

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 23 January 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 - URGENT

Reasons for Oral Decision lifting the stay of proceedings

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

The Office of the Prosecutor

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Mr Franck Mulenda
Ms Carine Bapita Buyangandu
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Legal Representatives of the Applicants

[1 name per team maximum]

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

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States Representatives

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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 delivers the reasons for its decision to lift the stay of the proceedings of 18 November 2008:

I. Background and submissions

A. Procedural history

1. On 13 June 2008, the Trial Chamber made its decision on the consequences of non-disclosure of Article 67(2) of the Rome Statute (“Statute”) and Rule 77 of the Rules of Procedure and Evidence (“Rules”) covered by agreements entered into pursuant to Article 54(3)(e) of Statute and the application to stay the prosecution of the accused (“Decision to Stay Proceedings”), finding that:¹

i) The disclosure of exculpatory evidence in the possession of the Office of the Prosecutor (“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) of the Statute, in that it is unable to determine whether or not the

¹ 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 other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1417.

non-disclosure of this potentially exculpatory material constitutes a breach of the accused's right to a fair trial.²

2. These three findings resulted in the Trial Chamber imposing a stay on the proceedings, halting the trial process in all respects unless the stay is lifted by either the Chamber or the Appeals Chamber.³
3. On 20 June 2008, the prosecution provided further information to that given to the Chamber prior to the stay regarding the outcome of its ongoing discussions with the United Nations ("UN") concerning the undisclosed evidence supplied by the latter.⁴ The prosecution indicated that discussions with the UN over lifting confidentiality restrictions under Article 54(3)(e) were continuing but that, in the absence of consent by the UN to lift the restrictions, a verbal agreement had been reached covering all the UN documents, namely that the Judges may view the material under appropriate conditions of confidentiality, in particular to enable them to assess the adequacy of the summaries by viewing the underlying material.⁵
4. The prosecution sought leave to appeal the Decision to Stay Proceedings on two bases:⁶

² ICC-01/04-01/06-1417, paragraph 92 (i) – (iii).

³ ICC-01/04-01/06-1417, paragraph 94.

⁴ Prosecution's additional further updated information on documents that were obtained by the Office of the Prosecutor from the United Nations pursuant to Article 54 (3) (e) on the condition of confidentiality and solely for the purpose of generating new evidence and that potentially contain evidence that falls under Article 67(2), 20 June 2008, ICC-01/04-01/06-1405.

⁵ ICC-01/04-01/06-1405, paragraph 7 (i) and (ii). The UN later confirmed its position in writing and this letter was submitted to the Trial Chamber in Prosecution's provision of the letter of the United Nations dated 20 June 2008 concerning 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), 23 June 2008, ICC-01/04-01/06-1409-Anx1.

⁶ Prosecution's application for leave to appeal 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54 (3) (e) agreements and the applications to stay the prosecution of the accused, together with other issues raised at the Status Conference on 10 June 2008', 23 June 2008, ICC-01/04-01/06-1407.

- (i) The Trial Chamber erred in the interpretation of the scope and nature of Article 54(3)(e) and in its characterization of the prosecution's use of it as constituting "a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances" (First issue);
- (ii) The Trial Chamber erred in the interpretation of, and exercise of its authority under, Article 64 and as a consequence imposed a premature and erroneous remedy in the form of a stay of all proceedings (Second issue).⁷

5. At a status conference on 24 June 2008, the Trial Chamber made certain observations in relation to any application that may be made to lift the stay of the proceedings.⁸ In particular, the Trial Chamber stated that "any application of this kind should occur, and only occur, when the prosecution is in a position to address – to the extent that is feasible – the totality of the evidence that is covered by the Article 54(3)(e) agreements from all the information providers."⁹ The Chamber also outlined four observations for guidance on the form that any such application should take.¹⁰

6. On 27 June 2008, the defence submitted the "Réponse de la Défense à la 'Prosecution's Application for leave to Appeal against the Decision to Stay Proceedings'" but made no substantive submissions on the prosecution's application.¹¹

⁷ ICC-01/04-01/06-1407, page 3.

⁸ Transcript of hearing on 24 June 2008, ICC-01/04-01/06-T-91-ENG, pages 30 – 33.

⁹ Transcript of hearing on 24 June 2008, ICC-01/04-01/06-T-91-ENG, page 31, lines 2 – 4.

¹⁰ Transcript of hearing on 24 June 2008, ICC-01/04-01/06-T-91-ENG, page 32, lines 1, 2- 8, 9 – 22 and 23 – 25 and page 33, line 1.

¹¹ Réponse de la Défense à la "Prosecution's application for leave to appeal the 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54 (3) (e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 27 June 2008, ICC-01/04-01/06-1416.

7. The Trial Chamber granted leave on the following issues:

- a. Whether the Trial Chamber erred in the interpretation of the scope and nature of Article 54(3)(e) of the Statute and in its characterization of the Prosecution's use of it as constituting "a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances".
- b. Whether the Trial Chamber erred in the interpretation and exercise of its authority under Article 64 of the Statute; whether the Chamber correctly determined that its obligation to ensure the accused receives a fair trial is dependent on the prosecution disclosing any potentially exculpatory evidence to the defence under Article 67(2) of the Statute (having first delivered the evidence in full to the Chamber for review and decision in case of doubt); and whether it imposed a premature and erroneous remedy in the form of a stay of the proceedings.¹²

8. The prosecution filed a document in support of appeal against the Decision to Stay Proceedings, setting out the grounds of appeal to the Appeals Chamber on 14 July 2008.¹³ Following a challenge by the defence to the prosecution's document in support of appeal on the grounds that it was one page longer than the page limit provided for in Regulation 37 of the Regulations of the Court, the Appeals Chamber found that the document in support of the appeal was in breach of the Regulations of the Court and so must be re-filed.¹⁴

¹² 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, paragraphs 31 – 32.

¹³ Prosecution's Document in support of appeal against Decision to Stay Proceedings, 14 July 2008, ICC-01/04-01/06-1434.

¹⁴ Observations de la Défense relatives à l'irrecevabilité du 'Prosecution's document in support of appeal against the Decision to Stay Proceedings', 16 July 2008, ICC-01/04-01/06-1440 ; Order on the filing of a response to Observations de la Défense relatives à l'irrecevabilité du 'Prosecution's document in support of appeal against the Decision to Stay Proceedings', 17 July 2008, ICC-01/04-01/06-1441 ; Prosecution's response to the defence challenge to the admissibility of the document in support of the appeal against Decision to Stay Proceedings, 18 July 2008, ICC-01/04-01/06-1443 ; Decision on the re-filing of the document in support of the appeal, 22 July 2008, 01/04-01-06-1445.

The prosecution duly re-filed its document in support of appeal against the stay of proceedings on 24 July 2008.¹⁵

9. The prosecution filed on a confidential, *ex parte* basis the "Prosecution's application to lift the stay of proceedings" on 10 July 2008, and a public redacted version of the application, was notified to the defence and the legal representatives of the victims the next day ("Application").¹⁶ The prosecution provided supplementary information to the Application on 30 July 2008, 8 August 2008, and 22 August 2008 by way, respectively, of the "Prosecution's provision of information supplementing the 'Prosecution's application to lift the stay of proceedings'";¹⁷ the "Prosecution's provision of further information supplementing the 'Prosecution's application to lift the stay of proceedings'";¹⁸ and the "Prosecution's additional provision of further information supplementing the 'Prosecution's application to lift the stay of proceedings'".¹⁹ The legal representatives of the victims did not respond to the Application or supplementary information. On 26 August 2008, the Chamber ordered the defence to file a consolidated response,²⁰ which was received on 1 September 2008.²¹

¹⁵ Re-filing of prosecution's document in support of appeal against Decision to Stay Proceedings, 24 July 2008, ICC-01/04-01/06-1446.

¹⁶ Prosecution's application to lift the stay of proceedings, 10 July 2008 (notified on 11 July 2008), ICC-01/04-01/06-1430-Conf-Exp, with 59 confidential *ex parte* prosecution only annexes; Prosecution's application to lift the stay of proceedings, 11 July 2008, ICC-01/04-01/06-1431, with 3 public annexes and 56 confidential *ex parte* prosecution only annexes.

¹⁷ Prosecution's provision of information supplementing the 'Prosecution's application to lift the stay of proceedings', 30 July 2008, ICC-01/04-01/06-1451, with 2 public annexes and 2 confidential, *ex parte*, prosecution only annexes.

¹⁸ Prosecution's provision of further information supplementing the 'Prosecution's application to lift the stay of proceedings', 8 August 2008, ICC-01/04-01/06-1454, with 2 public annexes and 2 confidential, *ex parte*, prosecution only annexes.

¹⁹ Prosecution's additional provision of further information supplementing the 'Prosecution's application to lift the stay of proceedings', 22 August 2008, ICC-01/04-01/06-1462, with 2 public annexes and 2 confidential, *ex parte*, prosecution only annexes.

²⁰ Order for a defence response to the "Prosecution's application to lift the stay of proceedings" and the subsequent related filings, 26 August 2008, ICC-01/04-01/06-1463.

²¹ Réponse de la défense à la "Prosecution's application to lift the stay of proceedings", datée du 11 juillet 2008, 1 September 2008, ICC-01/04-01/06-1464.

10. On 3 September 2008, the Chamber rendered its Decision on the prosecution's Application to Lift the Stay of Proceedings.²² The Trial Chamber rejected the prosecution's application to lift the stay and held, first, that the proposals unacceptably required the Chamber to return the Documents to the prosecution after its initial review unless the Appeals Chamber agreed to the same conditions as the Trial Chamber, thereby preventing the trial judges from keeping the Documents under review during the trial.²³ Second, the Chamber was not satisfied that it could adequately review the relevant Documents in a way which was susceptible to meaningful appellate review.²⁴ The Chamber determined that, in the circumstances, the "core proposals" were unacceptable in their current form, and unless and until they are adequate, it would be inappropriate for the Chamber to consider the Documents.²⁵ The Chamber, furthermore, expressed its concern that "there is no assurance that the prosecution will be able to afford adequate disclosure of all the exculpatory materials in the event that the Chamber concludes that the Documents should be provided to the defence."²⁶ However, the Chamber stressed that this apparent and significant difficulty would not prevent it from viewing the materials:

[...] the Chamber stresses 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 lifting 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.²⁷

²² Decision on the Prosecution's Application to Lift the Stay of Proceedings, 3 September 2008, ICC-01/04-01/06-1466-Conf-Exp; Redacted Version of "Decision on the Prosecution's Application to Lift the Stay of Proceedings", 3 September 2008, ICC-01/04-01/06-1467.

²³ *Ibid*, paragraph 40 (ii).

²⁴ *Ibid*, paragraph 30.

²⁵ *Ibid*, paragraphs 29, 30, 31, 33, 34, 35, 36, 37 and 40 (v).

²⁶ *Ibid*, paragraph 38.

²⁷ *Ibid*, paragraph 40 (v).

11. On 9 September 2008, the prosecution filed an “Application for Leave to Appeal against Decision on Application to Lift the Stay of Proceedings.”²⁸ The defence filed its response to the application on 15 September 2008.²⁹ The Trial Chamber rendered its decision on the application on 24 September 2008, granting leave on the two issues raised by the prosecution:³⁰

a) Whether the Chamber erred in ruling that the stay of proceedings will remain in place until it is able to consider all the Documents and there is some real prospect that the accused will be given sufficient access to any Documents which meet the criteria of Article 67(2) and Rule 77;

b) Whether the Chamber erred in refusing to consider the material until the following conditions are met: a) that the Documents are provided in non-redacted form to the Trial Chamber for the entirety of the trial, and, b) it is established that, should there be a relevant appeal, the Appeals Chamber is able to review the Documents, along with any non-redacted decisions by the Trial Chamber addressing the disclosure or non-disclosure of the Documents.

12. The prosecution submitted its document in support of appeal against the Decision on the prosecution’s application to lift the stay of proceedings on 6 October 2008.³¹

13. On 14 October 2008, the prosecution notified the Registrar that it was abandoning the first and second grounds of appeal against the Decision to

²⁸ Prosecution’s Application for Leave to Appeal against Decision on Application to Lift the Stay of Proceedings, 9 September 2008, ICC-01/04-01/06-1468.

²⁹ Réponse de la Défense à la « Prosecution’s Application for Leave to Appeal against Decision on Application to Lift the Stay of Proceedings » datée du 9 septembre 2008, 15 September 2008, ICC-01/04-01/06-1469.

³⁰ Decision on the prosecution’s application for leave to appeal the ‘Decision on the prosecution’s application to lift the stay of proceedings’, 24 September 2008, ICC-01/04-01/06-1473.

³¹ Prosecution’s document in support of appeal against Decision on the prosecution’s application to lift the Stay of Proceedings, 6 October 2008, ICC-01/04-01/06-1474.

Stay Proceedings of 24 July 2008 on the basis that they are moot. The prosecution had filed a submission with the Trial Chamber on 14 October, providing the judges with all the relevant undisclosed documents received from information providers under Article 54(3)(e) of the Statute. The information providers had agreed to afford the Trial Chamber and, if necessary, the Appeals Chamber, complete and unfettered access to all the Article 54(3)(e) documents; in those circumstances some of the issues arising from the Decision to Stay Proceedings no longer required resolution.³² The third ground of appeal was maintained, namely that the Trial Chamber erred in imposing an excessive and premature remedy; furthermore, it was argued that the prosecution's appeal against the Trial Chamber's decision of 3 September 2008 was unaffected.³³

14. The Appeals Chamber rendered its decision on the prosecution's appeal against the Decision to Stay Proceedings on 21 October 2008.³⁴ The Appeals Chamber's key findings were that: (i) the Prosecutor may only rely on Article 54(3)(e) of the Statute for a specific purpose, namely in order to generate new evidence; (ii) in its use of Article 54(3)(e), the prosecution must have regard to its obligations vis-à-vis the accused and apply the provision in such a manner that allows the Court to resolve the potential tension between the confidentiality to which the prosecution has agreed, and the requirements of a fair trial; (iii) the Trial Chamber must be allowed access to any material in possession or control of the prosecution which is subject to a confidentiality agreement under Article 54(3)(e), so that it can decide whether it is to be disclosed pursuant to Article 67(2). Any Chamber receiving such information must never order its disclosure without the prior agreement of the

³² Prosecution's notice to the registrar of its discontinuance, as moot, of the first and second grounds of appeal in its appeal against the decision to stay proceedings, 14 October 2008, ICC-01/04-01/06-1479, paragraph 5

³³ ICC-01/04-01/06-1479, paragraph 2.

³⁴ 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', 21 October 2008, ICC-01/04-01/06-1486.

information provider; (iv) a conditional stay of 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 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; (v) if the obstacles that led to the stay of proceedings fall away, the Chamber that imposed the stay of proceedings may decide to lift it, if this would not occasion unfairness to the accused person for other reasons, in particular in the light of his or her right to be tried without undue delay (see Article 67(1)(c) of the Statute).³⁵

15. The Appeals Chamber also stated that a Chamber which has imposed a conditional stay of proceedings must from time to time review its decision in order to resolve whether conditions have changed sufficiently thereby rendering a fair trial possible, or, instead, because of the effluxion of time, a fair trial in the future is not possible.³⁶

16. The appeal on the decision of the Trial Chamber of 3 September 2008 is still pending.

B. Prosecution's Submissions

17. On 14 October 2008, the prosecution submitted its application for the Trial Chamber to review all the undisclosed evidence obtained from the information providers ("Application for Review"),³⁷ indicating that it was in a position to comply with each of the Trial Chamber's conditions prior to reviewing the undisclosed evidence. The prosecution stated, having received the consent of the information providers, that it was immediately providing

³⁵ ICC-01/04-01/06-1486, paragraphs 1-5.

³⁶ ICC-01/04-01/06-1486, paragraph 81.

³⁷ Prosecution's application for Trial Chamber to review all the undisclosed evidence obtained from information providers, 13 October 2008, ICC-01/04-01/06-1477-Conf-Exp with 214 confidential *ex parte* annexes and, ICC-01/04-01/06-1478, public redacted version with 15 public annexes, 3 confidential prosecution and defence only annexes and 196 confidential *ex parte* annexes.

all the documents to the Trial Chamber, in non-redacted form, which the Chamber was authorised to retain for the entirety of the trial. The prosecution also confirmed that the Appeals Chamber will be able to consider the documents and any decision of the Trial Chamber under similar conditions.³⁸

18. The Application for Review was filed confidentially and *ex parte*, with 214 annexes comprising the 93 non-redacted documents that were the subject of Article 54(3)(e) agreements between information providers and the prosecution, as well as some translations thereof, and proposed redacted versions (as appropriate). 38 of the 93 documents had been provided by the UN and 55 by various NGOs. The prosecution included in its Application to Review, various proposals for disclosure of the documents to the defence, in accordance with the requirements of the information providers. These proposals included a range of options, to be effected individually or in any permutation: disclosure of non-redacted versions to the defence, disclosure of redacted versions, provision of summaries of the relevant material, disclosure of alternative evidence or admissions of fact by the prosecution. The justifications for less than full disclosure to the defence as regards certain documents related essentially to the security concerns of the providers. A detailed analysis of each of the 93 documents, together with the justification for partial non-disclosure and the proposed remedies, are set out, first, in general terms as regards issues of principle in the Trial Chamber's analysis and conclusions, and, second, document by document for each of the 93 annexes in an attachment that will follow this decision.

19. Having reviewed the prosecution's Application for Review, the Trial Chamber issued an "Order for further information regarding potentially exculpatory documents and for expedited defence response," requesting, *inter alia*, the prosecution to identify the particular passages within the 93

³⁸ ICC-01/04-01/06-1477-Conf-Exp, paragraph 2.

documents which it is suggested could not be disclosed directly to the defence, but which may be of exculpatory value, along with an explanation for each passage as to why it may have exculpatory effect or otherwise assist the defence.³⁹

20. The defence submitted its response on 21 October 2008 indicating that it did not object to the Trial Chamber reviewing the documents but it sought to reserve the opportunity to make submissions on other issues that are relevant to the documents, in particular the manner in which they are disclosed.⁴⁰

21. In compliance with the Trial Chamber's order of 15 October 2008, the prosecution submitted: (i) a table explaining the correlation between the 214 annexes attached to the Application for Review;⁴¹ and, (ii) the 93 documents with highlighted passages for the Article 67(2) or Rule 77 material.⁴² The prosecution submitted that it had given a broad reading to the concept of exculpatory material.⁴³ The prosecution provided further translations of the 93 documents on 28 October 2008.⁴⁴

22. On 29 October 2008, the Trial Chamber held an *ex parte* status conference at which it confirmed that the 93 items each fall either within Article 67(2) of the Statute or Rule 77 of the Rules. The Chamber conducted an annex by annex review of each of these 93 items with the prosecution in order to elicit further information on the proposed methods for disclosure to the defence, and the justification for the prosecution's proposals. As part of this exercise, the Trial

³⁹ ICC-01/04-01/06-1480, paragraph 5.

⁴⁰ Réponse de la Défense à la "Prosecution's Application for Trial Chamber to Review all the Undisclosed Evidence obtained from Information Providers", 21 October 2008, ICC-01/04-01/06-1484, paragraph 5.

⁴¹ Prosecution's submission of a table on correlation between annexes to the "Application for Trial Chamber to Review all the Undisclosed Evidence obtained from Information Providers", 21 October 2008, ICC-01/04-01/06-1485 and Anx.

⁴² Prosecution's submission of 93 documents highlighting the passages of potentially exculpatory value or falling within the parameters of Rule 77, 22 October 2008, ICC-01/04-01/06-1488 with confidential-*ex parte* Anx 1 – 94 and public Anx95.

⁴³ ICC-01/04-01/06-1488, paragraph 8.

⁴⁴ Prosecution's provision of further translations, 28 October 2008, ICC-01/04-01/06-1490 with confidential-*ex parte* Anx 1 – 7, 9, 10 and 11 and Public Anx8.

Chamber requested the prosecution, in certain instances, to revert to the information provider in order to obtain accurate, up-to-date information, and, where appropriate the prosecution was itself asked to provide the Trial Chamber with further information.⁴⁵

23. During the *ex parte* status conference on 29 October 2008, the Trial Chamber orally ordered the prosecution to file individual items of alternative evidence that, in the prosecution's submission, could appropriately replace relevant material coming within Article 67(2) or Rule 77, contained in three particular documents and annexes for which full disclosure to the defence was not possible. The prosecution submitted this alternative evidence, which comprises 58 items which are intended to cover the information contained in annexes 39, 40 and 41 of the Application for Review.⁴⁶

24. On 5 November 2008 the prosecution filed a request for an *ex parte* hearing to apprise the Trial Chamber of discrete issues in relation to some of the annexes, to make clarifications to the filing dealing with alternative evidence and to seek guidance from the Trial Chamber on witness protection issues which are relevant to the documents.⁴⁷ The Trial Chamber communicated its decision by e-mail that the prosecution was still required to meet the 12 November 2008 deadline, as imposed at the *ex parte* status conference on 29 October 2008 but that there would be an *ex parte* status conference on 17 November 2008 in which the issue would be reviewed.⁴⁸

25. Further to the Trial Chamber's requests at the *ex parte* status conference on 29 October 2008 and after additional consultations with the information

⁴⁵ Transcript of hearing on 29 October 2008, ICC-01/04-01/06-T-95-CONF-EXP-ENG.

⁴⁶ Prosecution's provision of alternative evidence further to the Trial Chamber's Confidential, *ex parte* Order dated 29 October 2008, 31 October 2008, ICC-01/04-01/06-1492-Conf-Exp and confidential *ex parte*-Anx1-58.

⁴⁷ Prosecution's request for an *ex parte* hearing pursuant to Rule 83 of the Rules of Procedure and Evidence, 5 November 2008, ICC-01/04-01/06-1495 and confidential *ex parte*-Anx.

⁴⁸ E-mail to the prosecution, copying the defence and participants from the Legal Officer to the Presiding Judge of Trial Chamber I on 7 November 2008.

providers, the prosecution furnished the Trial Chamber with the responses regarding the proposed methods of disclosure for all the undisclosed items of evidence.⁴⁹ Specifically, the prosecution filed: (i) final redacted versions of the documents, where applicable and subject to any Trial Chamber decision on the issue, in addition to further reasons explaining the necessity for the redactions, beyond those already advanced in relation to endangering the security of the source; (ii) the final versions of a summary, where applicable, to be provided in lieu of disclosure of the documents; (iii) admissions of fact or concessions that the prosecution submitted cover the Article 67(2) and Rule 77 material, where applicable; and (iv) highlighted alternative evidence in relation to certain annexes to the Application to Review.⁵⁰

26. The Trial Chamber held a second *ex parte* status conference on 17 November 2008 at which further issues relating to the methods of disclosure were discussed.⁵¹ The prosecution informed the Trial Chamber that the UN had requested the imposition of further protective measures for nine of the documents provided to the prosecution should any of them be used during trial.⁵² In particular the UN requested that they are presented in closed session and registered under seal.⁵³ Seven of these documents, Annexes 11, 16, 22, 23, 24, 25, and 35, were amongst the 93 documents provided to the Chamber for review in the prosecution's submission of 14 October 2008.⁵⁴

⁴⁹ Prosecution's provision of further information on undisclosed items pursuant to Trial Chamber's orders at 29 October 2008 *ex parte* hearing, 12 November 2008, ICC-01/04-01/06-1496-Conf-Exp and confidential *ex parte* Anx1-98 and A, B & C and public version ICC-01/04-01/06-1497.

⁵⁰ ICC-01/04-01/06-1496-Conf-Exp, pages 3 and 4.

⁵¹ Transcript of hearing on 17 November 2008, ICC-01/04-01/06-T-96-CONF-EXP-ENG.

⁵² Transcript of hearing on 17 November 2008, ICC-01/04-01/06-T-96-CONF-EXP-ENG, page 26, lines 12-18.

⁵³ Email communication to the Trial Chamber through the Legal Adviser to the Trial Division on 19 November 2008, referencing letters from the UN to the prosecution in which these protective measures were requested: For Annex 11 of filing 1477: ICC-01/04-01/06-1454-Anx3 and Conf-Exp-Anx4, 11 August 2008 and ICC-01/04-01/06-1477-Conf-Exp-Anx101 and Conf-Exp-Anx103; For Annexes 16, 22, 23, 24 and 25 of filing 1477: Letter from UN of 13 November 2008, handed to the Chamber during the *ex parte* Status Conference of 17 November 2008; For Annex 35: ICC-01/04-01/06-1477-Conf-Exp-Anx101 and Conf-Exp-Anx109.

⁵⁴ ICC-01/04-01/06-1477-Conf-Exp.

27. The two remaining documents⁵⁵ were not part of the 93 documents provided to the Chamber as they contained no redactions;⁵⁶ however, these two documents had been previously referred to in letters from the UN filed with the Chamber.⁵⁷ These two documents also remained undisclosed to the defence, pending the imposition of further protective measures, as requested.
28. The Trial Chamber instructed the prosecution to inform the defence in writing of the conditions requested by the UN for the use of these nine documents,⁵⁸ and confirmed that it authorised the proposed further protective measures to be taken in relation to all nine of the documents should they be used during trial.⁵⁹
29. At the status conference on 18 November 2008 the Trial Chamber lifted the stay of proceedings and ordered the prosecution to disclose all the items of evidence to the defence that were the subject of the stay of proceedings by 20 November 2008 at 1600 hours.⁶⁰
30. On 21 November 2008, the prosecution notified the Trial Chamber that it had complied with the Trial Chamber's order to disclose all the items of evidence that were the subject of the stay of proceedings by disclosing all the pertinent items of hitherto undisclosed evidence, in the modalities approved by the Chamber and in accordance with its obligations under the Statute and Rules.⁶¹

⁵⁵ ERN: DRC-OTP-0043-0129 and DRC-OTP-0043-0134.

⁵⁶ Email communication to the Trial Chamber through the Legal Adviser to the Trial Division on 19 November 2008.

⁵⁷ 22 August 2008, ICC-01/04-01/06-1462-Anx3; ICC-01/04-01/06-1462-Conf-Exp-Anx4; ICC-01/04-01/06-1477-Conf-Exp-Anx108.

⁵⁸ Transcript of hearing on 17 November 2008, ICC-01/04-01/06-T-96-CONF-EXP-ENG, page 27, lines 12-18.

⁵⁹ Email communication from the Trial Chamber through the Legal Adviser to the Trial Division on 19 November 2008.

⁶⁰ Transcript of hearing on 18 November 2008, ICC-01/04-01/06-T-98-ENG, page 3, line 25, page 4, line 1 and page 4, lines 2 – 9.

⁶¹ Prosecution's notification of disclosure of exculpatory and Rule 77 material to the defence on 18 and 20 November 2008, 21 November 2008, ICC-01/04-01/06-1502 and AnxA-C.

II. Relevant provisions

31. The following provisions from the Statute and Rules are relevant to a consideration of these issues:

Article 40 of the Statute:

Independence of the judges

1. The judges shall be independent in the performance of their functions.
[...]

Article 54 of the Statute:

Duties and powers of the Prosecutor with respect to investigations

- [...]
3. 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; and
(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.
[...]

Article 64 of the Statute:

Functions and powers of the Trial Chamber

- [...]
2. 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.
3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:
[...]
(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.
[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:
[...]
(e) Provide for the protection of the accused, witnesses and victims.
[...]

Article 67 of the Statute:

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
[...]
(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
[...]
2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Rule 77 of the Rules:

Inspection of material in possession or control of the Prosecutor

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

Rule 81 of the Rules

Restrictions on disclosure

- [...]
4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72, 93, and, in accordance with article 68, to protect the safety of witnesses and

victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.

Rule 82 of the Rules:

Restrictions on disclosure of material and information protected under article 54, paragraph 3 (e)

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 evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused.
2. If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence, a Chamber may not order the production of additional evidence received from the provider of the initial material or information, nor may a Chamber for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.
[...]

Rule 83 of the Rules:

Ruling on exculpatory evidence under article 67, paragraph 2

The Prosecutor may request as soon as practicable a hearing on an ex parte basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2

III. Analysis and conclusions

32. In this part of the decision, the Chamber addresses certain issues of principle that need to be decided which are of general applicability to the individual decisions that have been reached in the individual document-by-document analysis.

The approach of the Chamber to material covered by Article 54(3)(e)

33. The Appeals Chamber has set out the approach that is to be taken by the Chamber, now that the judges have been afforded unrestricted access to the documentation covered by this Article, as follows:⁶²

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 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.

34. The Chamber has followed this guidance. When there has been doubt, the prosecution has been asked to seek clarification from the information-provider as to whether full disclosure can occur. If it cannot, the Chamber has considered the availability of counter-balancing measures.

35. As the annexes reveal, a variety of approaches have been proposed as regards the documents under consideration, with the following being provided:

⁶² ICC-01/04-01/06-1486, paragraph 48.

- a) Non-redacted versions of the documents, save for the identity of the information-provider;
- b) Redacted versions of the documents, limited to names and identifying information;
- c) Redacted versions of the documents removing other types of information;
- d) Summaries instead of the original documentation, and including verbatim quotes of the relevant areas;
- e) Admissions of fact;
- f) Alternative evidence; and
- g) Documents disclosed in full, with restrictions as to the extent of their publication.

The use of redactions

36. The first question that arises as regards the counter-balancing measures is whether the Chamber has authority to approve redactions to Article 67(2) and Rule 77 material during the trial. The position prior to the commencement of the trial is relatively clear. Rule 81 of the Rules of Procedure and Evidence deals with restrictions on disclosure. By Rule 81(4)

[t]he Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information in accordance with articles 54, 71 and 93, and in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.

It is to be noted at the outset that the rule does not come within a section of the Statute that refers only to the work of the Pre-Trial Chamber; indeed Rule 81(6), for instance, deals expressly with both the pre-trial and the trial phase. Accordingly, the critical limitation, in this sense, is to be found in the use of

the words “prior to the commencement of the trial”. This begs the question as to when the “trial commences”: is it when the case passes from the Pre-Trial Chamber to the Trial Chamber, or is it instead when the opening statements are made and the process of introducing and considering the evidence begins in a formal sense in court? The provision most relevant to this issue is Article 64 which deals with the functions and powers of the Trial Chamber. The structure of the Article clearly differentiates between a period “prior to trial”, on the one hand, and a later period “during the course of a trial”, on the other (Article 64(6) of the Statute); furthermore, the structure of the Article (following two general paragraphs) explicitly separates the initial, “pre-trial” stage when preparation is undertaken and the procedures for the second stage are established (Article 64(3) – (6) and the trial itself (Article 64(7) – (10) of the Statute). In these circumstances the “commencement” of the trial was not when the Chamber was constituted under Article 61(11) or when the charges were confirmed under Article 61, but on the date fixed for trial (Monday 26 January 2009), when the proceedings by way of opening statements and the introduction of evidence commence.

37. Turning to the period after the trial commences, a number of provisions are relevant.

38. Although Article 54 is entitled “Duties and powers of the Prosecutor with respect to investigations”, under Article 54(3)(f), the prosecution may “[t]ake necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence”. There would be real difficulty in the prosecution’s proper discharge of its function if it is limited in its ability to implement, or to request, protective measures to the investigative stage only. It is clearly necessary for the prosecution to have the ability to take or to initiate these steps at any stage during the trial and the Chamber, adopting a purposive

interpretation, is persuaded that this provision, notwithstanding where it is included in the Statute, has general applicability throughout all stages of the pre-trial and trial stage.

39. In its judgment of 13 May 2008, issued in the context of the Pre-Trial proceedings in the KATANGA case, the Appeals Chamber⁶³ stated: “Article 54(3)(f), [...] expressly authorises the Prosecutor to take necessary measures, or to request that necessary measures be taken, to ensure “the protection of any person” (emphasis added). This article demonstrates an intention that protection should, in principle, be available to anyone at risk by the investigations of the Prosecutor.”

40. Once the proceedings reach the Trial Chamber, a range of provisions delineate the Chamber’s powers as regards protective measures of the kind under consideration in this decision. Under Article 64(2), “[t]he 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”. Further, by Article 64(6) the Chamber, in discharging its functions prior to trial and during the course of the trial, shall provide for the protection of confidential information (64(6)(c) of the Statute) and it shall provide for the protection of the accused, witnesses and victims (64(6)(e) of the Statute). Generally, by Article 64(6)(f), it shall rule on any other relevant matter.

41. The combined effect of these provisions is that the Trial Chamber, once constituted, has a statutory responsibility for the protection of victims and witnesses throughout the entirety of the period it is seized of the case. Furthermore, the Appeals Chamber (in the context of Rule 81 (4) of the Rules)

⁶³ Judgement on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled, “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements,” 13 May 2008, ICC-01/04-01/07-475, paragraph 44.

has also determined that the ambit of this approach extends to others who are affected by the operations of the Court in addition to victims and witnesses, in that in its judgment of 13 May 2008, the Appeals Chamber set out that:

the specific provisions of the Statute and the Rules for the protection not only of witnesses and victims and members of their families, but also of others at risk on account of the activities of the Court are indicative of an overarching concern to ensure that persons are not unjustifiably exposed to risk through the activities of the Court.⁶⁴

42. There is no logical reason for confining this approach to Rule 81(4) alone; it clearly has wider applicability.

43. These wide-ranging obligations will necessitate the Chamber making all necessary rulings in order to “provide for the protection” for these individuals, so long as they do not undermine the fairness of the proceedings and they do not prejudice the defence.

44. The combined effect of the provisions just described is to give the Chamber the responsibility and the authority, which is broadly encapsulated in Article 64(6)(e), mandating the Chamber to provide for the protection of witnesses and victims (along with others who may be affected by the operations of the court).

45. Turning to the detail of the approach to be taken, in its judgment of 13 May 2008, the Appeals Chamber, stated:⁶⁵

71. In the circumstances under consideration in the present case, non-disclosure pursuant to rule 81(4) may only be authorised if, first of all, disclosure of the information concerned would pose a danger to the particular person. In such circumstances, the Pre-Trial Chamber should consider the following factors in relation to the alleged risk of danger:

⁶⁴ ICC-01/04-01/07-475, paragraph 54

⁶⁵ ICC-01/04-01/07-475, paragraphs 71-72.

a) the alleged danger must involve an objectively justifiable risk to the safety of the person concerned;

b) the risk must arise from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large. The Chamber should consider, *inter alia*, whether the danger could be overcome by ruling that the information should be kept confidential between the parties. In making this assessment, the circumstances of the individual suspect should be considered, including, *inter alia*, whether there are factors indicating that he or she may pass on the information to others or otherwise put an individual at risk by his or her actions.

72. If the Pre-Trial Chamber concludes that it has been demonstrated that the risk addressed above in fact exists, it should proceed to assess whether the proposed redactions could overcome or reduce the risk. If not, the redactions should not be granted. If so, the following factors should be considered in determining whether the rights of the suspect will be restricted only as far as strictly necessary [...]"

46. In light of this approach, the Trial Chamber has taken into consideration the particular risks of individuals and organisations referred to in the annexes. It analysed the different options to protect their safety and security, and when no lesser measure was possible, authorised the non-disclosure of their identities and other identifying information. However, if in the result material was not disclosed to the defence, the Chamber then determined 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, notwithstanding the non-disclosure of the information. The Trial Chamber considered that these protective measures throughout were therefore necessary,⁶⁶ and did not significantly affect the rights of the accused.

47. It follows that the Chamber assessed the evidential "value" of the evidence or other material that is not to be disclosed and which otherwise would have

⁶⁶ Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/07-568, paragraph 37.

been revealed, and decided that in each instance either that the redacted sections did not affect the Article 67(2) or Rule 77 material, or the alternative, counter-balancing measures are sufficient to ensure that the trial remains fair, by providing satisfactory alternative measures. Moreover, the Chamber has carefully investigated each and every instance where the prosecution has suggested alternative evidence and has conducted an assessment of the replacement value of the material as compared to the original information.

The non-disclosure of the identity of particular individuals

48. Whenever this arises, the Chamber must make detailed, fact-specific decisions on whether the identity of someone who has provided information to the court or who is referred to in that information, comes within the scope of Article 67(2) or Rule 77 material, and if it does, whether or not alternative measures can be found which will protect the accused, and particularly by ensuring there is a fair hearing, where the individual will be at risk following disclosure of his or her identity.

49. The Chamber has carefully borne in mind that there may be instances when some particular factor means that the name in itself is important, because the defence may have wished to speak with the individual or to call him or her as a witness; the fact of the name may have helped to prove or demonstrate a particular point; or it may have led to other evidence which may be of real assistance. In those circumstances, the Chamber has made a decision addressing the particular facts relevant to that piece of evidence, to ensure the accused's rights are not prejudiced and the proceedings are fair.

Instances where the source is employed by the UN or an NGO, and the employee merely reports on what individuals in the DRC or surrounding countries have said to them.

50. On many occasions, the redactions involve removing the identity of someone who is employed by the UN or an NGO, who merely reports on what others in the DRC or surrounding countries have said to him or her. If the employee in this sense acts simply as a conduit for information provided by others, whose identities are not known or who are unlikely to be available to cooperate with the Court or the defence, there is usually no material advantage in supplying the employees' name to the defence. In those circumstances full disclosure would not add to the Article 67(2) or Rule 77 material already provided in the redacted document.

51. The Chamber has carefully borne in mind that there may be instances when some particular factor means that the name in itself is important, as helping to prove or demonstrate a particular point, or because the employee or his or her name will lead to other evidence which may be of real assistance. In these and any other relevant circumstances, the Chamber has addressed the particular facts of the redacted disclosure, to ensure that in its decision the accused's rights are not prejudiced and the proceedings are fair.

Instances when the redactions are to parts of documents that do not contain exculpatory material

52. On many occasions, the redaction or redactions come within portions of the document that are irrelevant to the exculpatory information within the relevant document. So long as the document, with the redactions in place, is intelligible and usable, and its overall coherence is not materially undermined, there are no sustainable objections to this form of partial disclosure occurring, so long as the redactions are justified and no other protective measures, singly or together, are sufficient.

53. The prosecution has the obligation to disclose to the defence evidence in its possession or control which the Prosecutor "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) of the Statute). Furthermore, the prosecution shall “permit the defence to inspect any books, documents photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence [...] or were obtained from or belonged to the person” (Rule 77 of the Rules). These obligations do not extend to providing irrelevant information that does not come within either of those provisions.

Instances in which other countries have been involved, directly or indirectly, with relevant events in Bunia or elsewhere in the DRC

54. There is a considerable body of information covered by the Article 54(3)(e) agreements that tends to indicate that arms or ammunition, or both, were arriving in the DRC from other countries, during, or proximate to, the relevant period, which comes within Rule 77 material. The information comes from a variety of sources, and including children, and in some of the annexes to this decision their names have been redacted.
55. Similarly, there is a considerable body of information covered by the Article 54(3)(e) agreements which tend to indicate that other countries have been involved, directly or indirectly, with relevant events in Bunia or elsewhere in the DRC, during or proximate to the relevant period, which comes within Rule 77 material. This information also comes from a variety of sources, and including children, and in some of the annexes to this decision their names have been redacted.
56. In order to address the non-disclosure of the names of these individuals, the prosecution has proposed, *inter alia*, to deal with this by way of admission. The Chamber has considered in each instance which alternative steps of this

kind ensure that the accused's rights are not prejudiced and the proceedings are fair.

Admissions generally

57. In addition to the admissions concerning the involvement of other countries in relevant events in Bunia, the prosecution has made admissions of fact as to *tu quoque* evidence and on the issue of voluntariness.

58. The prosecution's admissions of fact generally assist in ensuring the fairness and impartiality of the trial of the accused. The Chamber has assessed the evidential "value" of the proposed redactions and of the suggested admissions, and it has decided that the latter are a sufficient alternative, because the admissions are in each instance sufficiently broad in their scope (when considered with the other relevant material) and the essential elements that need to be covered by evidence are not in dispute. Accordingly, the defence will be able to rely on the prosecution's admissions concerning the relevant facts and events rather than having to seek to establish them through the currently unidentified sources. Indeed, arguably the defence is put in a more favorable evidential position than it otherwise would have been because of the "certainty" provided by the admissions (which are not in themselves binding on the Chamber).

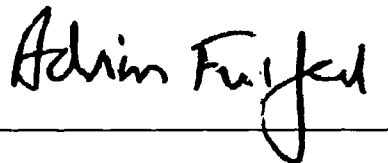
Conclusion

59. For all of the above reasons, the Chamber concluded that the reasons for imposing the stay of proceedings had now been sufficiently addressed, and it is in the interests of justice to resume the proceedings by lifting the stay.

60. The Chamber had intended to publish public, confidential and *ex parte*, prosecution-only versions of the annex to this Decision (document by document analysis) at the same time. However, the Chamber asked the

prosecution to review the annex and propose necessary redactions. The prosecution indicated its proposals as regards redactions to the public and confidential versions of the annex, which need to be resolved during a hearing, before they can be published. Therefore, with reluctance, the public and confidential versions of the annexes will be filed separately, as soon as possible.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 23 January 2009

At The Hague, The Netherlands