

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 4 February 2009

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

**with Confidential - *Ex Parte* - Prosecution Only Annexes 1, 3, 5, 7, 9 and
Confidential – Prosecution and Defence Only Annexes 2, 4, 6, 8, 10-34**

**Prosecution's Request for Non-Disclosure of Information in the Statements of Five
Individuals providing Rule 77 Information and Request for an Order on Sufficiency
of Admissions Regarding Undisputed Facts**

Source: Office of the Prosecutor

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

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Introduction

1. The Prosecution requests authorisation to redact information in the statements of five witnesses, and for disclosure of alternative forms of the relevant information provided by two of the five witnesses. In support of this request, the Prosecution relies on Articles 54(3)(f), 61, 64, and 68, Rule 81(2) and (4), and Rule 77; the latter provision expressly makes disclosure subject to the restrictions on disclosure contained in the Statute and Rules 81 and 82.
2. For two witnesses, the Prosecution seeks to redact the identity of the witnesses and that of a local interpreter. If those redactions are authorized, the Prosecution intends to disclose the redacted statements, appropriate admissions and alternative evidence to satisfy its disclosure obligations. For the other three witnesses, the Prosecution does not seek to redact the identity of the witnesses but requests authorization for discrete redactions (i) under Rule 81(2), to the name of the local interpreter, OTP sources and the location of an interview and (ii) under Article 54(3)(f) and Rule 81(4), to the references to the identities and whereabouts of family members or guardians of the witnesses, where applicable.
3. The Prosecution submits that the proposed redactions will not hinder the Defence's ability to assess the Rule 77 information contained in the statements, and they do not impact on issues that are relevant to the Defence case. Accordingly, the Prosecution submits that the redactions are not prejudicial to or inconsistent with the rights of the Accused.
4. The Prosecution also requests an Order by the Trial Chamber that it need not continue to disclose, pursuant to Rule 77, materials of a *tu quoque* nature. The prosecution has proposed admissions and has demonstrated that it will not dispute the fact that children under the age of 15 were recruited and used by

other armed groups. It has also disclosed in excess of 150 items of evidence that contain information on the use of child soldiers in other armed groups in Ituri, including from individuals who will be appearing to testify.

5. In paragraphs 57-58 of the "Reasons for Oral Decision lifting the stay of proceedings",¹ the Trial Chamber stated that the Defence can rely on the Prosecution's admissions, which in fact places it in a more favourable position than if it had to seek to establish the point at trial. The *tu quoque* matters are no longer in dispute. It thus seems unnecessary to continue to spend judicial resources on reviewing requests for redactions to statements that continue to be taken in, at least, the investigation in *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, and to continue to spend prosecution resources on the continual effort to locate and disclose or seek redactions to newly-located or newly-received documents whose only value is that they provide information about matters that are not in dispute.

Prosecution's Submissions

Witness DRC-OTP-WWWW-0280

6. Witness DRC-OTP-WWWW-0280 provided two signed statements to the Office of the Prosecutor (OTP). Each contains *tu quoque* information that the Prosecution continues to treat as disclosable under Rule 77. The witness was admitted to the ICC Protection Program and accordingly his identity can be disclosed. The first of his two signed statements was the subject of a previous request for limited redactions.² This second signed statement was taken in the case *The Prosecutor v. Germain KATANGA and Mathieu NGUDJOLO CHUI*

¹ ICC-01/04-01/06-1644, 23 January 2009.

² ICC-01/04-01/06-1567-CONF-EXP, 22 December 2008. In that application, the Prosecution sought to redact the names and whereabouts of the witness's guardians, the names of the interpreter and forensic psycho-social experts involved in the interview, and the location of the interview.

(Katanga case). The Prosecution now requests limited redactions to that signed statement, as set out below.³

7. First, pursuant to Rule 81(2), the Prosecution requests authorisation to redact the references in the signed statement to local interpreter throughout the statement. In the Katanga case, the Single Judge authorised redactions to the names, initials and signatures of interpreters and psycho-social experts who assisted in interviewing witnesses and taking their Statements. The Single Judge reasoned that these individuals cannot be easily rotated given the limited number of persons with the necessary qualifications to perform these functions properly.⁴ In order to protect his safety it would be appropriate to redact the information concerned.
8. Next, also pursuant to Rule 81(2), the Prosecution requests authorisation to redact a reference in para. 100. The individual was mentioned in order to obtain new information in the Katanga case, the disclosure of which would be prejudicial to the ongoing investigation.
9. Finally, the Prosecution requests authorisation, pursuant to Rule 81(4), to redact the references to the identities and whereabouts of family members or guardians of witness DRC-OTP-WWWW-0280.⁵ The Prosecution requests these redactions

³ DRC-OTP-1020-0461. The Prosecution attaches the signed statement with proposed redactions in a format that permits the Trial Chamber to view the words that are proposed for redaction at Confidential-Ex Parte- Prosecution Only Annex 1. For the purpose of this application, the Prosecution attaches as Annex 2 – Confidential – Prosecution and Defence Only the proposed redacted version of the signed statement with opaque redactions.

⁴ ICC-01/04/01/07-90, paras. 61, 64; ICC-01/04/01/07-160, para. 58; ICC-01/04/01/07-249, para. 51; ICC-01/04/01/07-361, para. 55; ICC-01/04/01/07-427, para. 66; ICC-01/04/01/07-561, paras. 49, 50. Specific references to 'interpreters' were redacted in the majority of these public decisions, pursuant to redactions authorised in Confidential Ex Parte annexes to the decisions.

⁵ The Single Judge in the Katanga case extended the protection to guardians. See ICC-01/04-01/07-90, para. 30. In the Katanga case, the Single Judge authorised the redactions, holding that disclosing to the Defence the names and identifying information of family members or guardians of prosecution witnesses, including information that could lead to the disclosure of their current whereabouts (particularly those currently located in the Ituri district or the Kinshasa area), could pose an additional risk to their safety and/or physical well-being. ICC-01/04-01/07-90, paras. 31, 35, 36 and 38; ICC-01/04-01/07-160, paras. 43, 45, 47 and 48; ICC-01/04-01/07-249, paras.18, 19, 21, 23; ICC-01/04-01/07-361, paras.

to protect the safety of these persons and to maintain consistency with another Chamber of this Court.

10. The signed statement of witness DRC-OTP-WWWW-0280 was disclosed to the Defence with the proposed redactions on 19 January 2009. The Defence was informed that the Prosecution intended to file an application to authorise the redactions. Should the Trial Chamber decide not to authorise the redactions, the Prosecution will immediately disclose an unredacted version to the Defence.

Witness DRC-OTP-WWWW-0238

11. Witness DRC-OTP-WWWW-0238 was interviewed by the OTP under Article 55(2). The interview contains Rule 77 information. The witness was admitted to the ICC Protection Program and accordingly his identity can be disclosed.
12. The Prosecution requests limited redactions to the transcript of the witness's interview.⁶ They include, pursuant to Rule 81(4), redacting references to the identities and whereabouts of the witness's family members.⁷ Redactions to family members who are not in the ICCPP appear at pages 0288, 0293, 0296, 0297,

13, 15, 18 and 21; ICC-01/04-01/07-427, paras. 30, 33, 39 and 41; ICC-01/04-01/07-425, paras. 11, 13, 15 and 18; and ICC-01/04-01/07-568, paras. 16, 19, 21 and 24. The redactions were authorised in Confidential Ex Parte annexes to the decisions.

⁶ The transcript of the interview begins at DRC-OTP-0173-0265. The Prosecution attaches the interview transcript with proposed redactions in a format that permits the Trial Chamber to view the words that are proposed for redaction at Confidential- Ex Parte- Prosecution Only Annex 3. The signed statement has not yet been disclosed to the Defence. For the purpose of this application, the Prosecution attaches as Annex 4 – Confidential – Prosecution and Defence Only the proposed redacted version of the signed statement with opaque redactions.

⁷ The Single Judge in the Katanga case extended the protection to guardians and family members. See ICC-01/04-01/07-90, para. 30. In the Katanga case, the Single Judge held that disclosing to the Defence the names and identifying information of family members or guardians of prosecution witnesses, including information that could lead to the disclosure of their current whereabouts (particularly those currently located in the Ituri district or the Kinshasa area), could pose an additional risk to their safety and/or physical well-being. ICC-01/04-01/07-90, paras. 31, 35, 36, 38; ICC-01/04-01/07-160, paras. 43, 45, 47, 48; ICC-01/04-01/07-249, paras. 18, 19, 21, 23; ICC-01/04-01/07-361, paras. 13, 15, 18 and 21; ICC-01/04-01/07-427, paras. 30, 33, 39, 41; ICC-01/04-01/07-425, paras. 11, 13, 15, 18; and ICC-01/04-01/07-568, paras. 16, 19, 21, 24. The redactions were authorised in Confidential Ex Parte annexes to the decisions.

0298, 0299, 0300, 0306 and 0341. The Single Judge has already authorized these very redactions in the Katanga case.⁸

13. The Prosecution requests these redactions to protect the safety of these persons and to maintain consistency with another Chamber of this Court.
14. The transcript of the interview of witness DRC-OTP-WWWW-0238 was disclosed to the Defence with the proposed redactions on 9 January 2009. The Defence was informed that the Prosecution intended to file an application to authorise the redactions. Should the Trial Chamber decide not to authorise the redactions, the Prosecution will immediately disclose an unredacted version to the Defence.

Witness DRC-OTP-WWWW-0312

15. Witness DRC-OTP-WWWW-0312 provided a signed statement to the OTP.⁹ The statement contains *tu quoque* Rule 77 information. The witness has consented to the disclosure of her identity.
16. The Prosecution requests authorisation, pursuant to Rule 81(2), to redact the references to the interview location contained on the first page and again in paragraph 53 of the statement.
17. The Prosecution recalls that in its oral decision of 18 January 2008, the Trial Chamber authorised redactions of references to this location.¹⁰

⁸ The Single Judge authorised these redactions in the Sixth Decision on Redactions. See ICC-01/04-01/07-413.

⁹ DRC-OTP-1018-0066. The Prosecution attaches the Investigator's Report with proposed redactions in a format that permits the Trial Chamber to view the words that are proposed for redaction at Confidential-Ex Parte- Prosecution Only Annex 5. For the purpose of this application, the Prosecution attaches as Annex 6 – Confidential – Prosecution and Defence Only the proposed redacted version of the signed statement with opaque redactions.

¹⁰ ICC-01/04-01/06-T-72-Conf-Exp-ENG ET, page 2, lines 8-17.

18. Next, the Prosecution requests authorisation, pursuant to Rule 81(2), to redact the reference in paragraph 53 of the statement to a Prosecution source.
19. Finally, the Prosecution requests authorisation, pursuant to Rule 81(4), to redact the references to the name of the witness's family members.
20. The signed statement of witness DRC-OTP-WWWW-0312 was disclosed to the Defence with the proposed redactions on 19 January 2009. The Defence was informed that the Prosecution intended to file an application to authorise the redactions. Should the Trial Chamber decide not to authorise the redactions, the Prosecution will immediately disclose an unredacted version to the Defence.

Witness DRC-OTP-WWWW-0102

21. Witness DRC-OTP-WWWW-0102 provided an Investigator's note and a signed statement to the OTP, under two different names. Both statements contain Rule 77 information. Although the names are different, the interviewee is the same person. The witness is not under the ICC Protection Program. The first of his two statements was the subject of a previous request for redactions¹¹ and for disclosure of an admission of fact and alternative evidence to satisfy the Prosecution's disclosure obligations.
22. The Prosecution now requests redactions to the second statement.¹²

¹¹ ICC-01/04-01/06-1567-CONF-EXP, 22 December 2008. In that application, the Prosecution sought to redact the name and identifying information of the witness under Rule 81(4) and the name and local employer of an OTP intermediary under Rule 81(2), and the OTP informed the Chamber of Rule 81(1) redactions.

¹² DRC-OTP-0132-0044. The Prosecution attaches the signed statement with proposed redactions in a format that permits the Trial Chamber to view the words that are proposed for redaction at Confidential-Ex Parte- Prosecution Only Annex 7. For the purpose of this application, the Prosecution attaches as Annex 8 – Confidential – Prosecution and Defence Only the proposed redacted version of the signed statement with opaque redactions.

23. First, the Prosecution requests authorisation, pursuant to Rule 81(4), to redact the references to the identity of the witness. The Prosecution proposes disclosing a redacted version of Witness DRC-OTP-WWWW-0102's statement.
24. The Prosecution requests authorisation, pursuant to Rule 81(2), to redact the references in the signed statement to local interpreter.
25. Next, the Prosecution requests authorisation, pursuant to Article 54(3)(f), to redact a reference to the name of two victims in paragraph 59 of the statement. The Prosecution submits that these individuals could be at risk if their names are disclosed.
26. The signed statement of witness DRC-OTP-WWWW-0102 was disclosed to the Defence with the proposed redactions on 19 January 2009. The Defence was informed that the Prosecution intended to file an application to authorise the redactions. Should the Trial Chamber decide not to authorise the redactions, the Prosecution will immediately disclose an unredacted version to the Defence.
27. The Prosecution submits a list of alternative evidence to cover the Rule 77 information contained in this statement due to the fact that it requests redactions to the identity of the witness.¹³
28. In addition, the Prosecution submits proposed admissions of fact for the Chamber's consideration to cover the information provided by the witness:

Proposed Admissions: (i) *In July 2002, Uganda supported the UPC/FPLC, and was present during attacks.* (ii) *Soldiers of Rwandan origin were present in the UPC/FPLC.*

¹³ The proposed alternative evidence is listed in Confidential – Prosecution and Defence Only Annex 11 and each item is attached in Confidential – Prosecution and Defence Only Annexes 13-25.

Witness DRC-OTP-WWWW-0090

29. Witness DRC-OTP-WWWW-0090 was interviewed by the OTP in May 2005 from which an unsigned Investigator's Report was generated. The Investigator's Report contains Rule 77 information and Article 67(2) information that is potentially exonerating, on the role and involvement of outside actors in the conflict in Ituri. The witness is not under the ICC Protection Program. The Prosecution requests redactions to this Investigator's Report.¹⁴
30. First, the Prosecution requests authorisation, pursuant to Rule 81(4), to redact the references to the identity of the witness. The Prosecution proposes disclosing a redacted version of the Investigator's Report from Witness DRC-OTP-WWWW-0090's interview.
31. The Prosecution also informs the Trial Chamber that it has made one redaction under Rule 81(1) in paragraph 28 to protect internal work product.
32. The Investigator's Report for witness DRC-OTP-WWWW-0090 was disclosed to the Defence with the proposed redactions on 23 January 2009. The Defence was informed that the Prosecution intended to file an application to authorise the redactions. Should the Trial Chamber decide not to authorise the redactions, the Prosecution will immediately disclose an unredacted version to the Defence.
33. The Prosecution submits a list of alternative evidence to cover the Rule 77 information contained in this statement due to the fact that it requests redactions to the identity of the witness.¹⁵

¹⁴ DRC-OTP-0113-0260. The Prosecution attaches the Investigator's Report with proposed redactions in a format that permits the Trial Chamber to view the words that are proposed for redaction at Confidential-Ex Parte- Prosecution Only Annex 9. The signed statement has not yet been disclosed to the Defence. For the purpose of this application, the Prosecution attaches as Annex 10 – Confidential – Prosecution and Defence Only the proposed redacted version of the signed statement with opaque redactions.

¹⁵ The proposed alternative evidence is listed in Confidential – Prosecution and Defence Only Annex 12 and each item is attached in Confidential – Prosecution and Defence Only Annexes 26-34.

34. In addition, the Prosecution submits proposed admissions of fact for the Chamber's consideration to cover aspects of the information provided by the witness:

Proposed Admissions: (i) *Rwandaphones held posts in the UPC/FPLC.* (ii) *External actors were involved in the conflict in Ituri.* (iii) *There was a Pro-Rwanda faction led by DIDO within the PUSIC and a pro-Kinshasa faction led by KAHWA and inclined towards UGANDA.*

Ex Parte Filing

35. The Prosecution submits that the classification of Attachment A and five annexes to the present filing and annexes as *Confidential-Ex Parte – Prosecution Only* is necessary.¹⁶

36. The present filing seeks relief on the basis of provisions on protective measures. The Prosecution submits that the information discussed must be treated confidentially and cannot be disclosed to the Defence in advance of a determination as to whether disclosure is necessary.¹⁷ Moreover, the Statute provides that the applications pursuant to Rule 81(2) "shall be heard on an *ex parte* basis". Since this application is made, in part, pursuant to Rule 81(2), an *ex parte* classification is justified.

37. The Prosecution submits that no alternative procedures exist to deal with this request. The rights of the Accused are maintained to the extent that he will be made aware of the filing as the main submission is public and he will receive as

¹⁶ In the Trial Chamber's 'Decision on the procedures to be adopted for *ex parte* proceedings', of 6 December 2007, the Trial Chamber determined that *ex parte* procedures are only to be used exceptionally when other procedures are not available, and that the Chamber must ensure that the use of the *ex parte* procedure is proportionate given the potential prejudice to the Accused (ICC-01/04-01/06-1058, para. 12).

¹⁷ 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.

annexes the redacted version of all statements that are the subject of this application for non-disclosure of information.

Requested Relief

38. Based on the foregoing, the Prosecution requests:

- (i) authorisation for the non-disclosure of information contained in the witness statements of WWW-0280, 0238, 0312, 0102 and 0090, in accordance with Articles 54(3)(f), 61, 64 and 68, and Rules 77, 81(2) and 81(4);
- (ii) an order that alternative forms of disclosure cover the relevant information from witnesses WWW-0102 and 0090, as identified; and
- (iii) an order that the Prosecution need not continue to disclose, under Rule 77, materials of a *tu quoque* nature.



Luis Moreno-Ocampo
Prosecutor

Dated this 4th day of February 2009
At The Hague, The Netherlands