

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/06
Date: 31 October 2007

TRIAL CHAMBER I

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

Registrar: Mr Bruno Cathala

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

Public with Confidential, Ex Parte, Prosecution only Attachments

Prosecution's Application for Direction on the Lifting of Redactions and for Non-Disclosure of Information

The Office of the Prosecutor

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Background

1. On 11 September 2007, the Prosecution filed its "Prosecution's Submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol" (11 September 2007 Submission).¹ In this filing, the Prosecution advised the Trial Chamber that by the end of October 2007, it anticipated having disclosed or provided for inspection or sought lifting of restrictions with respect to the materials in its possession or control.²
2. The Prosecution noted in its 11 September 2007 Submission, however, that in relation to witnesses for whom protective measures have been sought but not yet implemented, disclosure of their identities and statements can only take place once adequate protective measures are in place.³ The disclosure of documents sourced by these witnesses or referenced by them in their statements must also be disclosed at the same time as the statements.
3. As the Prosecution submitted during the hearing on 1 October 2007,⁴ the option to apply now for redactions further to Rule 81(4) of the Rules of Procedure and Evidence (Rules) to protect the identity of these witnesses for a limited time prior to their admittance into the ICC Protection Program (ICCPP), is not preferable given the amount of resources (prosecutorial and judicial) that would be expended on such a review process only to have those redactions lifted a short

¹ ICC-01/04-01/06-951, "Prosecution's Submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol", 11 September 2007 (Public)

² *Ibid.*, para. 24.

³ *Ibid.*, footnote 27. See also the transcript of the hearing on 1 October 2007, ICC-01/04-01/06-T-52-ENG at pages 28-30.

⁴ ICC-01/04-01/06-T-52-ENG at pages 28-30.

time thereafter. In addition, these heavily redacted statements, if authorized, would provide little or no substantive benefit to the Defence.

4. There are, nonetheless, certain steps that can be taken now to expedite the process of disclosure of these statements as soon as these witnesses are fully protected. Pending a decision and subsequent placement of trial witnesses into the ICCPP, the Prosecution is in a position to proceed at this time to apply for non-disclosure of information, pursuant primarily to Rule 81(2) regarding information that, if disclosed, may prejudice the OTP's ongoing and further investigations but also further to Article 54(3)(f), Article 68, Article 64(6)(c), Article 64(7) and Rule 81(4) in order to protect individuals who are named sources for the OTP.⁵ These redactions, if authorized, will continue throughout the trial.
5. On 9 October 2007, the Prosecution disclosed to the Defence its current list of trial witnesses. The list references the individuals concerned by either: name, pseudonym, Court code, Witness code and Evidence number, as applicable.
6. The statements of six of the witnesses on the list were disclosed to the Defence in completely un-redacted form prior to the Confirmation Hearing. Accordingly, there will not be an application for any redactions to these six statements.
7. The statement of one other witness on the list was disclosed to the Defence with redactions from the information provider. The identity of this witness was

⁵ This is the first filing related to non-disclosure of information in witness statements, in relation to those witnesses who are currently in the ICCPP and whose statements can be immediately disclosed to the Defence following the Trial Chamber's decision. A second filing will address the proposed redactions for the witnesses who are not yet in the ICCPP, and for whom disclosure of statements following the Trial Chamber's decision can only be done once they are fully protected.

disclosed to the Defence prior to the Confirmation Hearing. There are no further redactions necessary to this statement.

8. The statements of another four witnesses on the list were disclosed to the Defence with Rule 81(2) redactions as authorized by the Pre-Trial Chamber.⁶ The identity of all four of these witnesses was disclosed to the Defence prior to the Confirmation Hearing. The Prosecution submits that the Pre-Trial Chamber's decision to authorize redactions to these witness statements remains in effect. The Prosecution is of the view, however, that a number of these redactions should be lifted for trial. First, a broader scope for redactions at the pre-confirmation hearing stage was required in order to protect the information gathered by the OTP in relation to its further investigations. Second, information related to certain aspects of the further investigation could equally be relevant for determining the contextual elements of crimes contained in the Document Containing the Charges. Third, since the confirmation hearing certain redactions are no longer necessary, such as redactions related to the second DRC investigation which has been largely completed.

Present Application

9. The present application concerns the statements of these four witnesses.

⁶ ICC-01/04-01/06-234-Conf-Exp, "Decision on the Prosecution Amended Application pursuant to Rule 81(2)", 2 August 2006, ICC-01/04-01/06-453-Conf-Exp, "Second Decision on the Prosecution's Requests and Amended Requests for Redactions under Rule 81", 20 September 2006, and ICC-01/04-01/06-524, "Decision on the Prosecution's Application of 5 October 2006" (Public), 5 October 2006.

10. The Prosecution's application is divided into two parts. The first part concerns the need to lift certain redactions to the statements of all four witnesses, previously authorized to protect the OTP's further and ongoing investigations.⁷
11. The second part of the application concerns a second statement by one of these four witnesses. The second statement has not yet been disclosed.⁸ For this statement, the Prosecution seeks the non-disclosure of the names of its sources to preserve the integrity of its further investigations and/or to protect its sources from threat.

Lifting of Authorized Redactions

12. The Prosecution submits that while the non-disclosure of information that may prejudice further and ongoing investigations under Rule 81(2) must be the subject of an application for authorization to the relevant Chamber, in principle the Prosecution may on its own lift such redactions if there is no longer any prejudice to the disclosure of information.
13. The Prosecution bases this view on the fact that an application under Rule 81(2) can only be made by the Prosecution, as opposed to measures under Rule 81(4) which can be made either by the Chamber on its own motion or at the request of the Prosecutor. The matters at issue in a Rule 81(2) application are solely within

⁷ The Prosecution attaches a Confidential, *Ex Parte* – Prosecution Only Attachment A, with the statements of the four witnesses attached thereto as Confidential, *Ex Parte* – Prosecution Only **Annexes 1-12**.

⁸ The Prosecution attaches the statement as Confidential, *Ex Parte* – Prosecution Only **Annex 13**, which contains the proposed redactions. In Confidential, *Ex Parte* – Prosecution Only **Annex 14**, the Prosecution attaches a table providing details on the redactions which are now being lifted. The table also provides the justifications for the redactions proposed to Annex 13.

the purview of the Prosecutor.⁹ Accordingly, once disclosure of the information no longer prejudices further or ongoing investigations, the Prosecution may disclose the material to the Defence without re-applying to the Chamber to seek lifting of previously authorized redactions under Rule 81(2).

14. Notwithstanding this view, the Prosecution is herein providing the Chamber with details on redactions that can be lifted because disclosure of the information no longer prejudices further and ongoing investigations. Given the judicial involvement to this point in the Rule 81(2) redaction process, the Prosecution seeks a direction by the Chamber as to whether the Prosecution's interpretation of Rule 81(2) is accurate such that in future there will not be a need to apply for lifting of previously authorized redactions pursuant to Rule 81(2). Should the Chamber decide that the lifting of redactions must be authorized, the Prosecution requests such authorization with respect to the attached statements. Although the redactions were authorized by the Pre-Trial Chamber, the Trial Chamber is vested with the authority to exercise any functions of the Pre-Trial Chamber that is relevant and capable of application in the proceeding, in accordance with Articles 64(6)(a) and 61(11).

⁹ According to Helen Brady, Sub-rule 2 of Rule 81 provides at the same time "a judicial "check" on this prosecutorial discretion" - Brady, H., "Disclosure of Evidence", in Lee R. S., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers, Inc., New York, 2001), p. 419.

Proposed Redactions to Preserve Ongoing and Further Investigations

15. In the Pre-Trial Chamber's decision dated 2 August 2006,¹⁰ the term "ongoing investigation" for the purpose of Rule 81(2) was accepted as "referring to the ongoing investigation against Thomas Lubanga Dyilo in relation to the current case against him as set out in the warrant of arrest issued for him on 10 February 2006".¹¹ As the Prosecution has done in the past, it can confirm that there are no redactions currently proposed in relation to the "ongoing" investigation. In the Prosecution's view, all information relevant to the current charges against Thomas LUBANGA DYILO must be disclosed.¹²

16. The "further investigation" has been used in reference to the OTP's continued investigation with respect to allegations of crimes committed by Thomas LUBANGA DYILO that go beyond the scope of the crimes covered in the present warrant of arrest against him or to allegations of crimes committed by individuals other than Thomas LUBANGA DYILO.¹³

17. The Prosecution confirms that the proposed redactions contained in the attached witness statements do not seek to redact information that must be disclosed as either potentially exonerating information pursuant to Rule 67(2) or that must be provided for inspection as material to the Defence pursuant to rule 77.

¹⁰ ICC-01/04-01/06-234-Conf-Exp, "Decision on the Prosecution Amended Application pursuant to Rule 81(2)", 2 August 2006.

¹¹ *Ibid.*, page 5.

¹² *Ibid.*, page 5.

¹³ See generally, ICC-01/04-01/06-234-Conf-Exp, "Decision on the Prosecution Amended Application pursuant to Rule 81(2)", 2 August 2006.

18. As such, the Prosecution files the present application seeking:

- (i) a ruling pursuant to Rule 81(2) as to whether it is necessary to seek lifting of redactions that had been previously authorized by the Pre-Trial Chamber, and if so, a ruling that the lifting of such redactions is authorized on the basis that they are no longer required at the trial stage;
- (ii) in the case of one statement not previously disclosed, a ruling pursuant to Rule 81(2) as to whether information in the possession of the Prosecutor that relates to its ongoing and further investigations must be disclosed where disclosure may prejudice such investigations, and
- (iii) in the case of one statement not previously disclosed, a ruling pursuant to Article 54(3)(f), Article 68, Article 64(6)(c), Article 64(7) an/or Rule 81(4) as to whether the names of individuals who are sources for the OTP, or who may be perceived to be sources must be disclosed where to do so may result in threats of harm against them.

19. Following a determination by the Chamber, the Prosecution can immediately disclose the statements in their new form (with no or limited redactions).

Ex Parte Filing

20. The Rome Statute (Statute) provides that applications pursuant to Rule 81(2) “shall be heard on an *ex parte* basis”. This application is made further to Rule 81(2) and accordingly the Prosecution submits that an *ex parte* classification is justified on this basis.

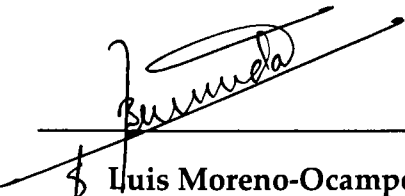
21. The present filing is primarily requesting relief on the basis of Rule 81(2). In connection with certain individuals and organizations who act as sources to the OTP in its investigations, the Prosecutor is seeking non-disclosure of their names on the basis of Rule 81(2), but also on the basis of provisions on protective measures, including Articles 54(3)(f), 68 and Rule 81(4). The Prosecution submits that the *ex parte* classification is necessary in the context of the present application to ensure the confidentiality of the information discussed.¹⁴

22. Accordingly, the Prosecution has filed the Annexes to this combined application for relief under Rule 81(2) and for the protection of individuals on an *ex parte* basis.

¹⁴ See the Decision of the Appeals Chamber, "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", ICC-01/04-01/06-568, 13 October 2006 at paras. 37, 65-67.

Order Requested

23. Based on the foregoing, the Prosecution requests that the Trial Chamber determine whether an application to lift previously authorized redactions is necessary and if so, to lift certain redactions, and to authorize the non-disclosure of information in accordance with Articles 54(3)(f), 64(6)(a), 61(11), 64(6)(c), 64(7), 68 and Rules 81(2) and 81(4) as set out in the proposed redactions to witness statements, attached.



Luis Moreno-Ocampo
Prosecutor

Dated this 31st day of October 2007
At The Hague, The Netherlands