

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/06
Date: 10 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 *v.* THOMAS LUBANGA DYILO**

Public redacted version

URGENT

Prosecution's Application for Extension of Time Limit for Disclosure

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Background

1. On 9 October 2007, the Prosecution filed the "Prosecution's Request for the Preservation of Evidence" ("Prosecution's Request for Preservation of Evidence").¹
2. On 9 November 2007, the Trial Chamber rendered its "Decision Regarding the Timing of Disclosure and the Date of Trial" ("Decision on Disclosure").²
3. On 21 November 2007, the Trial Chamber rendered its "Decision on 'Prosecution's Request for the Preservation of Evidence'" ("Decision on the Preservation of Evidence").³
4. On 30 November 2007, the Trial Chamber rendered its "Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial" ("Witness Preparation and Familiarisation Decision").⁴

¹ ICC-01/04-01/06-978-Conf. The Prosecution applied for an order from the Trial Chamber directing the Registry to separate REDACTED Prosecution witnesses who are living together and who the Prosecution proposes to re-interview.

² ICC-01/04-01/06-1019, para 25. The Trial Chamber ordered the Prosecution to serve the entirety of its evidence by 16:00 on 14 December 2007. In its Decision on Disclosure, the Trial Chamber also determined that "if the prosecution wishes to serve any of this material in a redacted form, each proposed redaction must be explained and justified to the bench".

³ ICC-01/04-01/06-1040-Conf. The Trial Chamber rejected the Prosecution's request (in para. 37). The Decision on the Preservation of Evidence indicated (in para. 32) that the Prosecution's proposed re-interviews of the five prosecution witnesses "should not occur for any purposes until the Chamber has ruled on the entirety of the subject of witness-proofing". The Decision on the Preservation of Evidence also held (in para. 35) that "[i]nterviews in this category should always be recorded by appropriate audio/visual equipment so there will be a permanent record available to the opposing party and the Chamber, should issues arise in relation to what occurred during the interviews".

⁴ ICC-01/04-01/06-1049. In this decision, the Trial Chamber ruled on the subject of witness-proofing, prohibiting it (in para 57).

Submissions on the variation of the terms of the Decision on Disclosure

5. With this application the Prosecution seeks extension of the time limit for disclosure of certain categories of evidence pursuant to Regulation 35 of the Regulations of the Court.
6. The Prosecution informs the Trial Chamber that a number of factors will make compliance with the 14 December 2007 deadline impossible in relation to specific items of evidence, even with the Prosecution acting with the utmost diligence. These categories include the evidence which the Prosecution intends to disclose in redacted form by 14 December 2007; the evidence which will not be collected prior to the 14 December 2007 deadline; the evidence of which collection is being finalised; the evidence subject to Article 54(3)(e) restrictions; and the evidence to be taken from expert witnesses.

In particular: Security situation

7. The Prosecution submits that in particular the security situation due to the ongoing conflict in the region affects OTP's ability to comply with disclosure of some categories of evidence by the 14 December 2007 deadline. The main factor is the general insecurity in Ituri, where UPC members continue to be active and are in control, resulting in witnesses becoming more and more reluctant to appear in Court for fear of retaliation against them and their families.
8. In more detail: According to MONUC figures, the UPC had 8,000 troops alone and, after having been recognized officially as a political party, it continues its political activities in Ituri. REDACTED.
9. REDACTED.

10. REDACTED.

11. The general security risk assessment of the Bunia and Ituri region as a whole indicates high levels of criminality (REDACTED). Redeployments of FARDC forces in response to the increasing violence in North Kivu have left Ituri with thinner coverage by the remaining FARDC forces. This gives greater freedom of movement to militia in this area. REDACTED remain active in the area. REDACTED.

Evidence which the Prosecution intends to disclose in redacted form

12. In accordance with the terms of the Decision on Disclosure,⁵ the Prosecution intends to serve part of its evidence to the Defence in redacted form. The Prosecution had worked on the basis that by this point in the proceedings the majority of the witness protection measures would be in place. This expectation did not materialise. REDACTED.⁶ The referrals for REDACTED witnesses are on hold, REDACTED and consequently to meet with the representatives of the Registry's Victims and Witnesses Unit ("VWU") for their initial assessments.⁷ REDACTED.⁸ In the case of REDACTED other witnesses, the Prosecution's referrals have been rejected by VWU; the Prosecution asked the Registry to review its decision.

⁵ ICC-01/04-01/06-1019, para 27. At the occasion of the hearing on 4 December 2007 the terms of the Decision on Disclosure were restated as follows: "in that decision the Bench ordered the Prosecution to serve the entirety of its positive case by the 14th of December, and any passages within witness statements or documents that the Prosecution wish to remain redacted must be brought to our attention in advance and justified, and we hope that that, in a general sense, makes the position very clear". See the Transcript of the hearing on 4 December 2007, ICC-01-04-01-06-T-62-ENG, at page 21, lines 13-18.

⁶ REDACTED.

⁷ REDACTED of these witnesses are the REDACTED referred to at footnote 6.

⁸ REDACTED.

13. As a result of the foregoing,⁹ the Prosecution must apply to the Chamber for authorisation to disclose portions of its evidence in redacted form.¹⁰ The first application for redactions was filed on 31 October 2007.¹¹ The second application for redactions was filed on 7 December 2007.¹² The Prosecution anticipates filing at least one additional application by 14 December 2007. The additional application or applications respectively will concern the evidence taken from or related to witnesses whose referrals to the Registry have not yet been answered, are on hold, or who are about to be referred. The additional application or applications respectively will also concern the evidence which is currently being collected by the Prosecution.
14. The Prosecution intends, pending further direction of the Trial Chamber,¹³ to disclose the materials subject to these redaction applications to the Defence on 14 December 2007 in redacted or summarised form, in order to provide the Defence with an opportunity to further prepare their case. The Prosecution will re-disclose the materials subject to these applications in a form that is consistent with the Chamber's decisions, once rendered.
15. The Decision on Disclosure sets 14 December 2007 as the deadline by which the Prosecution must serve the evidence to the Defence in either

⁹ And as foreshadowed by the Prosecution in the 11 September 2007 "Prosecution's Submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol", ICC-01/04-01/06-951, 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, and the 31 October 2007 "Prosecution's Application for Direction on the Lifting of Redactions and for Non-Disclosure of Information", paras 2-3.

¹⁰ The redactions with which the evidence will be served include redactions made pursuant to Rule 81(2).

¹¹ ICC-01/04-01/06-1008.

¹² ICC-01/04-01/06-1067

¹³ Reference is made to the "Prosecution's request to schedule a hearing on disclosure", ICC-01/04-01/06-1068.

unredacted or redacted form. The Prosecution submits that the terms of this decision make it unnecessary to request an extension of the time limit for disclosure, so long as the evidence is served by that date. However, should the Chamber considers it necessary to apply for such an extension, the Prosecution does so with the present application.

Evidence which will not be collected prior to 14 December 2007

Re-interviews of REDACTED Prosecution witnesses

16. The Prosecution submits that until the Witness Preparation and Familiarisation Decision was rendered on 30 November 2007, REDACTED.¹⁴ The Prosecution is presently engaged in consultation with REDACTED, on whose support the Prosecution is reliant in order to conduct the re-interviews. The Prosecution informs the Chamber that these interviews are anticipated to take place in January 2008. The Prosecution also informs the Trial Chamber that it will be able to disclose to the Defence copies of the audio/video recordings of these interviews within ten days of the Prosecution's staff's return to The Hague,¹⁵ and that it will be able to disclose transcripts of these tapes to the Defence within four weeks of the Prosecution's staff's return to The Hague.¹⁶

17. The Prosecution submits that the fact that it was bound by the terms of the Trial Chamber's Decision on the Preservation of Evidence constitutes

¹⁴ REDACTED.

¹⁵ The process of encoding and registration of audio/video materials and the production of a disclosure package will take ten full working days. The Prosecution also informs the Trial Chamber that its investigative staff will return to The Hague immediately upon the completion of these interviews. In light of the fact that the Prosecution will be assisted by an interpreter at these interviews, the Defence will be able to listen to the witnesses' statements in one of the two working languages of the Court.

¹⁶ The estimation of REDACTED weeks is based on a rate of REDACTED interviews per witness and a total of REDACTED hours of recording, in accordance with the Prosecution's available resources.

good cause for an extension of the time limit for disclosure of the evidence that will be collected from the REDACTED Prosecution witnesses, and requests the Trial Chamber to extend the deadline accordingly.

REDACTED

18. In June 2006 the Prosecution had requested the REDACTED to explore the willingness of REDACTED to appear at trial as Prosecution witnesses. On 6 November 2007 the Prosecution contacted REDACTED and informed him that the Prosecution was in the process of finalising its trial witness list and requested, for this purpose, a response regarding the participation REDACTED. On 3 December 2007 the REDACTED informed the Prosecution that REDACTED have agreed to testify in the case.

19. The Prosecution is in contact with the REDACTED, who indicated that REDACTED would be available for interviews in early January 2008. The Prosecution will also be consulting REDACTED, on whose support the Prosecution is reliant in order to conduct the interviews. The Prosecution also informs the Trial Chamber that it will be able to disclose to the Defence copies of the statements to be taken from these witnesses within three days of the Prosecution's staff's return to The Hague. REDACTED, the Prosecution does not anticipate applying for authorisation to make redactions to their statements.

Evidence of which collection is being finalised

Evidence of which collection is being finalised

Interviews of additional REDACTED

20. REDACTED, the Prosecution identified other REDACTED who could appear as witnesses at trial.¹⁷ The Prosecution screened additional witnesses in mid November 2007, and interviewed them in late November and early December 2007. These interviews have either already been finalised or will be finalised by 14 December 2007.

21. The addition of REDACTED¹⁸ of these REDACTED to the Prosecution's witness list is likely to result in further referrals to the ICCPP. The Prosecution anticipates submitting these REDACTED referrals to the Registry by the end of next week at the latest. Pending a response from the Registry on the referrals, the Prosecution anticipates disclosing redacted versions of their statements by 14 December 2007, in order to provide the Defence with an opportunity to further prepare their case.

22. The Prosecution also anticipates disclosing the unredacted versions of these statements once adequate protective measures are put in place. Should the Chamber consider it necessary to apply for an extension of time for the disclosure of the unredacted versions of the statements, the Prosecution does so with the present application.¹⁹

Forensic examination of REDACTED Prosecution witnesses

23. REDACTED. The examinations of an additional REDACTED witnesses are being scheduled to take place REDACTED. The aim of these

¹⁷ The Prosecution submits that in principle it intends to rely on the evidence taken from these witnesses as corroborating evidence of the policy and pattern of recruitment and use of child soldiers by the FPLC only, REDACTED.

¹⁸ A REDACTED is already in the ICCPP.

¹⁹ See paragraph 15, above.

examinations is to corroborate the age and dates of birth provided by these witnesses.²⁰

24. The results of the examinations of REDACTED Prosecution witnesses are expected to be available for disclosure to the Defence by 14 December 2007. On that date, however, the Prosecution will only disclose in unredacted form those that were taken from REDACTED witnesses whose identity is known to the Defence. The results of the examinations taken from the REDACTED witnesses whose identities have not been revealed will be disclosed in redacted form only, and will be the subject of a redaction application to be filed with the Chamber by 14 December 2007. Should the Chamber consider it necessary to apply for an extension of time for the disclosure of the unredacted versions of these documents, the Prosecution does so with the present application.²¹
25. The results of the examinations of the REDACTED further Prosecution witnesses can only be disclosed once they become available, REDACTED. In one case²² the Prosecution will be able to disclose the results to the Defence immediately. In the case of the other REDACTED,²³ disclosure can only take place in unredacted form once protective measures are in place. With respect to these REDACTED examinations, the Prosecution requests an extension of the disclosure deadline until January 2008.
26. In support of the above requests, the Prosecution refers the Chamber to the explanations set out at paragraphs 15 and 16, above.

²⁰ The Prosecution will address the probative value of these examinations during the trial.

²¹ See paragraph 15, above.

²² One of these witnesses is REDACTED, who is already in the ICCPP.

²³ The other REDACTED whose statements will be disclosed in redacted form by 14 December 2007.

Interviews of REDACTED witnesses

27. The Prosecution is presently finalising the collection or processing of the transcripts or statements of REDACTED witnesses considered to be key to the case. REDACTED.
28. The Prosecution has encountered significant difficulties in arranging the interview of witness DRC-OTP-WWWW-0055 because of the witness' precarious security situation. The witness REDACTED²⁴ REDACTED. This leads him to believe that his security would be gravely endangered should it become known that he is providing a statement to the Prosecution.²⁵ Furthermore, the witness has expressed having additional security concerns, stemming from his REDACTED,²⁶ as well as stemming from his REDACTED.
29. The Prosecution identified this witness as a key source of information in March 2005, and since then it has made numerous attempts to interview him. The witness met the Prosecution staff on five occasions between March and November 2005 in REDACTED, but a statement could not be obtained.²⁷ In 2006 the Prosecution explored potential alternative venues for an interview, outside of REDACTED. However, in light of the witness' significant security concerns and the difficulties in finding a suitable venue for the interview, the Prosecution had to desist from continuing the interview.
30. After a re-assessment of the situation, the Prosecution resumed its efforts to interview the witness. The Prosecution has sought to schedule his

²⁴ As far as the Prosecution is aware, the witness' presence in REDACTED.

²⁵ The Prosecution's assessment of the threat to this witness' life is based on his knowledge of REDACTED.

²⁶ According to information available to the Prosecution, REDACTED.

²⁷ REDACTED.

interview, but has had to address numerous additional difficulties. These include the fact that the witness did not REDACTED.

31. The Prosecution's attempts to interview this witness are about to materialise. An interview is scheduled to take place in REDACTED in the second half of December 2007.
32. The Prosecution submits that significant efforts and resources have already been invested in the collection of this evidence, including efforts by REDACTED. It submits, furthermore, that these efforts appear to be on the verge of succeeding and that the subjects on which this witness is anticipated to give evidence are key to clarifying the responsibility of Thomas LUBANGA DYILO for the crimes with which he is charged. Given his REDACTED, it is anticipated that this witness will provide significant evidence on the role of Thomas LUBANGA DYILO REDACTED, REDACTED and the recruitment and use of child soldiers by the FPLC.
33. While efforts will be made by the Prosecution to finalise the transcripts of the interview of this witness as soon as practicable, it will only be able to do so in the second half of January 2008. In light of the internal work processes required for the production of transcripts and the application for redactions, the Prosecution anticipates being able to apply for authorisation to provide a summary of this witness' evidence pursuant to Article 68(5) of the Rome Statute and for the non-disclosure of the audio/video tapes²⁸ in the second half of January 2008 only. The Prosecution anticipates being able to disclose the summary of the evidence once and if the Trial Chamber authorises it. As for the disclosure of the

²⁸ REDACTED.

unredacted version of the transcripts and of the audio/video materials, the Prosecution depends on the outcome and timing of a referral to the Registry.

34. Witness DRC-OTP-WWWW-0290 is REDACTED, and has given evidence on REDACTED.²⁹ The REDACTED between the REDACTED military commanders and the FPLC General Staff, including Thomas LUBANGA DYILO.

35. Witness DRC-OTP-WWWW-0187 was REDACTED during the time period for which Thomas LUBANGA DYILO is charged. He obtained REDACTED. Finally, he addressed his knowledge of the use of child soldiers by the FPLC: he stated that REDACTED included child soldiers as young as nine years old; he observed child soldiers being used by FPLC in military operations, including at the front line, and in REDACTED; and he asserted that REDACTED.

36. The Prosecution was prevented from finalising the interviews of these two witnesses earlier because of the repeated efforts that were necessary in order to ensure that they had the REDACTED and the necessary time available to them to meet with the Prosecution.

37. REDACTED.

38. Despite REDACTED, a number of witnesses alleged that they had not REDACTED, and the timing of their interviews was consequently affected. REDACTED.

39. Witness DRC-OTP-WWWW-0290 was first contacted by the Prosecution in August 2006. Between then and September 2007, the Prosecution maintained contact with the witness in anticipation of his interview.

²⁹ This REDACTED has been disclosed to the Defence.

REDACTED for interview purposes. The interview took place in mid September 2007, but had to be adjourned due to the short REDACTED. A new attempt at finalising this interview at the end of October 2007 was cancelled by the witness on account of REDACTED. When the interview resumed in November 2007, the witness again had REDACTED insufficient time to complete it.

40. The Prosecution first became aware of witness DRC-OTP-WWWW-0187 in October 2007, when the witness contacted the Prosecution. His first interview, in this same month,³⁰ had to be adjourned because he REDACTED. In mid November 2007 the witness REDACTED the Prosecution once more, and the interview was finalised between 23 and 26 November 2007.

41. The Prosecution submits that the delays encountered with respect of witnesses DRC-OTP-WWWW-0290 and DRC-OTP-WWWW-0287 constitute good cause for the Trial Chamber to grant an extension of the time limit for disclosure of their evidence, so long as they have occurred despite the Prosecution's best efforts to complete the witness interviews earlier. The Prosecution also submits that the evidence taken from these witnesses is of paramount importance to the establishment of Thomas LUBANGA DYILO's responsibility for the crimes with which he is charged.

42. The transcript of the interview of witnesses DRC-OTP-WWWW-0187 is scheduled to be completed by 14 December 2007.³¹ The statements taken from witness DRC-OTP-WWWW-0290 are already available to the

³⁰ At the occasion of this first interview, the witness was provided with REDACTED.

³¹ The transcript will need to be translated thereafter, as the interview of witness DRC-OTP-WWWW-0187 was video- and audio-taped with English-REDACTED interpretation.

Prosecution. The Prosecution submits, however, that in its view the provision of the transcripts and statements will not be possible until adequate protective measures can be put in place by the Court. The Prosecution informs the Chamber that it instead intends to submit these witnesses' evidence in summary form, pursuant to Article 68(5) of the Rome Statute, until such a time as the protective measures are in place. Should the Chamber consider that it is also necessary to apply for such an extension of time for the disclosure of the unredacted versions of the evidence obtained from witnesses DRC-OTP-WWWW-0187 and DRC-OTP-WWWW-0290, the Prosecution does so with the present application.

Evidence subject to article 54(3)(e) restrictions

43. With respect to evidence which is currently subject to article 54(3)(e) restrictions, the Prosecution has requested the lifting of these restrictions to the various information providers and is working intensively and closely with them in order to ensure that the deadline set in the Decision on Disclosure is met.

Evidence to be taken from expert witnesses and further request for extension of the time limit

44. The Prosecution has previously³² noted that, in light of its undertaking not to disclose the substance of the topics that the expert witnesses would be required to cover at trial, the Prosecution has not instructed any experts to date. Pending direction from the Trial Chamber on this issue, the

³² See the 29 March 2007 "Prosecution's Submission in Anticipation of a Status Conference", ICC-01/04-01/06-853, paras 8-12, and in particular para 12, and the 12 September 2007 "Prosecution's submissions regarding the subjects that require early determination: procedures to be adopted for instructing expert witnesses, witness familiarization and witness proofing", ICC-01/04-01/06-952, paras 2-4.

Prosecution has not pursued these experts as potential witnesses in advance of the 14 December 2007 deadline.

45. While no request is being made with respect to the evidence to be taken from expert witnesses, the Prosecution informs the Chamber that, in its view, an application for extension of time or otherwise might become necessary depending on how this matter evolves.

Justification for *ex parte* filing³³

46. In light of the multiple protection matters that are pending with the Court or which will arise from the content of the anticipated evidence, the identity of most of the witnesses with which the present application is concerned is not yet known to Thomas LUBANGA DYILO and the Defence. The Prosecution submits that the *ex parte* character of this filing is necessary because Thomas LUBANGA DYILO would be able to identify those witnesses on the basis of the information provided herein.

47. The Prosecution will in due course file a public redacted version of this filing containing the redactions which in its view are necessary to protect these witnesses until protective measures are put in place.

Request for extension of time limit for disclosure

48. Accordingly, the Prosecution requests the Trial Chamber to extend the time limits for the disclosure of the following categories of evidence, pursuant to Regulation 35 of the Regulations of the Court:

- a. *Re-interviews of REDACTED Prosecution witnesses.* The Prosecution requests that the Trial Chamber authorise disclosure of the audio/video tapes of these interviews within ten days of the

³³ The Prosecution refers to the "Decision on the procedures to be adopted for *ex parte* proceedings", ICC-01/04-01/06-1058.

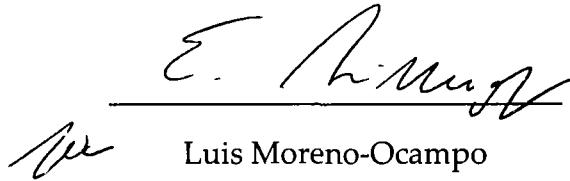
Prosecution's staff's return to The Hague at the completion of the interviews, and the disclosure of the transcripts four weeks later.

- b. *Statements of victim REDACTED*. The Prosecution requests that the Trial Chamber authorise disclosure of the statements of victim REDACTED three days after the Prosecution's staff's return to The Hague, following the completion of their interviews, which are anticipated to take place in January 2008.
- c. *Summary of the evidence of witness DRC-OTP-WWWW-0055*. The Prosecution requests authorisation to disclose a summary of the witness' evidence in the second half of January 2008.
- d. *Forensic examinations of REDACTED Prosecution witnesses*. The Prosecution requests authorisation to disclose the results of the forensic examinations of three of its witnesses in January 2008.
- e. *Materials subject to redaction applications*. Should the Chamber consider that an application for extension of time is necessary in order to re-disclose to the Defence the evidence that has been the subject of redaction applications and which, pending direction of the Trial Chamber, the Prosecution intends to disclose to the Defence in redacted or summarised form by 14 December 2007, the Prosecution herewith requests an extension of three³⁴ days to follow the Trial Chamber's decisions on the respective applications, for the disclosure of the materials in a form which is consistent with the Chamber's decisions.³⁵

³⁴ Based on its previous experience, the Prosecution estimates that three days are necessary to prepare the disclosure of the materials. This time is sufficient to prepare the disclosure from a technical point of view.

³⁵ Reference is made to paragraphs 8-10, 16-17, 19 and 36, above.

49. Should the Trial Chamber consider that the information provided by the Prosecution in the present filing is insufficient to substantiate its request for an extension of time limits, the Prosecution requests an opportunity to be heard, pursuant to Regulation 35(2) of the Regulations of the Court.

A handwritten signature in black ink, appearing to read 'L. Moreno-Ocampo', is written over a horizontal line. To the left of the line, there is a small, stylized mark that looks like a checkmark or a small 'L'.

Luis Moreno-Ocampo

Prosecutor

Dated this 10th day of December 2007
At The Hague, The Netherlands