

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04-01/06
Date: 13 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 Annexes

URGENT

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Senior Trial Lawyer

Counsel for the Defence

Ms Catherine Mabilie
M Jean-Marie Biju-Duval

Legal Representatives of the Victims

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

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu

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. The Pre-Trial Chamber had authorized certain redactions on the basis of Rule 81(2) and Rule 81(4) to witness statements and documents in advance of the Confirmation Hearing.⁵
4. The Prosecution seeks in some cases to maintain these redactions and in some cases to lift these redactions.

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.

⁵ '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'; '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., 'Décision sur la demande du Procureur en application de la règle 81(2) du 10 Octobre 2006' dated 11 October 2006 (ICC-01/04-01/06-556-Conf).

Scope of Present Application

5. The present application concerns 71 documents for which redacted disclosure was authorized prior to the Confirmation Hearing and 2 documents never before disclosed for which the Prosecution is seeking the temporary non-disclosure of information under Rule 81(4) until such time as the trial witnesses are adequately protected.

Overview of Current Application

6. In the current application, the Prosecution is applying for:
 - (i) authorization to lift authorized Rule 81(4) redactions to one document⁶;
 - (ii) authorization to retain Rule 81(2) redactions to one document⁷;
 - (iii) authorization to retain Rule 81(4) redactions throughout trial to 27 documents⁸; and
 - (iv) authorization to retain Rule 81(4) redactions on a temporary basis until such time as the trial witnesses are adequately protected in relation to 42 documents⁹.
7. In addition, the Prosecution is providing details of anticipated lifting of Rule 81(2) redactions in relation to 10 documents¹⁰. The Prosecution notes that some documents are mentioned in more than one of the above listed request categories.

⁶ Confidential, *Ex Parte – Prosecution Only*, Annex 8.

⁷ Confidential, *Ex Parte – Prosecution Only*, Annex 70.

⁸ Confidential, *Ex Parte – Prosecution Only*, Annexes 1-7, 9, 41-57, 59, 60.

⁹ Confidential, *Ex Parte – Prosecution Only*, Annexes 10-40, 62-69, 71-73.

¹⁰ Confidential, *Ex Parte – Prosecution Only*, Annexes 29, 43, 45, 46, 48-50, 54, 58, 61.

Ex Parte Filing

8. The Prosecution submits that the classification of the annexes to the present filing as *Confidential - Ex Parte - Prosecution Only* is necessary.¹¹ 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.
9. 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 and sources must be treated confidentially and cannot be disclosed to the Defence in advance of the implementation of protective measures.¹² To do so would run afoul of the Court’s obligation under Article 68(1) to protect these individuals and their families.
10. 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.

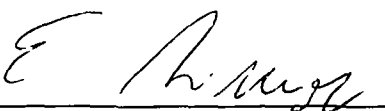
¹¹ Decision on the procedures to be adopted for *ex parte* proceedings, 7 December 2007, ICC-01/04-01/06-1058 at para. 12. On 6 December 2007, the Trial Chamber determined that *ex parte* procedures are only to be used exceptionally when other procedures are not available. The Court must ensure that the use of the *ex parte* procedure is proportionate given the potential prejudice to the Accused.

¹² 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

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

- (i) authorize the non-disclosure of information in accordance with Rule 81(2) to one document;
- (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 27 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 one document; and
- (iv) authorize the temporary non-disclosure of information 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 42 documents.



Luis Moreno-Ocampo
Prosecutor

Dated this 13th day of December 2007
 At The Hague, The Netherlands