

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 2 October 2009

TRIAL CHAMBER I

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

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

Public

**Decision on the prosecution's request for an order on the disclosure of *tu quoque*
material pursuant to Rule 77**

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Other

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, delivers the following decision ("Decision") on part of the "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"¹:

I. Background and Submissions

1. On 21 December 2007 the Office of the Prosecutor ("prosecution") informed the Chamber that it had disclosed to the defence excerpts of witness statements containing potentially exculpatory or Rule 77 material, some of which contained redactions that had not been previously authorised.² It submitted that the witness statements contained information that falls to be disclosed in accordance with Article 67(2) of the Rome Statute ("Statute") or Rule 77 of the Rules of Procedure and Evidence ("Rules"), but that the witnesses would be at risk if their identities are disclosed.³ It requested "the authorisation 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)".⁴
2. At a status conference on 18 January 2008, the Chamber made the following public order:⁵

¹ 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, 4 February 2009, ICC-01/04-01/06-1664; Annex A to 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, 4 February 2009, ICC-01/04-01/06-1664-Conf-Exp-AnxA.

² Prosecution's Application for Non-Disclosure of Information on the basis of Article 54(3)(f), 21 December 2007, ICC-01/04-01/06-1102, paragraphs 4 and 5.

³ *Ibid.*, paragraphs 6-8.

⁴ *Ibid.*, paragraph 10.

⁵ Transcript of hearing of 18 January 2008, ICC-01/04-01/06-T-71-ENG, page 10, lines 10-13.

The Prosecution are not under an obligation to serve material that relates to the general use of child soldiers in the DRC.

3. Following a request for leave to appeal,⁶ which was granted by the Chamber,⁷ in its judgment of 11 July 2008, the Appeals Chamber held that the appellant “sufficiently demonstrated that the material relating to the general use of child soldiers in the DRC is material to the preparation of his defence”, reversed the Trial Chamber’s oral decision of 18 January 2008 and held that the “Trial Chamber will have to determine whether or not the appellant has a right to access the entire statements containing information on the general use of child soldiers”.⁸
4. On 13 June 2008, the Trial Chamber ordered a stay of the proceedings.⁹ The Chamber lifted the stay at the status conference on 18 November 2008,¹⁰ once the issues that necessitated the imposition of the stay had been resolved. The Chamber provisionally set the date for the commencement of the trial as 26 January 2009.¹¹
5. In light of the Appeals Chamber judgement of 11 July 2008, on 18 November 2008, the Trial Chamber invited the parties and participants to make submissions on the issue of disclosure of *tu quoque* information.¹²
6. At a status conference of 25 November 2008, the prosecution advised the Trial Chamber that the witness statements of 43 individuals contained *tu quoque*

⁶ Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision orale de la Chambre de première instance I rendue le 18 janvier 2008 (*Règle 155 du Règlement de procédure et de preuve*), 28 January 2008, ICC-01/04-01/06-1134.

⁷ Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, 6 March 2008, ICC-01/04-01/06-1210; Corrigendum to Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, 14 March 2008, ICC-01/04-01/06-1210-Corr.

⁸ Judgement on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433 OA 11, paragraphs 82 and 86.

⁹ Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401.

¹⁰ Transcript of hearing on 18 November 2008, ICC-01/04-01/06-T-98-ENG, page 3, lines 22-25. page 4, line 1.

¹¹ *Ibid.*, page 7, lines 23-25.

¹² *Ibid.*, page 5, lines 14-22.

information and that they had been disclosed in excerpted form to the defence.¹³ The prosecution noted that some of the excerpts contained redactions relating to the identity of the witnesses.¹⁴

7. At the status conference of 25 November 2008 the defence submitted that the information regarding the use of child soldiers provided by the prosecution is not *tu quoque* evidence, but rather it is information that is relevant for understanding the charges and preparing the defence. The defence requested disclosure of all the non-redacted statements for the preparation of the accused's case, noting that summaries or analogous information do not enable proper investigation of the relevant area of evidence.¹⁵
8. During the status conference the Chamber ordered the prosecution to provide the Chamber with the undisclosed material in full, non-redacted form and in the format in which the prosecution proposes to disclose the materials to the defence,¹⁶ along with any proposed admissions of fact¹⁷ and alternative evidence¹⁸ relevant to the information in each statement. Finally, the Chamber ordered the prosecution to provide an update on the security situation of each of the 43 witnesses whose identity the prosecution sought to protect, to the extent that it is available.¹⁹
9. On 5 December 2008 the prosecution filed the "Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information"²⁰ and the "Prosecution's Request for Non-Disclosure of the

¹³ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 28, lines 14-17.

¹⁴ *Ibid.*, page 28, lines 20-22.

¹⁵ *Ibid.*, page 32, lines 12-22.

¹⁶ *Ibid.*, page 34, lines 12-16 and page 37, lines 7-10.

¹⁷ *Ibid.*, page 31, lines 3-9, page 34, lines 12-16, page 37, lines 10-13.

¹⁸ *Ibid.*, page 30, line 22 to page 31, line 2.

¹⁹ *Ibid.*, page 35, lines 1-13.

²⁰ Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542.

Identity of Twenty-Five Individuals providing *Tu Quoque* Information”.²¹

These filings are the subject of separate decisions.²²

10. On 19 December 2008 the prosecution filed a request for leave to implement redactions in the statements of 15 of the 18 witnesses providing *tu quoque* information whose identities were disclosed to the defence.²³ This will be addressed in a separate decision.

11. On 4 February 2009 the prosecution submitted requests for further redactions and an “Order on Sufficiency of Admissions Regarding undisputed facts”.²⁴ Moreover, the prosecution requested an order from the Trial Chamber that it need not disclose further materials of a *tu quoque* nature. While the question of redactions will be dealt with separately, the issue of the disclosure of further materials of a *tu quoque* nature is the subject of this decision. The prosecution observes that it has proposed admissions on, and it has demonstrated that it will not dispute, the fact that children under the age of 15 were recruited and

²¹ Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information, 5 December 2008, ICC-01/04-01/06-1545-Conf-Exp; The public redacted version was filed on 10 December 2008, ICC-01/04-01/06-1552.

²² Decision on the “Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information” of 5 December 2008 and “Prosecution’s Request for Non-Disclosure of Information in One Witness Statement containing Rule 77, 12 June 2009, ICC-01/04-01/06-1965-Conf-Exp. The public redacted version was issued on 24 June 2009 as Annex 2 to the Decision issuing confidential and public redacted versions of “Decision on the ‘Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information’ of 5 December 2008 and ‘Prosecution’s Request for Non-Disclosure, ICC-01/04-01/06-1980-Anx2; Decision on the “Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” of 5 December 2008, 9 April 2009, ICC-01/04-01/06-1814-Conf. The final corrigendum and the public redacted version were issued on 2 June 2009 as Annexes to the Decision issuing corrected and redacted versions of “Decision on the “Prosecution’s Request for Non-Disclosure of the Identity of Twenty Five Individuals providing *Tu Quoque* Information” of 5 December 2008”, ICC-01/04-01/06-1924.

²³ Prosecution’s Request for Non-Disclosure of Information in the Statements of Fifteen Individuals providing *Tu Quoque* Information, 19 December 2008, ICC-01/04-01/06-1567-Conf-Exp; Prosecution’s Submission of a Public Redacted Version of its 19 December 2008 “Prosecution’s Request for Non-Disclosure of Information in the Statements of Fifteen Individuals providing *Tu Quoque* Information”, 24 December 2008, ICC-01/04-01/06-1574 with Annex1.

²⁴ 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, 4 February 2009, ICC-01/04-01/06-1664. A confidential *ex parte* prosecution only version of the request was submitted as Annex A to the public filing, ICC-01/04-01/06-1664-Conf-Exp-AnxA.

used by other armed groups.²⁵ It observes that it has disclosed more than 150 items of evidence that contain information on the use of child soldiers in other armed groups in Ituri, including from individuals who are witnesses for the prosecution.²⁶ It expresses the view that it is unnecessary to continue to expend judicial resources, not least in reviewing requests for redactions to statements that continue to be taken as part of the investigation in the case of *The Prosecutor v. German Katanga and Mathieu Ngudjolo Chui (Katanga and Ngudjolo case)*, and it highlights the expenditure of prosecution resources in its efforts to locate and disclose, or seek redactions to, newly-located or recently-received documents, the only value of which is that they provide information about matters that are not in dispute.²⁷

12. On 17 February 2009 the defence responded to the requests of the prosecution filed on 4 February 2009.²⁸ *Inter alia*, it opposes the non-disclosure of yet further information relevant to the recruitment and use of child soldiers by armed groups other than the FPLC, and it relied on the finding of the Appeals Chamber that this information is necessary for the preparation of the defence.²⁹ The defence submits that the fact that the prosecution has already submitted material of this kind does not diminish the importance of obtaining all relevant information.³⁰ Moreover, the defence submits that the admissions of fact proposed by the prosecution are of no real assistance for providing an understanding of the context and the extent of the recruitment and use of child soldiers by other armed groups.³¹

²⁵ 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, 4 February 2009, ICC-01/04-01/06-1664, paragraph 4.

²⁶ *Ibid.*, paragraph 4.

²⁷ *Ibid.*, paragraph 5.

²⁸ Réponse de la Défense à la "Prosecution's Request for Non-Disclosure of Information in the Statement of Five Individuals providing Rule 77 and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts", depose le 4 février 2009, 17 February 2009, ICC-01/04-01/06-1702.

²⁹ *Ibid.*, paragraphs 4 and 5.

³⁰ *Ibid.*, paragraph 5.

³¹ *Ibid.*, paragraph 6.

II. Relevant provisions and decisions

13. The following provisions of the Statute and Rules are relevant to a consideration of the prosecution's requests:

Article 64

Functions and powers of the Trial Chamber

[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

[...]

(e) Provide for the protection of the accused, witnesses and victims.

(f) Rule on any other relevant matter.

[...]

Rule 77

Inspection of material in possession or control of the Prosecutor

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82 permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

III. Analysis

14. As the prosecution is not intending to introduce information relating to the general use of child soldiers in the DRC by groups other than the UPC/FPLC as evidence in the case, and as the relevant material was not obtained from, and did not belong to, the accused, Rule 77 of the Rules applies insofar as the information is "material to the preparation of the defence."
15. The Chamber notes that the prosecution will not dispute that children under the age of 15 were recruited and used by other armed groups, and that the prosecution has proposed relevant admissions of fact and has disclosed in

excess of 150 items of evidence that contain information on the use of child soldiers in other armed groups in Ituri. It further observes that as investigations are ongoing in the *Katanga and Ndugjolo* case, the prosecution will have to expend – in all likelihood – significant resources in the effort to locate and disclose, or seek redactions, to newly-located or recently-received documents whose only value is that they provide information about matters that are not in dispute, if the present disclosure obligation is maintained.

16. The defence, on the other hand, argues that continuing disclosure of material of a *tu quoque* nature is important in order for it to gain a full understanding of the “child soldier phenomenon” in Ituri. The Chamber notes that the defence submits that although it has received some material on this issue, this does not diminish the importance of receiving all pertinent information. The defence accepts that the proposed admissions of fact shed some light on the context and scope of the use of child soldiers.

17. The Appeals Chamber in its judgment of 11 July 2008, determined that the Trial Chamber had interpreted Rule 77 of the Rules too narrowly when it concluded, first, that this area of evidence does not relate to a live issue in the case, and, second, that it will not assist the accused.³² The Appeals Chamber concluded that the accused had sufficiently demonstrated that material relating to the general use of child soldiers in the DRC is relevant to the preparation of the defence.³³

18. In essence, the Appeals Chamber identified three reasons why the recruitment and use of child soldiers by other armed groups is relevant to the preparation of the defence: (1) it assists in understanding the situation in Ituri at the relevant time; (2) it assists on the phenomenon of the use of child soldiers and

³² Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433 OA 11, paragraph 77.

³³ *Ibid.*, paragraphs 82.

their demobilisation in the DRC; and (3) it will contribute to the sentencing phase of the proceedings, if relevant.³⁴

19. The Appeals Chamber identified Rule 81 of the Rules as the legal basis for determining the scope of the disclosure obligations of the prosecution in relation to material on the general use of child soldiers in the DRC.³⁵

20. Against this background, the Chamber concludes that the disclosure obligations of the Prosecutor as regards material on the general use of child soldiers pursuant to Rule 77 of the Rules are subject to a two-fold test. First, the information must be material to the preparation of the defence. If that is satisfied, then, second, the use of the word “shall” in Rule 77 of the Rules indicates that an order for non-disclosure can only be based on “restrictions on disclosure as provided for in the Statute and in rules 81 and 82”.

21. The next question is whether the further information identified by the prosecution on the general use of child soldiers by armed groups in Ituri, above and beyond that which has already been disclosed, continues to be material for the preparation of the defence in the sense of Rule 77 of the Rules, and in consequence must continue to be served.

22. Given the prosecution is not disputing that other armed groups recruited and used child soldiers, and it has provided a number of admissions of fact in this regard, it is necessary to examine whether yet further information is necessary to provide the defence with a full understanding of the general situation and the scope of the phenomenon, and to assist it in preparing for the sentencing phase, if relevant.

³⁴ *Ibid.*, paragraph 82.

³⁵ *Ibid.*, paragraph 70.

23. As set out above, the prosecution has submitted over 150 items of evidence containing information on the use of child soldiers in other armed groups in Ituri, including from individuals who have testified. Having reviewed this information, the Chamber is persuaded that the defence has been supplied with a more than sufficient body of information that: (i) explains the general context of the conflict in Ituri, (ii) identifies the background for the phenomenon of the use of child soldiers, (iii) addresses the extensive recruitment and use of child soldiers by the majority of the armed groups in Ituri, and (iv) addresses in detail their demobilisation. Even though the detail of the descriptions varied between the various child soldiers themselves and the other witnesses, the information provided – to the extent it confirms the context and the nature of the phenomenon of the use of child soldiers – is repetitive or is overlapping in its nature. These latter differences are irrelevant to, and they do not undermine, the generality of the background and contextual evidence that has been provided on this area. Moreover, the Chamber notes that these issues have been addressed by the experts who have been called to give evidence, and who were questioned extensively on the issue. Given the clear lack of dispute *inter partes* on this issue, and given the extent of the information already provided, it would be unnecessary and disproportionate to order continued disclosure on this issue. In essence, further material will not provide additional assistance to the defence under Rule 77. The Chamber will revisit this issue as necessary, and including the need for supplementary evidence for sentencing, if that stage is reached in this case.

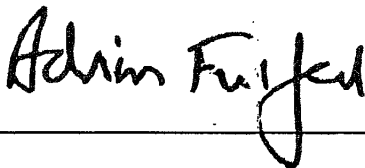
24. For these reasons, the Chamber finds that further information relating to the general use of child soldiers by groups other than the UPC, above and beyond that already disclosed, is unnecessary for the preparation of the defence (*viz.* it would have no material effect). It does not, therefore, fall into the scope of the disclosure obligations under Rule 77 of the Rules. This does not, however,

exempt the prosecution from fulfilling its disclosure obligations relating to any potentially exculpatory material within Article 67 (2) of the Statute or as regards other Rule 77 material outwith this category.

Conclusion

25. For these reasons, the Chamber authorises the prosecution not to disclose further information on the recruitment and use of child soldiers by armed groups other than the UPC/FPLC.

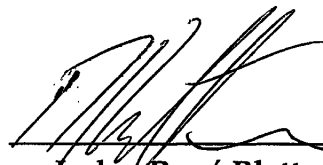
Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 2 October 2009

At The Hague, The Netherlands