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

TRIAL CHAMBER I

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

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

Public redacted version

**With 15 public Annexes (Annexes 1, 2, 97 to 99, 101 to 109 and 111), 3 Confidential
-Prosecution and Defence only Annexes (Annexes 15, 112 and 214) and 196
Confidential - *ex parte* - Prosecution only Annexes (Annexes 3 to 14, 16 to 96, 100,
110, and 113 to 213)**

**Prosecution's Application For Trial Chamber to Review all the Undisclosed
Evidence Obtained from Information Providers**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Mr Luc Walley

Mr Franck Mulenda

Ms Carine Bapita Buyangandu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

INTRODUCTION

1. In its “Decision on the Prosecution’s Application to Lift the Stay of Proceedings”¹ (“3 September 2008 Decision”) the Trial Chamber ruled that *“if all of the Documents from all the information providers are submitted to the Chamber in a non-redacted form for the entirety of the trial and if the Appeals Chamber is able to consider in a similar, non-redacted form all of the relevant materials and any decision of the Trial Chamber on the issue, the Bench would be prepared to review all the Documents (prior to the lifting of the stay) to assess which Documents need to be disclosed and whether the proposed methods of disclosure accord with the accused’s right to a fair trial.”*²
2. The Prosecution is now in a position to comply with the above-mentioned conditions set by the Trial Chamber. It hereby provides the Trial Chamber with all the documents from all the information providers in non-redacted form henceforth and through the entirety of the trial for its review. It furthermore confirms that the Appeals Chamber will be able to consider the documents - and any decision of the Trial Chamber - in a similar, non-redacted form

BACKGROUND

3. On 13 June 2008, the Trial Chamber issued the “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”³ (“Decision on the stay of proceedings”).

¹ ICC-01/04-01/06-1466-Con-Exp, 3 September 2008.

² *Ibid*, at para. 40(v).

³ ICC-01/04-01/06-1401.

4. On 10 July 2008, the Prosecution filed the "Prosecution's application to lift the stay of proceedings"⁴ ("10 July 2008 Application"). On 30 July 2008,⁵ 8 August 2008⁶ and 22 August 2008⁷ respectively, the Prosecution provided further information supplementing its 10 July 2008 Application ("Supplementary Information").
5. On 1 September 2008, the Defence filed the "Réponse de la défense à la 'Prosecution's application to lift the stay of proceedings'".⁸
6. By its 3 September 2008 "Decision on the Prosecution's Application to Lift the Stay of Proceedings"⁹ ("Decision") the Trial Chamber concluded that *"it is necessary for the stay of proceedings to remain in place"*.¹⁰
7. The Prosecution herewith submits its application with all the material concerned annexed for review by the Trial Chamber.

APPLICATION

A) Provision of all relevant materials in unredacted form

8. In paragraph 40(v) of the 3 September 2008 Decision, the Trial Chamber ruled that it would be prepared to review all the Documents prior to the lifting of the stay if the following conditions were satisfied:

⁴ ICC-01/04-01/06-1430 Conf-Exp; the Prosecution filed the public redacted version (ICC-01/04-01/06-1431) on 11 July 2008.

⁵ ICC-01/04-01/06-1451.

⁶ ICC-01/04-01/06-1454.

⁷ ICC-01/04-01/06-1462.

⁸ ICC-01/04-01/06-1464.

⁹ ICC-01/04-01/06-1467.

¹⁰ *Ibid*, at para. 39.

- (i) that the Trial Chamber be able to review all documents from all information providers in an unredacted form for the entirety of the trial; and
- (ii) that the Appeals Chamber is able to consider in a similar, non-redacted form all of the relevant materials and any decision of the Trial Chamber on the issue.

9. The United Nations (“UN”) - in addition to the Non-Governmental Organisations (“NGOs”) - has consented to those requirements. The Trial Chamber is provided with all documents in unredacted form and, in rendering any decision, the Trial Chamber can refer to the detail of the documents, where necessary on an *ex parte* basis, thus enabling the Appeals Chamber to subject any Trial Chamber’s decision to full appellate review.

10. The UN has also consented that the documents can be made available to the Appeals Chamber, for the purpose of appellate review of any Trial Chamber’s decision on a continuing basis and for the entirety of the appeal proceedings.

11. The agreement by the UN is expressed in an exchange of letters between the Prosecutor and the UN Legal Counsel of 9 October 2008 and 10 October 2008 respectively.¹¹ The UN provided their consent to unfettered review and continuing access of the items by both the Trial Chamber and the Appeals Chamber. The UN has confirmed that the Judges of the Trial Chamber would be able to retain copies of all the items “*throughout the trial*”. The UN has further

¹¹ The 9 October 2008 OTP letter and the 10 October 2008 UN letter are annexed as public Annexes 1 and 2.

agreed to the *“documents being made available in the same unredacted form to the Judges of the Appeals Chamber for their review.”*¹²

B) Identification of all relevant material

12. 228 items are relevant to this Application, 173 items from the UN and 55 items from NGOs.¹³

13. 135 items can be disclosed directly and in fully unredacted form to the Defence; they were all obtained from the UN. Although the items in question can already be disclosed to the Defence, and thus the Prosecution has not attached them to the present Application, the Prosecution does not wish to impose any limitation on the Trial Chamber’s review functions and if the Trial Chamber wishes the Prosecution do so, the Prosecution is able to immediately provide these items to the Chamber.

14. 93 documents cannot be disclosed directly and/or in fully unredacted form to the Defence; they include 38 documents from the UN and 55 documents from the NGOs. The Prosecution provides all 93 documents - from both the UN and the NGOs - in unredacted form to the Trial Chamber for review.¹⁴

C) Provision of Information on Proposed Methods of Disclosure

¹² Reference is made to the 10 October 2008 UN letter, at page 2.

¹³ Reference is made to paragraphs 18 and 20 of the Decision on the stay of proceedings and paragraphs 9(i), 11, 12 and 14 of the 10 July 2008 Application. One additional item (DRC-OTP-0043-0080) is referred to in Annexes 3 and 10 to the 25 September 2008 letter but is not part of the 228 items of Undisclosed Evidence because a copy (DRC-OTP-0181-0492) was provided by the UN for disclosure and was indeed disclosed to the Defence; for clarity, the Prosecution attaches the undisclosed and the disclosed copies of this document as Annexes 15 and 112 to this filing.

¹⁴ The 93 documents are annexed as Confidential - *ex parte* - Prosecution only Annexes 3 to 96, with the exception of Annex 15 which is Confidential – Prosecution and Defence only. For convenience and ease of reference, the Prosecution re-submits as part of the 93 documents the 55 documents that were obtained from NGOs and that were submitted as Annexes to the 10 July 2008 Application.

15. In addition, the Prosecution submits the following information in relation to the methods of disclosure proposed at this stage by the information providers.

UN documents

16. As a result of its continuing review of the documents, the UN has now conveyed a further two letters to the Prosecution lifting Article 54 (3) (e) restrictions. In its letter of 19 September 2008, the UN consented to the disclosure of a further 9 documents in redacted form.¹⁵ In its letter of 25 September 2008, the UN consented to limiting the redactions in 20 out of the 36 documents concerned and to the disclosure of a further 3 documents in redacted form.¹⁶ A further 80 documents can be disclosed in unredacted form.

17. In light of these latest letters from the UN, out of the total number of 173 UN items:

- (i) 135 items may be disclosed directly to the Defence in their entirety and without redactions.¹⁷ In respect of these items, the Prosecution is in a position to fully discharge its disclosure obligations as submitted in paragraph 13 above.
- (ii) For 35 documents, the UN has provided its consent for their disclosure to the Defence with a small number of redactions. For the Chamber's ease of reference, the Prosecution also provides the proposed redacted versions for

¹⁵ The 19 September 2008 UN letter with its Annexes I and II are attached as public Annexes 97 to 99. Annex III to the 19 September 2008 UN letter is attached as Confidential – *ex parte* – Prosecution only Annex 100.

¹⁶ The 25 September 2008 UN letter with its Annexes I to VIII are attached as public Annexes 101 to 109. Annex IX to the 25 September 2008 UN letter is attached as Confidential – *ex parte* – Prosecution only Annex 110. Annex X to the 25 September 2008 UN letter is attached as public Annex 111.

¹⁷ For 2 out of these 135 documents the UN is requesting that they are not disclosed to the public.

disclosure of the above-mentioned documents and the reasons thereof as provided by the UN.¹⁸

- (iii) For 3 documents,¹⁹ the UN has not yet consented to disclosure to the Defence. For 2 of those documents, disclosure is deemed by the UN to be possibly threatening the safety of their staff.²⁰ For 1 document, the UN has no difficulty of its own to fully disclose but has to secure consent for disclosure from a third party which has not responded yet.²¹ For the 3 documents for which methods of disclosure have not been identified or have not been identified yet respectively, the Prosecution notes for the full information of the Trial Chamber that it has disclosed materials to the Defence that provides for information that is largely analogous to the content of the 3 documents that is potentially exonerating or falls within the parameters of Rule 77.

NGO documents

18. As a result of further consultation of the Prosecution with the NGOs and further consultation of the NGOs internally, upon a decision of the Trial Chamber that those documents must be disclosed to the Defence, methods of disclosure have been identified - either through the provision of summaries or redacted versions, not providing for the identity of the NGOs, REDACTED - for 53 out of the 55 documents that are subject to the Decision on the stay of proceedings. For the 2 documents for which methods of disclosure have not been identified yet, the Prosecution notes for the full information of the Trial Chamber that it has disclosed materials to the Defence that provide for information that is largely

¹⁸ The 35 redacted UN documents and the disclosed version of DRC-OTP-0043-0080 (referred to at footnote 14 above) are attached as Confidential – *ex parte* – Prosecution Only Annexes 112 to 147, with the exception of Annex 112 which is Confidential – Prosecution and Defence only.

¹⁹ These three documents form part of Annexes 3 to 96.

²⁰ DRC-OTP-0053-0247 and DRC-OTP-0159-0408.

²¹ Reference is made to the 25 September 2008 UN letter, at page 3, and its Annex VI (Annexes 101 and 107).

analogous to the content of the 2 documents that is potentially exonerating or falls within the parameters of Rule 77.

19. In detail, the situation of the 55 documents is as follows:

- (i) REDACTED ("REDACTED") has now consented to the provision of either summaries or redacted versions for 5 out of the 6 documents obtained from them. For 1 document, REDACTED was not in a position to identify a method of disclosure for reasons that are detailed in their letter of 6 October 2008.²²
- (ii) REDACTED ("REDACTED") has now consented to consider providing either summaries or redacted versions of the 22 documents obtained from them.
- (iii) REDACTED ("REDACTED") has consented to the disclosure in redacted form of the 1 document obtained from them.
- (iv) In respect of the 22 documents obtained from REDACTED ("REDACTED"), the Prosecution has recommended the provision of summaries, where applicable in redacted form.²³
- (v) REDACTED ("REDACTED") has consented to the provision of either summaries or redacted versions of the 3 documents obtained from them.²⁴
- (vi) REDACTED ("REDACTED") informed the Prosecution that they are considering whether REDACTED would be properly addressed by disclosing a summary or a redacted version of the one document obtained from them.

²² The 6 October 2008 REDACTED letter is attached as Confidential – *ex parte* – Prosecution Only Annex 148. For further details, the Prosecution refers to the content of the 6 October 2008 REDACTED letter.

²³ See 10 July 2008 Application, at para. 30.

²⁴ *Ibid*, at para. 34.

20. For the Trial Chamber's information and ease of reference, the Prosecution - at this stage - can submit 19 NGO documents in redacted form, with redactions applied pursuant requests from the respective NGOs.²⁵

21. All information providers, the UN as well as NGOs, have expressed willingness to pursue consultations further to any Trial Chamber decision on disclosure in order to implement such Decision.

Translations provided to the Trial Chamber

22. The Prosecution is also providing the Trial Chamber with 38 full²⁶ and 8 partial translations²⁷ of documents from their original French to English.²⁸

PUBLIC REDACTED VERSION

23. In light of the information that is provided on the NGOs and their position, the Prosecution files the present submission as "Confidential - *ex parte* – Prosecution only".

²⁵ The 19 redacted NGO documents are attached as Confidential – *ex parte* – Prosecution Only Annexes 149 to 167.

²⁶ The 38 full translations are annexed as Confidential – *ex parte* – Prosecution only Annexes 168 to 205. Annexes 168 to 170 are translations of documents obtained from the UN. Annexes 171 to 205 are translations of documents obtained from NGOs.

²⁷ The 8 partial translations of documents obtained from NGOs are annexed as Confidential – *ex parte* – Prosecution only Annexes 206 to 213. In these cases, as a priority, only the relevant substantive and contextual components of the documents were translated.

²⁸ Transcript of hearing on 24 June 2008, ICC-01/04-01/06-T-91, page 29. Where applicable, the redactions in the French documents are mirrored in "see through" in the English translations. The Prosecution will provide further translations of portions of another 6 documents obtained from the UN upon completion. In respect of document DRC-OTP-0022-0856 (Annex 69 to the present filing), the Prosecution draws the Trial Chamber's attention to the fact that the title of the document appears in both English and French, and for this reason a translation is not being provided with this filing. The Prosecution is also not providing a translation of the document DRC-OTP-0021-0685 (Annex 63 to the present filing) because a document with the same content has been disclosed to the Defence. For the Trial Chamber's reference, the Prosecution provides as Confidential – Prosecution and Defence only Annex 214 the document which has been disclosed to the Defence, namely DRC-OTP-0107-0223.

24. The Prosecution files a public redacted version, with public annexes and Confidential – *ex parte* – Prosecution only Annexes,²⁹ simultaneously with the present “Confidential – *ex parte* – Prosecution only” filing.

RELIEF REQUESTED

25. Accordingly, the Prosecution requests the Trial Chamber to review the documents received from information providers.



Luis Moreno-Ocampo
Prosecutor

Dated this 13th day of October 2008
At The Hague, The Netherlands

²⁹ In addition, there will be one Confidential – Prosecution and Defence only Annex.