

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/06
Date: 21 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 Prosecution and Defence annexes and
Confidential - *Ex parte* - Prosecution Only annexes
Prosecution's Application for Non-Disclosure of Information
on the Basis of Article 54(3)(f)

The Office of the Prosecutor

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

Legal Representatives of the Victims

a/0001/06 to 1/0003/06 and a/0105/06

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu

Counsel for the Defence

Ms Catherine Mabilille
Mr Jean-Marie Biju-Duval
Mr Marc Desalliers
Ms Caroline Buteau

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, 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 13 December 2007, the Trial Chamber rendered an oral decision, in which it addressed several issues related to disclosure. It authorised, *inter alia*, the non-disclosure of information to certain documents in accordance with Article 54(3)(f).⁴
3. In its decision, the Trial Chamber held, in relation to the authorisation of redactions, that if redactions are to be maintained or imposed, it must be ensured that either the material is irrelevant to the accusations that Thomas LUBANGA faces, and neither tends to undermine the prosecution case on the charges confirmed by the Pre-Trial Chamber, nor gives any support for the defence case, namely that the accused is innocent of the charges.⁵

¹ ICC-01/04-01/06-1019.

² *Ibid.*, paragraph 25.

³ *Ibid.*, paragraph 27.

⁴ ICC-01-04-01-06-T-65-ENG ET WT 13-12-2007 1-22 NBT, page 12 line 24 and further.

⁵ ICC-01-04-01-06-T-65-ENG ET WT 13-12-2007 1-22 NBT, page 3, line 3 and further.

Scope of the Present Application

4. Since 28 July 2006, the Prosecution has disclosed to the Defence excerpts of statements containing potentially exculpatory information and information falling under the provisions of Rule 77.⁶ More specifically, the Prosecution has disclosed excerpts of 153 witness statements, screening notes, investigators notes and transcripts from a total of 88 witnesses (collectively referred to hereafter as 'statements') containing potentially exculpatory information, and/or information under Rule 77.⁷ A number of these excerpts have been disclosed with redactions, that have not been previously authorised, which are related to the identity of the witness from whom the statement was taken.⁸
5. The excerpts disclosed are extracts from statements taken in the framework of investigations in the present case as well as in the case *The Prosecutor v. Germain KATANGA*. These excerpts have been taken from statements of witnesses which are not in the ICC Protection Program ('the Program'), because the Prosecution has decided not to submit their referral to the Victims and Witnesses Unit as it does not intend to call the witness. As a result, no protective measures are currently in place in respect of these witnesses.

⁶ This practice has been applied without complaint from the Defence.

⁷ In addition, the Prosecution has disclosed excerpts of four OTP summaries, pursuant to Court order ICC-01/04-01/06-515-Conf-Exp. Since the excerpts have been disclosed to the Defence, the Prosecution has been able to disclose the statements of 10 of the 91 witnesses.

⁸ The Prosecution notes that on 28 July 2006, PEXO and Rule 77 excerpts were disclosed with redactions to protect the OTP's further investigations at the pre-confirmation hearing stage. In particular, the Prosecution redacted the location of certain attacks and the names of certain commanders who participated in those attacks. This was the case for PEXO Witness 2 (DRC-OTP-0096-0074); PEXO Witness 3 (DRC-OTP-0104-0170); PEXO Witness 12 (DRC-OTP-0150-0287); PEXO Witness 15 (DRC-OTP-0073-0397); PEXO Witness 16 (DRC-OTP-0073-0381); PEXO Witness 18 (DRC-OTP-0104-0002); PEXO Witness 22 (DRC-OTP-0163); PEXO Witness 28 (DRC-OTP-0150-0177); PEXO Witness 29 (DRC-OTP-0155-0106). The Prosecution will lift these redactions and re-disclose the excerpts to the Defence.

Discussion

6. The Prosecution submits that the statements of the witnesses concerned contain information which needed to be disclosed to the Defence pursuant to Article 67(2) or Rule 77.
7. However, the statements also contain information that would identify the witnesses from whom the statements were taken. The Prosecution is of the view that these witnesses would be at risk should their identity be disclosed.
8. In balancing the interests at stake, the Prosecution has disclosed excerpts of the statements, without identifying the witnesses that were interviewed. When present in the text of the excerpt, identifying information of the witness has been redacted by the Prosecution. The excerpts that have been disclosed to the Defence with redactions are attached to this filing as Confidential annexes 1 to 22.⁹ The unredacted versions of the excerpts are attached to this filing as Confidential *Ex Parte* Prosecution Only Annexes A-S.¹⁰
9. By providing excerpts, the information has been disclosed as accurately as possible since the actual wording from the source statement was, to the highest extent possible, preserved. It is submitted that this manner of proceeding permits the Defence to assess the information in the most complete way, while at the same time does not risk compromising witness security by disclosure of identifying information.¹¹

⁹ Confidential – Prosecution and Defence Annexes 1 to 22.

¹⁰ Confidential *Ex Parte* Prosecution Only, Annexes A-S

¹¹ As mentioned above, the Prosecution submits that as an exception, in relation to four witnesses, excerpts of OTP summaries were disclosed pursuant to Court order ICC-01/04-01/06-515-Conf-Exp. After the excerpt was disclosed, the statement of one witness, the transcript of another witness and the summary of a third witness was disclosed in full.

Order Requested

10. The Prosecution requests the authorization of (i) the non-disclosure of the full statements including the identity of the respective witnesses (i.e. the disclosure of excerpts); as well as (ii) the non-disclosure of certain portions of the excerpts (i.e. redactions within the excerpts) on the basis of Article 54(3)(f). The Prosecution believes that this remedy represents the only currently available avenue to protect the witnesses concerned.
11. The Prosecution has refrained from filing the full text of the 153 statements with the Chamber at this time, but remains prepared to do so forthwith if the Chamber determines that access to the full text of the statements is necessary for a ruling on this application.

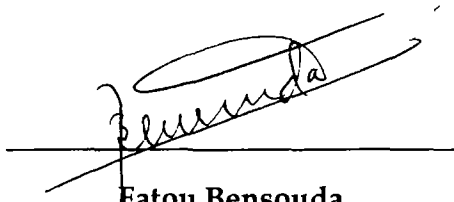
Ex Parte Filing

12. The Prosecution submits that the classification of 19 of the 41 annexes to the present filing as Confidential - *Ex Parte* - Prosecution Only is necessary.¹² The present filing seeks relief on the basis of provisions on protective measures for the confidentiality of information and protection of any person, under Article 54(3)(f).
13. The Prosecution submits that the information contained in the 19 annexes that provide an unredacted version of the excerpts must be treated confidentially and cannot be disclosed to the Defence.¹³ The rights of the Accused are maintained to

¹² 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.

¹³ 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.

the extent that he has been made aware of the filing, but cannot be privy to the specifics of the information therein. The Prosecution submits that no alternative procedures exist to deal with this filing.



Fatou Bensouda
Deputy Prosecutor (Prosecutions)

Dated this 21th day of December 2007
At The Hague, The Netherlands