

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06
Date: 4 December 2008

TRIAL CHAMBER I

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

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

**Public Document - Redacted Version
with Confidential – Prosecution and Defence Only Annexes 1-10 and
Confidential, Ex Parte – Prosecution Only Annex 11**

**Prosecution's application to add ten items as incriminating evidence and
request for redactions pursuant to Rule 81(2)**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Counsel for the Defence

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Legal Representatives of Applicants

Mr Luc Walley

Mr Franck Mulenda

Ms Carine Bapita Buyangandu

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. 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
2. On 13 December 2007, the Trial Chamber ruled that each item of evidence not disclosed by the (then) disclosure deadline must be the subject of an application, in order to allow the Trial Chamber to consider any impact that late disclosure of evidence may have on the accused's trial prior to determining whether the Prosecution is permitted to rely on the evidence.³
3. On 13 March 2008, the Trial Chamber held that the Prosecution could disclose items of incriminatory evidence until 28 March 2008, and that applications to rely on additional incriminatory evidence after that date would be scrutinized with great care.⁴
4. On 13 June 2008, the Trial Chamber imposed a stay on the proceedings in the case, indicating that "the trial process in all aspects is halted".⁵
5. On 18 November 2008, the Trial Chamber lifted the stay of proceedings.⁶
6. During the Status Conference on 25 November 2008, the Prosecution advised the Trial Chamber that it would seek to rely on

¹ ICC-01/04-01/06-1019.

² *Ibid.*, paragraph 25.

³ ICC-01/04-01/06-T-65-ENG, page 16, lines 18-25 and page 17, lines 1-7.

⁴ ICC-01/04-01/06-T-79-ENG, page 10, lines 1-13.

⁵ ICC-01/04-01/06-1401, at para. 94.

⁶ ICC-01/04-01/06-T-98-ENG at page 3, lines 23-25, and page 4, line 1.

five additional documents in the present application.⁷ The Trial Chamber stated that it would need to examine the documents in order to determine whether it is appropriate and fair for the additional material to be introduced.⁸

7. Since the Status Conference on 25 November 2008, The Prosecution has removed two of the five documents upon which it had indicated it would seek to rely and has added seven further documents to the present application.

II. Overview of the Present Application

8. The Prosecution requests the Trial Chamber's authorisation to add ten documents to the evidence upon which it will rely at trial, and to apply limited redactions under Rule 81(2) to one of these ten documents.
9. The Prosecution's submission includes information on the nature of each document, its relevance to the Prosecution's presentation of evidence, the manner in which it is proposed the item will be entered into evidence, the reasons for the late disclosure and also addresses the issue of possible prejudice to the Defence. The Prosecution first provides the Trial Chamber with an overview of the ten items, which are comprised of:
 - (i) the unredacted version of two documents obtained from [REDACTED] DRC-OTP-WWWW-0031 relating to [REDACTED] DRC-OTP-WWWW-0294. Both documents were previously disclosed with limited redactions to the identifying information of the witness;

⁷ ICC-01/04-01/06-T-98-ENG at page 2, lines 4-6.

⁸ ICC-01/04-01/06-T-99-ENG at page 2, lines 21-25, page 3, lines 1-6 and page 4, lines 17-18.

- (ii) a recently generated investigator's note related to [REDACTED] DRC-OTP-WWWW-0213, which has been disclosed under Article 67(2); and
- (iii) seven documents related to [REDACTED] DRC-OTP-WWWW-0157 that will be disclosed to the Defence on 28 November 2008 as being material to the preparation of the Defence pursuant to Rule 77. In connection with one of these items, the Prosecution seeks limited redactions under Rule 81(2) in the present application.

III. Prosecution's Submissions

- (i) *Two documents obtained from [REDACTED] DRC-OTP-WWWW-0031*

10. The Prosecution sought⁹ and obtained¹⁰ authorisation from the Trial Chamber to impose temporary redactions to the identifying information of [REDACTED] DRC-OTP-WWWW-0294 contained in two documents: (i) a one-page [REDACTED] dated 28 July 2004 recording the details of [REDACTED] DRC-OTP-WWWW-0294 [REDACTED] and (ii) a one-page sketch of a home in a village signed by [REDACTED] DRC-OTP-WWWW-0294.¹¹ Both

⁹Authorization for redactions was sought on 12 December 2007 at ICC-01/04-01/06-1081 at Conf-Exp Annex 45 and ICC-01/04-01/06-1081-Conf-Exp-Anx75, page 42.

¹⁰ Authorization for redactions to identifying features of [REDACTED] witnesses in statements and related documents was granted generally by the Trial Chamber on 13 December 2007, see ICC-01/04-01/06-T-65-Eng, page 7, lines 8-22 and on 18 January 2008 at ICC-01/04-01/06-T-71-ENG, page 5, lines 9-17. See also ICC-01/04-01/06-T-65-ENG ET, page 10, lines 12-21 and ICC-01/04-01/06-1097, paras 6 and 10.

¹¹ DRC-OTP-0160-0188 is a family reunification certificate and DRC-OTP-0160-0093 is a sketch of a village. Both documents are related to [REDACTED] DRC-OTP-WWWW-0294. They are attached as Confidential – Prosecution and Defence Only Annexes 1 and 2, with the disclosed redactions but in a form that allows the Defence and the Trial Chamber to read the words that were initially redacted.

documents were provided to the Office of the Prosecutor by [REDACTED] DRC-OTP-WWWW-0031.

11. The two documents were disclosed in redacted form, with redactions to the name of the witness, [REDACTED] his address and the local authority to the Defence on 17 December 2007. Subsequently, the identity of [REDACTED] DRC-OTP-WWWW-0031 was disclosed on 22 February 2008 and the identity of DRC-OTP-WWWW-0294 was disclosed on 17 March 2008.
12. In a review of witness-related documents conducted in May 2008, the Prosecution found that these two documents had, inadvertently, not been re-disclosed in unredacted form. Given that the identity of [REDACTED] DRC-OTP-WWWW-0031 and DRC-OTP-WWWW-0294 are now known to the Defence, the Prosecution will re-disclose the documents without redactions. The Prosecution seeks authorization to rely on the unredacted version of these two documents as incriminating evidence at trial.
13. The two documents are probative of [REDACTED] membership in an armed group. Through the documents [REDACTED] of [REDACTED] DRC-OTP-WWWW-0031 and DRC-OTP-WWWW-0294, the Prosecution intends to prove that [REDACTED] DRC-OTP-WWWW-0294 [REDACTED] in the ranks of the UPC/FPLC and that there were [REDACTED] members of the UPC/FPLC at the relevant time. The Prosecution will seek to tender the two documents through [REDACTED].
14. The Defence has had the redacted version of the documents since December 2007 with only limited redactions to identifying information. Furthermore, these documents were referred to in the witness statement of DRC-OTP-WWWW-0031 which was disclosed

on 22 February 2008. In paragraphs 141 and 177 of the witness statement, the [REDACTED] was referred to by registration number and individual name, without redaction. At paragraph 168, the witness refers to the sketch by registration number and by the name of the witness who drew the sketch, without redaction. At paragraph 141, the [REDACTED] is referred to by registration number and by individual name, without redaction. Cross-referencing between the documents and the statements would have allowed the Defence to ascertain the name of the witness that had been redacted in the documents, at least since the disclosure of the witness statement on 22 February 2008.

15. The Prosecution submits that the right of the accused to receive evidence sufficiently in advance of the trial has not been unduly prejudiced by the late disclosure of the unredacted version of the two documents.¹²

(ii) Investigator's note related to witness DRC-OTP-WWWW-0213

16. On 20 May 2008, the Prosecution contacted [REDACTED] DRC-OTP-WWW-0213 by telephone in order to discuss security matters [REDACTED]. During the telephone conversation, the [REDACTED] provided information on [REDACTED], which the Prosecution considers to be of both an incriminating and a potentially exculpatory nature. For this reason, on 27 May 2008 the Prosecution disclosed the one-page investigator's note¹³ in which

¹² The Prosecution notes that, without prejudice to its obligation to disclose all incriminating evidence in the regular disclosure process, the Defence will be informed of the fact that the [REDACTED] relates to [REDACTED] DRC-OTP-WWWW-0294 as of the notification of the present filing.

¹³ DRC-OTP-0194-0252. The document is attached hereto as Confidential – Prosecution and Defence Only Annex 3.

the information is recorded, under Article 67(2), and advised the Defence that it would seek the Trial Chamber's authorisation to add it to the evidence upon which the Prosecution will rely at trial.

17. The Prosecution now seeks authorisation to add the item to the evidence to be relied upon at trial. The Prosecution submits that, in combination with other evidence, the investigator's note is probative of the fact that [REDACTED] DRC-OTP-WWWW-0213 was [REDACTED] at the time relevant to the charges as confirmed against the Accused. The individual concerned will not be testifying at trial and the Prosecution will seek to tender the investigator's note from the bar table.

18. The Prosecution submits that the late disclosure of the investigator's note has occurred through no fault of the Prosecution's, since the information was not previously in its possession. Finally, the Defence has had access to the information contained in the investigator's note since its disclosure on 27 May 2008 and that delayed disclosure as incriminating evidence should therefore not prejudice the right of the accused to receive evidence sufficiently in advance of the trial.

(iii) Seven documents related to DRC-OTP-WWWW-0157

19. The Prosecution seeks to add seven documents related to [REDACTED] DRC-OTP-WWWW-0157 to the documents it intends to rely upon at trial. These seven documents will be disclosed on 28 November 2008 under Rule 77 as being material to the preparation of the Defence.

20. The first document is an initial screening¹⁴ [REDACTED] taken on 14 December 2005 that is less than one page in length, recording information that is not substantive and is in almost all respects duplicated in other disclosed statements [REDACTED]: the languages he speaks, the name of the interpreter present during the meeting, the witness' full name, his security concerns, [REDACTED], his religion, his place of origin, whether he has a passport, his educational background and the fact of a previous interview by a third party.

21. The screening was transferred to the evidence management system from which documents are tagged for disclosure in early 2008 in the context of the investigation into crimes allegedly committed by Mathieu NGUDJOLO and Germain KATANGA. The Prosecution in the case against Thomas LUBANGA had by that time already identified for disclosure the documents [REDACTED] and realized only subsequently that this document had been inadvertently omitted from that group.

22. As mentioned above, the information contained in the screening note is significantly duplicated in the Investigator's Note and in the

¹⁴ DRC-OTP-1016-0045. The document is attached hereto as Confidential – Prosecution and Defence Only Annex 4.

signed statement [REDACTED], both disclosed in December 2007. [REDACTED] The initial screening contains information that is relevant as part of the totality of the interview [REDACTED]. The Prosecution does not anticipate that the screening note will be tendered into evidence; [REDACTED].

23. Due to the fact that the screening primarily captures information of a biographical nature only, which the Defence has had by way of other disclosures since December 2007, the Prosecution submits that the Defence is not prejudiced by the late disclosure of this document.

24. The second, third and fourth documents can be considered as a group. The second document is entitled '[REDACTED]' for witness DRC-OTP-WWWW-0157.¹⁵ The document records the witness' [REDACTED].

25. The third document is a [REDACTED] belonging to witness DRC-OTP-WWWW-0157.¹⁶ The document records the witness' [REDACTED].

26. The fourth document is an Investigator's Note recording the manner in which the witness reported having obtained [REDACTED]. The Investigator's Note is dated 25 September 2008.¹⁷

27. These three documents are relevant to [REDACTED] who states he was a soldier in the UPC/FPLC. [REDACTED] In an initial Investigator's Note for this witness taken in January 2006, the

¹⁵ DRC-OTP-1018-0110. The document is attached hereto as Confidential – Prosecution and Defence Only Annex 5.

¹⁶ DRC-OTP-1015-0552. The document is attached hereto as Confidential – Prosecution and Defence Only Annex 6.

¹⁷ DRC-OTP-0202-0372. The document is attached hereto as Confidential – Prosecution and Defence Only Annex 7.

witness provides [REDACTED]. In the signed statement [REDACTED] taken in October 2006, [REDACTED] is provided as being in [REDACTED]. In a second signed statement [REDACTED] taken in 2007, the witness confirmed that [REDACTED] was [REDACTED]. The three documents upon which the Prosecution seeks to rely are additional, necessary elements [REDACTED].

28. The Prosecution did not disclose the Investigator's Note earlier because it was prepared in September 2008 and was not available before this time. The Prosecution submits that the Investigator's Note nonetheless provides relevant information on circumstances surrounding the [REDACTED].

29. The '[REDACTED]' was obtained during an interview with the [REDACTED] at the end of February 2008, in the context of the investigation into crimes allegedly committed by Mathieu NGUDJOLO and Germain KATANGA. The document was subsequently registered in the evidence management system in March 2008, by which time the Prosecution had already disclosed documents [REDACTED] and realized only subsequently that this document did not form part of the disclosed group.

30. The [REDACTED] was obtained and registered at the end of November 2007 in the context of the investigation into crimes allegedly committed by Mathieu NGUDJOLO and Germain KATANGA. The document was not at that time captured for disclosure in this case.

31. The Prosecution submits that any prejudice to the Defence as a result of the late disclosure of these three documents is minimized by the fact that the [REDACTED] does appear as being [REDACTED] in three documents that have been disclosed to the

Defence since 22 February 2008. In addition, the Prosecution currently anticipates that [REDACTED].

32. The fifth document is a scanned version of a [REDACTED] certificate¹⁸ for [REDACTED] DRC-OTP-WWWW-0157. It was not disclosed earlier due to the late registration of the document in the Office of the Prosecutor's evidence management system at the end of September 2008, which is exceptional as the Office of the Prosecutor's obligations are to register all items collected during the investigation. For the purposes of disclosure, the Prosecution was unable to identify this document until it was registered.

33. The Prosecution seeks to tender this document [REDACTED].

34. The Prosecution submits that any prejudice to the Defence of the late disclosure of this document is minimized by the fact that the Defence has had access to information on the existence of the [REDACTED] certificate since 17 December 2007. In paragraphs 27-30 of the signed statement of DRC-OTP-WWWW-0157 at DRC-OTP-1006-0054, the [REDACTED] details of [REDACTED] [REDACTED] and refers to the fact that [REDACTED] signed [REDACTED] [REDACTED]. The [REDACTED] certificate that the Prosecution now seeks to rely upon appears to be the one [REDACTED] as it bears the signature of [REDACTED]. In addition, as already indicated, [REDACTED] DRC-OTP-WWWW-0157 [REDACTED] thereby allowing more time for the Defence to investigate this certificate.

35. Lastly, the sixth and seventh documents related to [REDACTED] DRC-OTP-WWWW-0157 can also be considered as a group. The

¹⁸ DRC-OTP-0202-0244. The document is attached hereto as Confidential – Prosecution and Defence Only Annex 8.

sixth document is the statement referred to above from the [REDACTED] and contains information on the [REDACTED].¹⁹ In particular, the [REDACTED] explains the basis for her belief that [REDACTED] DRC-OTP-WWWW-0157, was [REDACTED].

36. The seventh document is an addendum to the statement of the [REDACTED]. It is an Investigator's Note containing three lines explaining that one of the investigators from the Office of the Prosecutor who had been participating in the interview was absent during the second and last day of the interview and accordingly his signature is missing from the statement.²⁰ The Investigator's Note does not touch upon matters of substance relative to the interview.

37. The Prosecution submits that, as described above, the interview with the [REDACTED] took place at the end of February 2008, in the context of the investigation into crimes allegedly committed by Mathieu NGUDJOLO and Germain KATANGA. It was registered in the evidence management system in March 2008, by which time the Prosecution had already disclosed documents [REDACTED] and did not subsequently realize for some time that additional materials had been collected and should be disclosed.

38. The [REDACTED] is not appearing to testify. The Prosecution will seek to tender the statement from the bar table.

39. The Prosecution submits that the fact that information on the [REDACTED] has been available since at least 17 December 2007 and [REDACTED] minimizes any prejudice to the Defence on account of the late disclosure of this statement.

¹⁹ DRC-OTP-1018-0103. The document is attached hereto as Confidential – Prosecution and Defence Only Annex 9.

²⁰ DRC-OTP-1018-0111. The document is attached hereto as Confidential – Prosecution and Defence Only Annex 10.

IV. Prosecution's Request for Limited Redactions under Rule 81(2)

40. The Prosecution is seeking limited redactions to the interview location at which the statement of [REDACTED] was taken. A version of this statement with redactions to the location of the interview has been attached hereto as Annex 9 while a redacted version that allows the Trial Chamber to view the words that the Prosecution seeks to redact is attached hereto as Confidential, Ex Parte – Prosecution Only Annex 11.²¹

41. The Prosecution confirms that the proposed Rule 81(2) redactions contained in the attached witness statement 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.

42. The Prosecution further confirms that the information contained in the proposed Rule 81(2) redactions is not relevant to the Prosecution's case or to current information of the Defence's case.

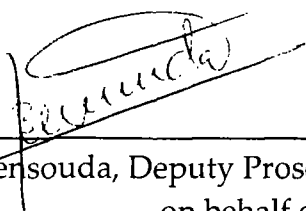
43. In order to provide the information to the Defence at the earliest opportunity, the Prosecution will proceed to disclose the statement with the requested redactions on 28 November 2008, pending a decision of the Chamber on this issue. Should the Chamber determine that the redactions are not justified, the Prosecution will re-disclose the statement immediately following such a decision in accordance with the Chamber's decision on the issue.

²¹ The Prosecution notes that the redaction of information related to this interview location was previously authorized by the Trial Chamber in relation to four different witness statements « Prosecution's Application for Lifting of Redactions, Non-Disclosure of Information, and Disclosure of Summary Evidence » dated 12 December 2007, ICC-01/04-01/06-1081 at Annexes 6, 14 and 33-39. Trial Chamber decision authorizing the requested redactions to interview location: Transcript, ICC-01-04-01-06-T-72-CONF-EXP-ENG, 18 January 2008, page 2, lines 8-17.

V. Request

44. Based on the foregoing, and pursuant to Articles 64, 69(3) and Rule 81(2) of the Rome Statute as well as Regulation 35 of the Regulations of the Court, the Prosecution seeks the Trial Chamber's authorisation:

- (i) to add the above-referenced ten documents to the evidence that the Prosecution will rely on at trial; and
- (ii) to redact the location of the interview pursuant to Rule 81(2) in one non-trial witness statement.



Fatou Bensouda, Deputy Prosecutor (Prosecutions)
on behalf of
Luis Moreno-Ocampo, Prosecutor

Dated this 4th day of December 2008
At The Hague, The Netherlands