

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 23 March 2009

TRIAL CHAMBER I

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

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

Public

**Decision issuing Annex accompanying Decision lifting the stay of proceedings
of 23 January 2009**

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 Mabilie
Mr Jean-Marie Biju-Duval

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Jean Louis Gilissen
Mr Jean-Chrysostome Mulamba Nsokoloni
Mr Paul Kabongo Tshibangu
Mr Hervé Diakiese

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

States Representatives

The Office of Public Counsel for the Defence

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, hereby attaches the annex to its Decision on Reasons for Oral Decision lifting the stay of the proceedings (“Decision on lifting the stay”):¹

1. As stated in its Decision on lifting the stay, the Trial Chamber had intended to publish public, confidential and *ex parte*, prosecution-only versions of this Decision in their entirety at the same time. During the status conference on 22 January 2009, the Chamber requested the Office of the Prosecutor (“prosecution”) to review the analysis that the Chamber had conducted of each document that is the subject of a confidentiality agreement between the prosecution and an information provider pursuant to Article 54(3)(e) of the Rome Statute (“Statute”), to ensure that by filing the decision the Chamber would not breach confidentiality or any other properly founded security concerns.²
2. The prosecution provided its review in 4 tranches, each provided to the Chamber in a separate attachment to e-mails sent between Friday 23 January 2009 and the evening of Sunday 25 January 2009.³
3. The prosecution proposed various redactions to the Chamber’s analysis of the individual documents, distinguishing between the public and the confidential versions.
4. Given the potential risks to the security of individuals and organisations, the Chamber has carefully reviewed each of the prosecution’s suggestions.

¹ Reasons for Oral Decision lifting the stay of proceedings, 23 January 2009, ICC-01/04-01/06-1644.

² Transcript of hearing on 22 January 2009, ICC-01/04-01/06-T-105-ENG, page 4, line 22 – page 5, line 9.

³ Emails from the prosecution to the Trial Chamber through the Legal Adviser to the Trial Division, 23 January 2009 at 14.18 (annexes 42-70), at 14.39 (annexes 93-96), and at 19.49 (annexes 3-41) and Email from the prosecution to the Trial Chamber through the Legal Adviser to the Trial Division, 25 January 2009 at 17.37 (annexes 71-92).

5. For the analysis of the documents from the United Nations (annexes 3 – 41), the prosecution's proposals are essentially confined to individual identifying information (already approved by the Chamber). The relevant annexes in this regard are 5, 12, 17, 19, 27, 30, 32, 35, 40 and 41.
6. As regards documents from various NGOs (annexes 42-96), the prosecution's review established three broad categories, as set out below:
 - (i) Redactions to general information which tend to reveal the particular "form" of certain documents, which in turn may reveal their origins;
 - (ii) Redactions to the "concerns" of certain information providers in the public and the confidential versions, along with redactions to the prosecution's *ex parte* submissions in the public version; and
 - (iii) Redactions to individual witness information.
7. The Chamber sought further details from the prosecution as to why particular redactions had been suggested in the public and confidential versions of the analysis. For this reason, the Chamber held an *ex parte* hearing with the prosecution to clarify these matters, and detailed information was provided to the Chamber via the presiding judge's legal officer as regards particular proposed redactions.⁴
8. As a result, it became apparent that whilst some of the proposed redactions are unnecessary and have been lifted, a significant number need to be retained, notwithstanding the fact that in some instances the material appears innocuous: for instance, on close reading, the substance or style of the

⁴ Transcript of hearing on 26 January 2009, ICC-01/04-01/06-T-108-CONF-EXP-ENG.

document, on occasion, has a tendency to reveal the identity of the information provider.

9. At the Chamber's invitation, the prosecution re-submitted its review, taking into account the guidance generally given by the Chamber.⁵ On 16 February 2009, the Chamber requested the prosecution to conduct another review of the redacted versions. The prosecution was also requested to consult the providers on whether the confidential version of the annex could be provided to the legal representatives of the victims.⁶ The prosecution informed the Chamber on 18 February of the UN's position that the confidential version of the annex may be provided to the legal representatives only and not to the victims they represent.⁷ The Chamber was informed on 23 February that the NGOs also consent to the notification of the confidential annex to the legal representatives but not to the victims they represent.⁸ Having finalised the public, confidential and *ex parte*, prosecution-only versions of this Decision, the Chamber requested the prosecution to conduct a last review of the redactions before issuing these versions as attached.⁹ The prosecution provided its final views on 20 March 2009.¹⁰

10. The Chamber is persuaded that the redactions set out in Annexes 2 and 3 to this Decision are each essential in order to protect the identities of the information providers, and, moreover, if they are not maintained, there will be, *prima facie*, a breach of the confidentiality agreements. However, in each instance, the analysis contains all the relevant factual background and reasoning which is necessary for the purposes of these proceedings: the

⁵ Emails from the prosecution to the Trial Chamber through the Legal Adviser to the Trial Division on 27 January 2009.

⁶ Email communication to the prosecution through the Legal Adviser to the Trial Division on 16 February 2009.

⁷ Email communication from the prosecution to the Trial Chamber through the Legal Adviser to the Trial Division on 18 February 2009. This position was confirmed on 20 February 2009, also by way of email.

⁸ Email communication from the prosecution to the Trial Chamber through the Legal Adviser to the Trial Division on 23 February 2009.

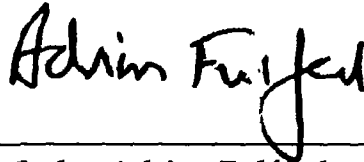
⁹ Email communication to the prosecution through the Legal Adviser to the Trial Division on 18 March 2009.

¹⁰ Email communication from the prosecution to the Trial Chamber through the Legal Adviser to the Trial Division on 20 March 2009 at 13.48 and 16.39.

analysis remains fully comprehensible and usable, and it ensures that the rights of the accused to a fair trial are preserved, and particularly the accused will be able to decide whether or not to exercise his appellate rights. The Chamber decided that the confidential redacted annex shall be notified to the defence only, given that the legal representatives do not appear before the Chamber on their own behalf but on behalf of the victims they represent, and they would be unable to discuss the content of the annex with the very individuals whose interests are potentially affected.

11. The Chamber hereby attaches the following versions of the annex containing its analysis and conclusions regarding the methods of disclosure authorised by the Trial Chamber for the 93 documents that are the subject of a confidentiality agreement between the prosecution and various information providers pursuant to Article 54(3)(e): 1) a full confidential *ex parte* prosecution only version of the annex (Annex 1); 2) a confidential redacted version of the annex to be notified to the prosecution and defence only (Annex 2); a public redacted version of the annex (Annex 3).
12. It has come to the Chamber's attention that footnote 55 to the Decision on lifting the stay contains a clerical error which needs to be corrected. Footnote 55 should read as follows: "ERN: DRC-OTP-0038-0909 and DRC-OTP-0047-0056."

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 23 March 2009

At The Hague, The Netherlands