



Original: English

No.: ICC-01/04-01/06

Date: 14 September 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 Redacted Version

Prosecution's Information on Filing # 1820 for Non-Disclosure of Meta-data

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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**Victims Participation and Reparations
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Other

Pursuant to the instructions of Trial Chamber I¹ the Prosecution hereby provides information on its application # 1820 for 'Non-Disclosure of Sources contained in the meta-data in compliance with the Consolidated E-Court Protocol'.

***Ex Parte* Filing**

1. The Prosecution submits that the classification of this filing as Confidential-*Ex Parte* – Prosecution Only is necessary² as it seeks relief on the basis of protective measures. The information discussed must be treated confidentially, and cannot be disclosed to the Defence.³
2. The Prosecution submits that no alternative procedures exist to deal with this request. The rights of the Accused are maintained as a public redacted version will be filed setting out the basis for the filing.

Background

3. On 16 April 2009, the Prosecution filed a 'Prosecution's Application for Non-Disclosure of Sources contained in the meta-data in compliance with the Consolidated E-Court Protocol' (16 April 2009 Application).⁴ Amongst others, it requested the non-disclosure of the names of two individuals, REDACTED (DRC-OTP-WWWW-0154) and REDACTED (DRC-OTP-WWWW-0120).

¹ Email received on 08 September 2009..(email)

² 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).

³ 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.

⁴ ICC-01/04-01/06-1820-Conf-Exp, 16 April 2009. For the background of this filing see para. 1.

4. Both individuals have been subject to similar requests before Trial Chamber II in the *Prosecutor v. Germain KATANGA and Mathieu NGUDJOLO CHUI case* (Katanga case).
5. In the e-mail Trial Chamber I indicated that 'Trial Chamber II has issued decisions granting protective measures for these two individuals'. The Chamber therefore requests the prosecution 'to provide it with the relevant information on Trial Chamber II's decisions which impacts on the Prosecution's Application' and to identify 'each relevant part of the application(s) and decision(s)'.

Information

REDACTED (DRC-OTP-WWWW-0120)

6. On 16 February 2009, the Prosecution filed its request for non-disclosure of the identity of REDACTED before Trial Chamber II (16 February 2009 Request).⁵ In paragraphs 28 to 31 of the request, it explained in general terms the need for permanent redactions (i.e. throughout the trial) to the identities of the family members of witnesses pursuant to Rule 81(4).
7. In Annex B to the 16 February 2009 Request, the Prosecution specified its concerns in respect of REDACTED.⁶ More specifically it indicated that the individual is not in the International Criminal Court Protection Program (ICCPP), and that redactions would safeguard the choice of each witness to cooperate with the Office of the Prosecution without having to fear for the security of his family.
8. In the same Annex, the Prosecution also referred to a decision of Trial Chamber II of 10 February 2009, in which Trial Chamber II had granted redactions to the identity

⁵ ICC-01/04-01/07-902-Conf-Exp, 16 February 2009.

⁶ ICC-01/04-01/07-902-Conf-Exp-Anx B, 16 February 2009, pages 1 and 2.

of family members REDACTED.⁷ In the Annex, the Prosecution further indicated that REDACTED. The Prosecution argued that this fact needed to be taken into account when deciding on the implementation of protective measures in respect of witnesses and their family.⁸

9. On 7 April 2009, Trial Chamber II issued a decision on the request.⁹ In paragraphs 32 to 37, the Chamber addressed the issue of family members of witnesses. It concluded:

'37. The Chamber considers, as does the Prosecutor, that disclosing the identity of the family members of witnesses as well as information which enables them to be identified or located might jeopardise their safety, especially when they are in Ituri. Moreover, the Chamber is of the opinion that some of the redactions requested constitute an adequate measure to lessen that risk and that no other less restrictive measure could achieve the same result inasmuch as the family members of the witnesses in question are not covered by the Court's witness protection programme.

38. The Chamber considers that the redactions sought in the format proposed by the Prosecutor do not prejudice the rights of the accused, since the documents can still be read, understood and used by the Defence. The Chamber is therefore in favour of authorising the redactions sought, but is of the view that it can only authorise them on a temporary basis and not until the end of the trial, as, in its opinion, such a measure seems excessive in relation to the exercise of the rights of the Defence. For the reasons stated at paragraph 19, the Chamber considers that the Defence will be able to examine the documents and see for itself whether or not it considers the redacted information to be necessary for the preparation of the case of the accused. It therefore authorises the redactions until the thirtieth day prior to the date of the trial'.

10. On 10 August 2009, the Prosecution in the Katanga case renewed its request to redact the identities of family members of witnesses.¹⁰ The decision of Trial Chamber II is pending.

REDACTED (DRC-OTP-WWWW-0154)

11. On 20 March 2009, the Prosecution filed its request for non-disclosure of the identity of REDACTED before Trial Chamber II (20 March 2009 Request).¹¹ In paragraphs 13

⁷ The decision concerned is ICC-01/04-01/07-888-Conf-Exp, 10 February 2009, para. 30.

⁸ ICC-01/04-01/07-902-Conf-Exp-Anx B, 16 February 2009, pages 1 and 2.

⁹ ICC-01/04-01/07-1036-Conf-Exp, 7 April 2009.

¹⁰ ICC-01/04-01/07-1359-Conf-Exp, 10 August 2009, para. 7.

¹¹ ICC-01/04-01/07-971-Conf-Exp, 20 March 2009.

to 15 of the request, the Prosecution explained in general terms the need for permanent redactions (i.e. throughout the trial) to the identities of intermediaries (pursuant to Rule 81(2)).

12. In Annex F to the 20 March 2009 Request, the Prosecution specified its concerns in respect of REDACTED.¹² More specifically, The Prosecution indicated that the individual was living REDACTED and that the disclosure of his identity could expose him and his family, as well as the persons he put in contact with the Office of the Prosecution. As such, non-disclosure of his identity would not only protect ongoing investigations but would also ensure the security of Prosecution witnesses with whom he is in contact.

13. In the same Annex, the Prosecution also referred to a decision of Trial Chamber II of 10 February 2009, in which Trial Chamber II had granted redactions to the identity of intermediaries.¹³ The Prosecution reiterated that several NGOs had been victims of threats and aggressions (citing examples of REDACTED).¹⁴ In the Annex, the Prosecution further indicated that REDACTED. The Prosecution argued that this fact needed to be taken into account when deciding on the implementation of protective measures in respect of any person who is cooperating with the Court, including intermediaries and Prosecution sources.¹⁵

14. On 8 April 2009, Trial Chamber II issued a decision on the request.¹⁶ In paragraphs 19 to 29, the Chamber addressed the issue of intermediaries. It concluded:

‘26. The Chamber considers that disclosing the identity of these intermediaries or ICC staff could only increase the threats hanging over any person in the DRC who cooperates with the Court. Accordingly, it considers that it is necessary to redact the names of persons and organisations who act in this capacity between the Court and potential witnesses in order to ensure their protection. It is also mindful of the important role played by these sources in the proper conduct of the investigations and of the risk that they might refuse to continue to

¹² ICC-01/04-01/07-971-Conf-Exp-Anx F, 20 March 2009, pages 1 and 2.

¹³ The decision concerned is ICC-01/04-01/07-888-Conf-Exp, 10 February 2009, para. 21.

¹⁴ ICC-01/04-01/07-971-Conf-Exp-Anx F, 20 March 2009, pages 1 to 4.

¹⁵ ICC-01/04-01/07-971-Conf-Exp-Anx F, 20 March 2009, pages 1 to 4.

¹⁶ ICC-01/04-01/07-1042-Conf-Exp, 8 April 2009.

cooperate with the Office of the Prosecutor and, more generally, with the Court, in the event that their names were disclosed. Redacting their names is therefore necessary for the protection of the investigations, and it does not appear feasible to resort to less restrictive measures.

27. The Chamber considers that these redactions do not interfere with the overall intelligibility of the documents. The Defence will, in fact, have access to most of the information contained therein. However, the Chamber is of the view that it cannot authorise the redactions until the end of the trial as it does not believe that such a measure, under the circumstances, takes sufficient account of the rights of the Defence. At this stage, it is difficult for the Chamber to conclusively assess the usefulness and relevance of such information for the Defence. It is actually up to the Defence to make such an assessment, since it is the Defence and the Defence alone which determines the strategy it intends to adopt.

28. In this case, the Defence has so far been unable to fully assess the value of this information, as the applications only describe it in general terms. It will have the opportunity to analyse and assess the usefulness and relevance of the redacted documents once it has received them, and, if necessary, will be able to submit an application for reconsideration to the Chamber prior to the commencement of the trial. In that event, the Chamber will assess the actual impact of the redactions sought, in the light of the arguments advanced by the Defence. For his part, the Prosecutor may, no later than 45 days prior to the commencement of the trial, also request that these redactions be maintained.

29. Having thus weighed the interests at stake, the Chamber finds that the redactions sought are justified until the thirtieth day prior to the commencement of the trial’.

15. On 10 August 2009 (i.e. 45 days before the planned trial date), the Prosecution in the Katanga case renewed its request to redact the identities of intermediaries who work and reside in Ituri.¹⁷ This decision is pending.

16. The Prosecution submits the afore-mentioned information to the Trial Chamber in order to assist it in determining the matter.



Luis Moreno-Ocampo
Prosecutor

Dated this 14th day of September 2009
At The Hague, The Netherlands

¹⁷ ICC-01/04-01/07-1359-Conf-Exp, 10 August 2009, para. 7.