

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 7 December 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 Attachment A
and Confidential, *Ex Parte*, Prosecution Only Annexes**

**Prosecution's Application for Lifting of Redactions, Non-Disclosure of Information
and Disclosure of Summary Evidence**

The Office of the Prosecutor

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a/00001/06 to 1/00003/06 and 1/0105/06

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Background

1. On 9 November 2007, the Trial Chamber issued the 'Decision Regarding the Timing and Manner of Disclosure and the Date of Trial'¹ in which it held, *inter alia*, that the Prosecution must disclose its incriminatory material, including witness statements, by 14 December 2007.² Should redactions be necessary to the documents, the Prosecution must explain and justify each redaction to the bench.³
2. On 4 December 2007, the Trial Chamber rendered a decision orally that the Prosecution is not required to request leave to lift a previously authorized redaction on the basis of Rule 81(2), but that the Trial Chamber must be notified of each redaction that is lifted in this manner. In contrast, the Prosecution must apply to the Trial Chamber to lift redactions that had previously been authorized on the basis of Rule 81(4).⁴
3. On 5 December 2007, the Prosecution disclosed an updated list of trial witnesses. Currently, the statements related to a number of witnesses have not yet been disclosed to the Defence because an application for lifting of redactions or for non-disclosure of information pursuant to Rule 81(2), Articles 54(3)(f), 61(5), 61(11), 64(6)(a), 64(6)(c), 64(7), 68 and/or Rules 81(4) and 87 must be filed with the Trial Chamber.

¹ ICC-01/04-01/06-1019.

² *Ibid.*, paragraph 25.

³ *Ibid.*, paragraph 27.

⁴ Transcript, ICC-01-04-01-06-T-62-ENG, 4 December 2007 at page 21, lines 19-25 and page 22, lines 1-11.

Scope of Present Application

4. The present application concerns the statements and/or related documents of thirteen witnesses on the Prosecution's trial witness list and four documents related to non-trial witnesses. The Prosecution requests (i) lifting of authorized Rule 81(4) redactions, (ii) non-disclosure of information on the basis of Rule 81(2), Articles 54(3)(f), 61(5), 61(11), 64(6)(a), 64(6)(c), 64(7), 68 and/or Rules 81(4) and 87 (in most cases on a temporary basis only), and (iii) authorization to disclose summary evidence until such time as the witnesses concerned are adequately protected, but certainly in advance of the trial.⁵
5. As directed by the Trial Chamber on 4 December 2007⁶, the Prosecution also provides details on each redaction previously authorized under Rule 81(2) for which it will lift redactions, in relation to a number of witness statements and documents.

Background to Previous Applications Regarding the Thirteen Witnesses

6. The statements and related documents of eight of the thirteen witnesses in the present application were relied upon during the confirmation hearing, in either redacted⁷ or summarized⁸ form, as authorized by the Pre-Trial Chamber.⁹

⁵ The Prosecution can advise that prior to 14 December 2007 additional applications for lifting of redactions and the non-disclosure of information in relation to at least the 13 currently remaining witnesses on the Prosecution's current trial witness list.

⁶ Transcript, ICC-01-04-01-06-T-62-ENG, 4 December 2007 at page 21, lines 19-25 and page 22, lines 1-11.

⁷ Previous disclosure of two statements contained redactions pursuant to both Rule 81(2) and Rule 81(4) including redactions to witness identity.

⁸ Six summaries of witness statements/ transcripts taken pursuant to Article 55(2) were disclosed (witness identities protected).

⁹ 'Decision on the Prosecution Amended Application Pursuant to Rule 81(2)', 2 August 2006, ICC-01/04-01/06-234-Conf Exp; 'First Decision on the Prosecution Requests and Amended Requests for Redactions

7. For five of the eight witnesses, the Prosecution had first brought applications for non-disclosure of information pursuant to Rule 81(2).¹⁰ These redactions were authorized by the Pre-Trial Chamber.¹¹
8. Subsequently, the Prosecution brought applications for redactions pursuant to Rule 81(4) in relation to these same five witnesses, as well as Rule 81(2) and Rule 81(4) redactions for the remaining three witnesses.
9. For two of these eight witnesses, the Pre-Trial Chamber noted Articles 57(3)(c), 61, 67, 68 and 69 of the Statute and Rules 81, 87 and 88 in its decision to authorize the redactions.¹² For the remaining six witnesses for which redactions applications were made, the Pre-Trial Chamber ultimately authorized the use of summaries of these witness statements and transcripts of interviews, based on concerns that “disclosure of redacted versions of their statements, transcripts of their interviews and investigator’s notes and reports of their interviews ‘would amount to defeating the purpose of such redactions, that is to preserve the non-disclosure of the identity of the relevant witnesses’.”¹³

under Rule 81’, 15 September 2006, ICC-01/04-01/06-437 + Conf Exp Annex 1; ‘Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’, 20 September 2006, ICC-01/04-01/06-453-Conf Exp; ‘Decision concerning the Prosecution Proposed Summary Evidence’, 4 October 2006, ICC-01/04-01/06-515-Conf Exp.

¹⁰ ‘Prosecution’s Application pursuant to Rule 81(2)’, 19 June 2006, ICC-01/04-01/06-153-Conf with Conf-Exp Annexes; Prosecution’s Amended Application pursuant to Rule 81(2)’, 18 July 2006, ICC-01/04-01/06-198-Conf with Conf-Exp Annexes; ‘Prosecution’s Response to the Single Judge’s Decision Inviting the Prosecution to Revise Proposed Redactions in relation to the Prosecution Amended Application pursuant to Rule 81(2) of the Rules of Procedure and Evidence’, 1 August 2006, ICC-01/04-01/06-230-Conf-Exp.

¹¹ ‘Decision on the Prosecution Amended Application Pursuant to Rule 81(2)’, 2 August 2006, ICC-01/04-01/06-234-Conf Exp.

¹² ‘Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’, 20 September 2006, ICC-01/04-01/06-453-Conf Exp.

¹³ ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’, 15 September 2006, ICC-01/04-01/06-437 + Conf Exp Annex 1 at p. 7; ‘Decision concerning the Prosecution Proposed Summary Evidence’, 4 October 2006, ICC-01/04-01/06-515-Conf Exp. At p. 3.

10. The remaining five of the thirteen witnesses were not relied upon during the confirmation hearing. In the case of one of the five witnesses, however, documents related to this witness were disclosed with redactions for which lifting is now necessary.

Current Protection Status of the Thirteen Witnesses

11. On 24 April 2007 and 24, 25 and 27 September 2007, the Prosecution referred eleven of the thirteen witnesses contained in the present application to the Victim and Witness Unit (VWU) for the provision of protective measures. Two witnesses do not require protective measures as they reside outside of the DRC. At present only one of the eleven witnesses who require protection has been admitted into the protection program.
12. The Prosecution has no precise indication as to when VWU will complete its assessment of the ten witnesses contained in the present application whose referrals are pending. VWU has advised, however, that once a determination on a referral is made, it can take approximately one month to implement protective measures. Accordingly, it will not be possible for these witnesses to be fully protected prior to 14 December 2007.

The Need for Temporary Redactions for Reasons of Protection

13. The implementation of protective measures for these ten and other trial witnesses will not be completed by 14 December 2007. Given the precarious situation in the DRC and the risks to OTP witnesses who will testify at trial should their identities be disclosed, the Prosecution submits that disclosure of the identities of

the witnesses can only be accomplished safely once adequate protective measures have been implemented.

14. Accordingly, the Prosecution seeks to protect disclosure of the identities of the ten witnesses that are the subject of this application and for whom a referral is pending, for a limited time. As indicated herein, the Prosecution intends to disclose the identities of these witnesses in advance of trial.
15. Two of the ten witness statements have already been disclosed with redactions to protect identity as authorized by the Pre-Trial Chamber. The Prosecution submits that the only effective way to protect the identity of the other eight witnesses and to provide sufficiently clear information to the Defence is to prepare detailed summaries of the evidence, in line with the reasoning of the Pre-Trial Chamber in its decision to authorize the use of summary evidence.¹⁴
16. The issue of the date by which the Prosecution must disclose the identity of its trial witnesses has been addressed at the International Criminal Tribunal for Rwanda.¹⁵ In many of these cases, disclosure of the identity of trial witnesses and of the unredacted versions of statements was ordered no later than either 21 or 30 days before the commencement of trial.
17. The Prosecution submits that the temporary non-disclosure of the identity of a number of its trial witnesses is not inconsistent with the rights of the Accused.

¹⁴ 'Decision concerning the Prosecution Proposed Summary Evidence', 4 October 2006, ICC-01/04-01/06-515-Conf Exp.

¹⁵ See for example, *The Prosecutor v. Jean-Baptiste GATETE*, ICTR-2000-61-I, 11 February 2004 at para. 9; *The Prosecutor v. Ephrem SETAKO*, ICTR-04-81-I, 18 September 2007 at para 10. The Trial Chamber noted that in the case of a single Accused where there is little likelihood of a long delay between disclosure of the witness' identity and their testimony, numerous decisions have required the disclosure of witness identity before the start of trial rather than on a rolling basis before each witness' testimony. See also *The Prosecutor v. Gaspard KANYARUKIGA*, ICTR-2002-78-I, 3 June 2005 at para 10; the *Prosecutor v. Callixte KALIMANZIRA*, ICTR-2005-88-I, 8 November 2007 at para 10.

First, the Court has an obligation to ensure the safety, physical and psychological well-being of witnesses. In this case, there is a real risk that disclosure of a witness' participation in the trial proceedings could threaten his or her safety and security, as evidenced by the general security situation on the ground and the fears expressed by the witnesses themselves. Second, the Prosecution is seeking protection of the identity of witnesses on a temporary basis only, until adequate protective measures are in place for these witnesses, and certainly in advance of the trial. On balance, the risk to the witnesses presented by disclosure of their names is greater than any potential prejudice to the Accused, who will receive the names of the witnesses in advance of trial and well in advance of the presentation of the Defence's case.

Prosecution Submissions on the Temporary Disclosure of Summary Evidence

18. Article 68(5) provides that "where disclosure of information may lead to the grave endangerment of the security of a witness or his or her family", the Prosecutor may submit a summary of the evidence or information in proceedings prior to the commencement of trial so long as this would not be inconsistent with the rights of the Accused and a fair and impartial trial.

19. At the confirmation hearing stage, the Pre-Trial Chamber identified witness statements which the Prosecution intended to rely upon for which redactions alone would be insufficient to prevent witness identification.¹⁶ Accordingly, and following a suggestion of the Pre-Trial Chamber, the Prosecution applied for the

¹⁶ 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81', 15 September 2006, ICC-01/04-01/06-437 + Conf Exp Annex 1.

disclosure of summaries of these statements.¹⁷ The Pre-Trial Chamber authorized the use of summary evidence during the confirmation hearing proceedings on the basis that: (i) non-disclosure of witness identity was the only feasible measure for protection, (ii) disclosure of redacted versions of statements would defeat the purpose of using redactions to protect witness identity, (iii) the deteriorated security situation in parts of the DRC impacted the range of feasible protective measures.¹⁸

20. Summaries were authorized by the Pre-Trial Chamber for six of the witnesses that are the subject of the present filing.

21. In the present case, the Prosecution seeks to disclose summaries of the statements of eight of the thirteen witnesses on a temporary basis prior to the commencement of trial. Once the witnesses are adequately protected, the Prosecution will immediately disclose their identities and unredacted versions of their statements.

22. The Prosecution attaches the six previously authorized summaries. In addition, the Prosecution attaches three additional summaries: two relating to witnesses who were not relied upon during the confirmation hearing, and one related to a witness for whom a second statement was recently obtained (a summary of the first statement was relied upon during the confirmation hearing).

Overview of Current Application

¹⁷ 'Provision of Summary Evidence to the Chamber', 26 September 2006, ICC-01/04-01/06-479; 'Provision of Summary Evidence to the Pre-Trial Chamber', 29 September 2006, ICC-01/04-01/06-491; 'Amended Provision of Summary Evidence to the Pre-Trial Chamber', 4 October 2006, ICC-01/05-01/06-513.

¹⁸ 'Decision concerning the Prosecution Proposed Summary Evidence', 4 October 2006, ICC-01/04-01/06-515-Conf Exp.

23. In the current application, the Prosecution is applying for:

- (i) authorization to disclose summaries of the statements of eight witnesses in order to protect witness identity;
- (ii) authorization to disclose redacted statements of three witnesses with Rule 81(4) redactions to protect witness identity;
- (iii) authorization to disclose redacted statements of two witnesses and four documents with Rule 81(2) redactions only;
- (iv) authorization to disclose redacted versions of 56 documents under Rule 81(4) or Article 54(3)(f);
- (v) authorization to lift redactions under Rule 81(4) for six documents; and
- (vi) authorization for complete non-disclosure of eight documents in order to protect the identity of the witness.

24. In addition, the Prosecution is providing details of anticipated lifting of Rule 81(2) redactions in relation to six statements and two related documents. This is done in order to expedite the disclosure process. The Prosecution will first disclose the summary evidence or redacted statements on a temporary basis. Once the witnesses are adequately protected, the Prosecution will be in a better position to disclose the statements, having already sought any necessary Rule 81(2) redactions and having already advised the Chamber of the lifting of Rule 81(2) redactions.¹⁹ The Prosecution would still, however, have to apply for lifting of any authorized Rule 81(4) redactions.

Scope of Redactions to Ongoing and Further Investigations – Rule 81(2)

¹⁹ The Prosecution acknowledges that it must apply for lifting of any authorized Rule 81(4) redactions.

25. In the Pre-Trial Chamber's decision dated 2 August 2006,²⁰ 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".²¹ 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.²²

26. 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.²³

27. The Prosecution confirms that the proposed Rule 81(2) redactions contained in the attached witness statements do not seek to redact information that must be disclosed as either potentially exonerating information under Rule 67(2) or that must be provided for inspection as material to the Defence under Rule 77.

Ex Parte Filing

²⁰ ICC-01/04-01/06-234-Conf-Exp, "Decision on the Prosecution Amended Application pursuant to Rule 81(2)", 2 August 2006.

²¹ *Ibid.*, page 5.

²² *Ibid.*, page 5.

²³ See generally, ICC-01/04-01/06-234-Conf-Exp, "Decision on the Prosecution Amended Application pursuant to Rule 81(2)", 2 August 2006.

28. The Prosecution submits that the classification of the annexes to the present filing as *Confidential-Ex Parte – Prosecution Only* is necessary.²⁴ First, the Statute provides that applications pursuant to Rule 81(2) “shall be heard on an *ex parte* basis”. This application is made in part further to Rule 81(2) and accordingly the Prosecution submits that an *ex parte* classification is justified.

29. Second, the present filing seeks relief on the basis of provisions on protective measures, including Articles 54(3)(f), 68 and Rule 81(4). The Prosecution submits that the information discussed, including names of witnesses, their current location and their security situation, must be treated confidentially and cannot be disclosed to the Defence in advance of the implementation of protective measures.²⁵ To do so would run afoul of the Court’s obligation under Article 68(1) to protect these individuals and their families.

30. The rights of the Accused are maintained to the extent that he has been made aware of the filing and its legal basis, but cannot be privy to the specifics of the information that needs to be addressed. The Prosecution submits that no alternative procedures exist to deal with this request.

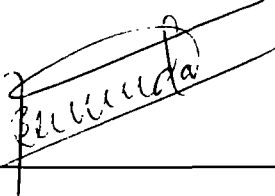
Order Requested

31. Based on the foregoing, the Prosecution requests the Trial Chamber to:

²⁴ Decision on the procedures to be adopted for *ex parte* proceedings, 7 December 2007, ICC-01/04-01/06-1058 at para. 12. On 6 December 2007, the Trial Chamber determined that *ex parte* procedures are only to be used exceptionally when other procedures are not available. The Court must ensure that the use of the *ex parte* procedure is proportionate given the potential prejudice to the Accused.

²⁵ 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.

- (i) authorize the non-disclosure of information in accordance with Rule 81(2) to four statements from two witness and to four documents;
- (ii) 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/or Rules 87 and 81(4) to four statements of three witnesses and to 56 documents;
- (iii) authorize the lifting of redactions based on Articles 54(3)(f), 64(6)(a), 61(11), 64(6)(c), 64(7), 68 and/or Rules 87 and 81(4) to six documents;
- (iv) authorize the temporary disclosure of summary evidence under Article 68(5) in relation to statements of eight witnesses; and
- (v) authorize the temporary non-disclosure of seven documents in order to protect the identity of witnesses.


Fatou Bensouda
Deputy Prosecutor (Prosecutions)

Dated this 7th day of December 2007
At The Hague, The Netherlands