* House of Lords, *R (on the application of R) v. Durham Constabulary* [2006] Criminal Law Review (Crim.L.R.), page 87

[76] Emphasis added.

E. Decision to stay the proceedings

46. Failure on the part of the Prosecutor to discharge the duty of obtaining exonerating evidence known to exist and eventual inability to disclose exonerating evidential material in his possession constitute a breach of the right of the accused under article 67 (2) of the Statute, fundamental for the preparation of his/her defence and of direct relevance to the main issue of the trial, his/her guilt or innocence. If the Trial Chamber was to embark upon the trial of the accused, this would be done with knowledge that the right of the accused to prepare his defence had been violated and that evidence supporting the accused's innocence was withheld with predictable consequences on the safety of the verdict of the court. Knowledge of the existence of exonerating evidence not put before the Trial Chamber would cloud the proceedings with doubt, rendering them *a priori* inconclusive.

47. To guard against the eventuality of relevant evidence not being produced before the Chamber, article 69 (3) of the Statute stipulates:

> The Court shall have the authority to request the submission of evidence that it considers necessary for the determination of truth.

In this case, it was made abundantly clear that such evidence, exculpatory in nature, would not be forthcoming, with the consequence that the truth could not crystallise at the trial. In light of this state of affairs, could a fair trial be held, let alone a fair and expeditious trial?

48. By the time that stay of proceedings had been ordered, the accused had been in custody by order of the Court for nearly 2 years and 3 months and under charge for a considerable time. The impossibility of embarking upon the trial of the accused after the lapse of such a length of time was in itself a consideration with a direct impact upon a decision to stay the proceedings. The time perspective from which impossibility to hold a fair trial is judged, is the time at which the trial should be held. In this case, the Trial Chamber was exploring for a period of several months the possibility of disclosure being made to the accused, postponing sequentially the date of trial from 31 March 2008 to 23 June 2008, signalling the time at which the trial should be held. There was no prospect of the obstacles to holding a fair trial being removed at a predictable early date.

49. The order to stay proceedings was absolute and unconditional. The remarks of the Trial Chamber, in the nature of *obiter dicta*, following the making of the order to stay to the effect that the Trial Chamber or the Appeals Chamber were not deprived of "legal competence" to lift stay, in no way conditioned the order made. Where does power to revive the proceedings derive from, it is nowhere explained. Certainly no such power resides with the Appeals Chamber unless the Trial Chamber is merely referring to the power of the Appeals Chamber to reverse its decision to stay. To my mind, contemplating stay being lifted at an unspecified future time contradicts the order of stay itself, founded as it was on the impossibility of holding a fair trial and wholly ignores the timeliness of the proceedings as an element of a fair trial, not to mention its expeditiousness.

50. The Trial Chamber attached no conditions to the order to stay the proceedings, whereas its foundation, impossibility of holding a fair trial, underlined the permanence of the order. Impossibility admits of no qualification. It derives from the judgment of the Appeals Chamber of 14 December 2006 that stay brings the proceedings to an end. This is the inevitable outcome of impossibility to piece together the constituent elements of a fair trial. Stay is therefore irrevocable. The following quotation from the judgment of the Appeals Chamber of 14 December 2006 signifies the consequences of impossibility to hold a fair trial:

> A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.[77]

51. The pertinent question in this appeal is whether the finding of impossibility to hold a fair trial and the sequential order to stay the proceedings are justified. The answer is in the affirmative. The finding of impossibility to hold a fair trial seals the end of the proceedings.

[77] Judgment of 14 December 2006, para. 37.

52. For the reasons given, the order to stay the proceedings is confirmed.

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

Judge Georghios M. Pikis

Dated this 21st day of October 2008

At The Hague, The Netherlands