

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 10 December 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

**Redacted Decision on the prosecution's application for non-disclosure of
information filed on 17 July 2009**

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

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Section**

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following Decision on the “Prosecution’s Application for Non-disclosure of Information”:¹

I. Background and Submissions

1. On 25 June 2009, the Chamber issued its “Preliminary and Final Decisions on the group of potential court witnesses”,² in which, *inter alia*, it indicated certain preliminary views in order to assist the parties and participants in formulating their final submissions concerning the individuals who, following contact by the Registry, indicated they will cooperate with the Court,³ and who may be called to give evidence if the Chamber considers this step necessary.
2. The Chamber indicated that WWW-0003, WWW-0005, and WWW-0034 should be treated as potentially exculpatory witnesses whose identities could be provided to the accused, and thus the Office of the Prosecutor (“prosecution”) was ordered to disclose to the defence forthwith the materials relevant to each of them, in suitable, non-redacted form (that included the identity and current whereabouts of the witnesses).⁴
3. In an application submitted on 17 July 2009, the prosecution requested leave to withhold certain information in these materials, pursuant to Articles 54(3)(f) and 68 of the Rome Statute (“Statute”) or Rule 81(2) of the Rules of Procedure and Evidence (“Rules”), and it underlined that Rule 81(1)

¹ Prosecution’s Application for Non-Disclosure of Information, 17 July 2009, ICC-01/04-01/06-2057-Conf-Exp with 13 confidential ex parte annexes (notified on 20 July 2009). A confidential redacted version of this application was also filed on 17 July 2009, ICC-01/04-01/06-2058-Conf (notified on 20 July 2009).

² Preliminary and Final Decisions on the group of potential court witnesses, 25 June 2009, ICC-01/04-01/06-1986-Conf-Exp.

³ ICC-01/04-01/06-1986-Conf-Exp, paragraph 3.

⁴ ICC-01/04-01/06-1986-Conf-Exp, paragraphs 8, 16, 25 and 33.

redactions continue to apply, thereby protecting internal documents, relevant to two statements.⁵

DRC-OTP-WWW-0003

4. For this witness the prosecution: i) requests discrete, permanent redactions to the screening note for his first interview (limited to the witness's telephone numbers),⁶ suggesting that these redactions will not impair the opportunity for the defence to understand or assess the note, and generally they will not prejudice the accused;⁷ ii) recalls that the screening note prepared for this witness contains redactions to internal material covered by Rule 81(1), in paragraphs 55 and 56;⁸ and iii) highlights that two transcripts, and the linked recordings, of the witness's interview are subject to existing redactions under Article 54(3)(f), since the Chamber authorised non-disclosure of the name and other identifying details of an individual named [REDACTED] in its Decision of 17 December 2008.⁹
5. On 16 July 2009, the prosecution disclosed the witness's statements with these proposed redactions.¹⁰

DRC-OTP-WWW-0034¹¹

6. The prosecution seeks to redact the interview locations referred to in two statements from this witness, as well as in a further transcript and its linked recording, to avoid prejudice to the prosecution's further or ongoing investigations, in accordance with Rule 81(2).¹² The prosecution submits that these redactions will not impair the opportunity for the defence to understand

⁵ ICC-01/04-01/06-2057-Conf-Exp and ICC-01/04-01/06-2058-Conf, paragraph 3.

⁶ ICC-01/04-01/06-2057-Conf-Exp and ICC-01/04-01/06-2058-Conf, paragraph 5.

⁷ ICC-01/04-01/06-2057-Conf-Exp and ICC-01/04-01/06-2058-Conf, paragraph 6.

⁸ ICC-01/04-01/06-2057-Conf-Exp and ICC-01/04-01/06-2058-Conf, paragraph 7.

⁹ ICC-01/04-01/06-2057-Conf-Exp and ICC-01/04-01/06-2058-Conf, paragraph 8.

¹⁰ ICC-01/04-01/06-2057-Conf-Exp and ICC-01/04-01/06-2058-Conf, paragraph 9.

¹¹ The Registry informed the Trial Chamber that they have been unable to contact the witness to inform him about the Decision of 25 June 2009. Email communication from the Registry to the Chamber through the legal advisor to the Trial Division on 24 August 2009.

¹² ICC-01/04-01/06-2057-Conf-Exp and ICC-01/04-01/06-2058-Conf, paragraph 10.

or assess the screening note, and they will not in any other way prejudice the accused.¹³ On 21 August 2009 the prosecution notified the Chamber *inter alia* that redactions to two of the interview locations [REDACTED] will be lifted in all the relevant material disclosed to the defence to date.¹⁴

7. On 16 July 2009, the prosecution disclosed the witness's statements with these proposed redactions.¹⁵

DRC-OTP-WWW-0005

8. It is indicated that six transcribed versions of this witness's [REDACTED] contain Rule 81(1) redactions on the first page, which were imposed in order to protect certain internal documents of the prosecution; moreover, redactions applied to the witness's unsigned statement (under Rule 81(1)), continue to apply.¹⁶
9. The prosecution disclosed these redacted materials on 16 July 2009.¹⁷
10. The defence informed the Chamber by email that it did not intend to respond to the application.¹⁸

II. Applicable law and relevant decisions

11. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

Article 54 of the Statute

Duties and powers of the Prosecutor with respect to investigations

¹³ ICC-01/04-01/06-2057-Conf-Exp and ICC-01/04-01/06-2058-Conf, paragraph 13.

¹⁴ Prosecution's Notice that it will lift redactions to names of interpreters and interview locations, 21 August 2009, ICC-01/04-01/06-2089-Conf, paragraph 5.

¹⁵ ICC-01/04-01/06-2057-Conf-Exp and ICC-01/04-01/06-2058-Conf, paragraph 14.

¹⁶ ICC-01/04-01/06-2057-Conf-Exp and ICC-01/04-01/06-2058-Conf, paragraphs 15 and 16.

¹⁷ ICC-01/04-01/06-2057-Conf-Exp and ICC-01/04-01/06-2058-Conf, paragraph 17.

¹⁸ Email communication from the defence to the Chamber through the legal advisor to the Trial Division on 12 August 2009.

[...]

3. The Prosecutor may:

[...]

(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 64 of the Statute

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.

[...]

Article 68 of the Statute

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[...]

Rule 81 of the Rules

Restrictions on disclosure

1. Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.

2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an ex parte basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

[...]

4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.

[...]

12. The Chamber has previously set out its approach concerning Rule 81(1) as follows:

31. Rule 81(1) of the Rules explicitly excludes from disclosure the internal documents ("reports, memoranda or other internal documents") prepared by "a party, its assistants or representatives" in connection with the investigation or preparation of the case. It is of note that the ICTY Rules of Procedure and Evidence contain an almost identical provision: Rule 70(A). It would be unhelpful to attempt in the context of this decision to define the material covered by this provision, but it includes, inter alia, the legal research undertaken by a party and its development of legal theories, the possible case strategies considered by a party, and its development of potential avenues of investigation. The Chamber further ensured that the relevant material was limited only to internal documents of the prosecution, and redactions were only authorised if the information was not of a kind that required disclosure under the Statute. It is to be stressed that the material covered by this provision can be entire documents or parts thereof. Furthermore, the Chamber ensured the redactions did not change the substance of the relevant parts of the documents, and in each instance they remained intelligible and usable.¹⁹

The Chamber has applied this approach to the redactions made by the prosecution on the basis of Rule 81(1) in this Decision.

13. Turning to Rule 81(4), the Appeals Chamber in the *Katanga* case decided that:

93. The terms of rule 81(4) are set out at paragraph 42 above. The Appeals Chamber observes that rule 81(2) provides generally for the non-disclosure of "information", without excluding per se certain categories of information from non-disclosure. Similarly, rule 81(4) does not expressly rule out the information referred to in rule 111(1) from its ambit. The Appeals Chamber therefore concludes that it will have to be determined on a case-by-case basis whether the non-disclosure of information that is required to be recorded pursuant to rule 111(1) may be authorised by a Chamber. This will be determined in light of the conditions stipulated by rule 81(2) and/or (4) of the Rules.²⁰

14. In line with this Decision, the Trial Chamber has authorised redactions (for instance, to the location of interviews) when the information is irrelevant to the known issues in the case, so long as this course does not render the document in any way unintelligible or unusable.²¹

¹⁹ 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, and public redacted version, ICC-01/04-01/06-1924-Anx2, paragraph 31.

²⁰ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, paragraph 93.

²¹ Transcript of hearing on 18 January 2008, ICC-01/04-01/06-T-72-CONF-EXP, page 2, line 14.

15. The Appeals Chamber held that Rule 81(4) "should be read to include the words "persons at risk on account of the activities of the Court" so as to reflect the intention of the States that adopted the Rome Statute and the Rules [...], as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect that category of persons."²² The Appeals Chamber emphasised that non-disclosure of information for the protection of persons at risk on account of the activities of the Court requires "a careful assessment [...] on a case by case basis, with specific regard to the rights of the [accused]."²³

16. This approach undoubtedly applies, in the right circumstances, to those who act as intermediaries, anyone present during interviews, and sources for the prosecution (as well as others). If the identities of any individuals in categories of this kind are disclosed, ongoing investigations may be prejudiced, not least if the prosecution will have difficulty securing qualified personnel to fill these various roles in the future, and it may additionally experience problems identifying and contacting witnesses.

17. Although this Decision of the Appeals Chamber relates to restrictions on disclosure in the context of the pre-trial confirmation of charges and therefore it is not strictly binding on the Trial Chamber, the principles outlined are clearly of high relevance to proceedings before this Chamber. The Trial Chamber has determined that its responsibility under Article 64(6)(e) to "[p]rovide for the protection of the accused, witnesses and victims" includes providing protection for all those at risk in the context of this trial on account of the activities of the Court.²⁴

18. In all the circumstances, in accordance with this approach, the Chamber has

²² ICC-01/04-01/07-475, paragraph 1.

²³ ICC-01/04-01/07-475, paragraph 2.

²⁴ ICC-01/04-01/06-1814-Conf, and public redacted version, ICC-01/04-01/06-1924-Anx2, paragraph 34.

reviewed the information provided by the prosecution and it has applied a case-by-case analysis of the circumstances relevant to each individual witness, as set out below.

III. Analysis

Redactions to materials of DRC-OPT-WWW-0003

19. The prosecution seeks permanent redactions to this witness's telephone number, as recorded in the screening note for his first interview. The prosecution [REDACTED],²⁵ but it is no longer in contact with him because he may be called as a witness by the Court.

20. The Chamber is satisfied that this information is irrelevant to any known or live issue in the case; the redaction does not render the document unintelligible or unusable, and no lesser measures appear to be feasible to ensure the continued safety and security of the witness. In all the circumstances, given the lack of identifiable prejudice to the defence, these suggested redactions are necessary and proportionate, and are authorised pursuant to Article 64(6)(e) of the Statute and Rule 81(4) of the Rules.

21. Furthermore, as the prosecution indicated, redactions to paragraphs 55 and 56 of Annex 1 have been imposed in order to protect the prosecution's internal documents, and pursuant to Rule 81(1), these are not subject to disclosure.

22. In addition, the prosecution highlighted certain existing redactions to the name and identifying details of [REDACTED],²⁶ previously authorized by the

²⁵ Annex 1 to Prosecution's Application for Non-Disclosure of Information, 17 July 2009, ICC-01/04-01/06-2057-Conf-Exp-Anx1.

²⁶ Annexes 2 and 3 to Prosecution's Application for Non-Disclosure of Information, 17 July 2009, ICC-01/04-01/06-2057-Conf-Exp-Anx2 and ICC-01/04-01/06-2057-Conf-Exp-Anx3.

Chamber.²⁷ This former intermediary has remained involved with the Court,²⁸ and the Chamber authorised non-disclosure of his identity because he may be at risk on account of his involvement with the activities of the Court; additionally, the redactions are limited and they are irrelevant to any live issue in the case. In all the circumstances, if the redactions are maintained they will not cause any identifiable prejudice to the accused, and the Chamber authorises them pursuant to Article 64(6)(e) of the Statute and Rule 81(4) of the Rules.²⁹

Redactions to materials of DRC-OTP-WWW-0034

23. The redactions sought are to interview locations referred to in the witness's two statements and in a transcript, along with the recording linked to the latter.³⁰ The Chamber notes that redactions to one of the two locations in the witness's statements and in the relevant transcript no longer apply, and the prosecution is instructed to provide the relevant information to the defence forthwith, if this has not already occurred. Since investigations into several cases in the Democratic Republic of Congo are ongoing, the Chamber is satisfied that disclosure of the second interview location [REDACTED] which is still used as such by the prosecution may be detrimental to current or future investigations, and therefore this redaction is justified, pursuant to Rule 81(2). Critically, the location is wholly irrelevant to the issues in this case, and its non-disclosure will not cause any prejudice to the accused.

Redactions to materials of DRC-OTP-WWW-0005

24. Redactions have been made to the first page of six transcribed versions of this witness's [REDACTED] pursuant to Rule 81(1), in order to protect the

²⁷ Decision on the prosecution's application for non-disclosure of information filed on 7 May 2008, 17 December 2008, ICC-01/04-01/06-1560-Conf-Exp, paragraphs 23 and 24.

²⁸ *Ibid.*, paragraph 23.

²⁹ *Ibid.*, paragraph 24.

³⁰ Annexes 4 to 6 to Prosecution's Application for Non-Disclosure of Information, 17 July 2009, ICC-01/04-01/06-2057-Conf-Exp-Anx4, ICC-01/04-01/06-2057-Conf-Exp-Anx5 and ICC-01/04-01/06-2057-Conf-Exp-Anx6.

prosecution's internal documents'³¹ and similar redactions have been applied to the unsigned statement of the witness.³² This material is not subject to disclosure under the terms of this Rule.

IV. Conclusions

25. For the above reasons, the Chamber hereby grants the prosecution's Application for non-disclosure of information.

26. A public version of this decision will be issued in due course.

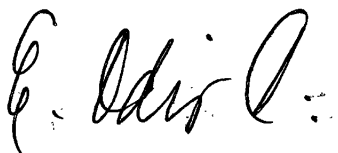
³¹ Annexes 7 to 12 to Prosecution's Application for Non-Disclosure of Information, 17 July 2009, ICC-01/04-01/06-2057-Conf-Exp-Anx7, ICC-01/04-01/06-2057-Conf-Exp-Anx8, ICC-01/04-01/06-2057-Conf-Exp-Anx9, ICC-01/04-01/06-2057-Conf-Exp-Anx10, ICC-01/04-01/06-2057-Conf-Exp-Anx11, and ICC-01/04-01/06-2057-Conf-Exp-Anx12.

³² Annex 13 to Prosecution's Application for Non-Disclosure of Information, 17 July 2009 ICC-01/04-01/06-2057-Conf-Exp-Anx13.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 10 December 2009

At The Hague, The Netherlands