



Original: English

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

Date: 2 March 2010

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
with Confidential *Ex Parte* - Prosecution Only Annex A and
Confidential *Ex Parte* – Prosecution Only Annexes 1-14**

**Prosecution's Request for Non-Disclosure of Information
in Documents related to Defence Witnesses and Re-Interviews with
Prosecution Witnesses**

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

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Other

The Prosecution requests authorisation, pursuant to Articles 54(3)(f), 64, and 68 of the Rome Statute (Statute) and Rule 81(2) and 81(4) of the Rules of Procedure and Evidence (Rules) to redact certain information in expense documents related to Defence witnesses and in transcripts and recordings of re-interview with Prosecution witnesses.

I. Background

1. On 27 August 2009, the Defence requested the disclosure by the Prosecution of all documents related to Defence witnesses. Among the documents subsequently disclosed to the Defence, 6 expense documents have been disclosed with redactions made pursuant to Rule 81(2) or 81(4).¹
2. On 2 October 2009, the Prosecution filed an application seeking leave of the Trial Chamber to “contact trial witnesses called by the Prosecution”.² On 19 November 2009, the Chamber authorised the Prosecution to contact its own witnesses with the purpose of re-interviewing them.³ The Prosecution has also interviewed *inter alia* intermediary DRC-OTP-WWWW-0321 to conduct further inquiries regarding the Defence case.
3. Among the materials subsequently disclosed to the Defence related to Prosecution interviews with trial and non-trial witnesses, the

¹ For all items it is clear (either from the document itself or the E-Court meta-data) to which Defence witness the expenses relate.

² ICC-01/04-01/06-2144-Red, p. 4, at (iii). See also para. 34.

³ ICC-01/04-01/06-2192-Red, para. 66: the “Chamber is persuaded that it is appropriate for the prosecution to meet again with witnesses [...] for the purposes identified in the application. These meetings should be recorded by audio or video equipment, and the prosecution must apply its disclosure obligations following any re-interview. If it becomes necessary to use this procedure with other witnesses, the same approach is to be followed (once the Court and the defence have been given adequate notice).”

transcripts and recordings of 3 interviews have been disclosed with redactions made pursuant to Rule 81(2) or 81(4).⁴

II. Prosecution's Submissions

4. The Prosecution requests the authorisation of the Trial Chamber pursuant to Articles 54(3)(f), 64, and 68 and Rule 81(2) and 81(4) to apply redactions to the expense documents and interview materials.
5. The proposed redactions do not affect the value, or hinder Defence's ability to assess the relevant information contained in the expense documents and interview materials, nor do they 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.
6. The overview chart attached hereto as Confidential-*Ex Parte* Annex A indicates (i) the category of information to which the redaction pertains, and (ii) the proposed redaction. The expense documents and interview transcripts with the proposed redactions made pursuant to Rule 81(2) and 81(4) are attached hereto as Annexes 1 to 14 in a format that permits the Trial Chamber to view the information that the Prosecution proposes for redaction.⁵

⁴ The 3 interviews comprise 1 interview with DRC-OTP-WWWW-0299 (5 recordings, of which 4 contain redactions) and two interviews with DRC-OTP-WWWW-0321 (10 transcripts, of which 8 contain redactions).

⁵ For the 4 recordings bearing the ERNs DRC-OTP-0221-0011_01, DRC-OTP-0221-0011_03, DRC-OTP-0221-0011_04 and DRC-OTP-0221-0011_05, redactions were applied to the electronic media and therefore these have not been attached as annexes. The interviews were disclosed in this format to ensure that the Defence had access to these interviews at the earliest opportunity. The request for these redactions is included in the present application under "Whereabouts of witnesses who are in the ICCPP" and entries for each are included at the end of the chart attached as Confidential-*Ex Parte* Annex A.

7. The information that the Prosecution proposes for redaction is as follows:

OTP Contact and VWU Staff – Rule 81(2)

8. The Prosecution requests authorisation, pursuant to Rule 81(2), to redact a reference in one expense document to an individual, [REDACTED]. This individual supports OTP operations from time to time, [REDACTED]. His name has not been disclosed to date.
9. The Prosecution submits that there is no basis to conclude that his identity is relevant to any issue in this case. In order to protect further and ongoing investigations and preserve the OTP's ability to operate on the field, the Prosecution requests that the name of this individual remain undisclosed.
10. The Prosecution also requests authorisation, pursuant to Rule 81(2), to redact references in two transcripts of interviews to individuals employed in the Victims and Witnesses Unit (VWU), [REDACTED] and [REDACTED].
11. The Prosecution recalls that the Trial Chamber authorised non-disclosure of both these names in previous decisions.⁶

Locations for Witness Interviews / Accommodation – Rule 81(2)

12. The Prosecution requests authorisation, pursuant to Rule 81(2), to redact the reference to the name of a hotel in two expense documents. This hotel has been and continues to be used to accommodate witnesses [REDACTED] for interviews.

⁶ For "[REDACTED]", see ICC-01/04-01/06-1295-US-Exp-AnxB and for "[REDACTED]", see oral decision ICC-01/04-01/06-T-167-ENG ET WT dated 08 April 2009, page 18, lines 10-17.

13. The Prosecution recalls that the Trial Chamber has previously granted authorisation to redact interview locations.⁷ The same arguments apply to premises used to accommodate witnesses at the time of their interview. In order to protect further and ongoing investigations, the Prosecution requests authorisation to redact the information concerned.

Name and Whereabouts of Witness [REDACTED] – Rule 81(4)

14. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact references in the expenses documents to “[REDACTED]”, the [REDACTED] of witnesses DRC-OTP-WWWW-0297 and DRC-D01-WWWW-0004, and to “[REDACTED]”, [REDACTED] address.
15. The person concerned was the witnesses’ [REDACTED] and the address [REDACTED].
16. The Prosecution submits, as was held by the Single Judge in the *Katanga and Ngudjolo Chui* case, 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.⁸ The Prosecution submits that these considerations and reasoning apply equally to [REDACTED] family members and guardians.

⁷ ICC-01/04-01/06-2186-Conf-Exp, para. 23. The confidential and public versions of this decision were notified as ICC-01/04-01/06-2186-Conf-Red (para. 23) and ICC-01/04-01/06-2186-Red (para. 23) on 10 December 2009. The same arguments apply.

⁸ See 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. 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.

17. The Prosecution recalls that the Trial Chamber has previously authorised redactions to family members of witnesses and prosecution sources, applying the reasoning that information was irrelevant to the known issues in the case, so long as this course did not render the document in any way unintelligible or unusable.⁹ In order to protect the safety of this person, the Prosecution requests authorisation to redact the information concerned.

Whereabouts of Witnesses in the ICCPP – Rule 81(4)

18. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact references to “[REDACTED]” and other information revealing the current location of protected witnesses in 5 interview transcripts and recordings. Trial witnesses DRC-OTP-WWWW-0213 and DRC-OTP-WWWW-0299 have both been relocated as part of the Court’s protection program [REDACTED].
19. In the *Katanga and Ngudjolo Chui* case, the Single Judge authorised the redactions of the current whereabouts of Prosecution witnesses who have been accepted in the ICC protection program as a necessary measure to minimize the risk posed by the disclosure of their identities to the Defence.¹⁰

⁹ Decision on the “Prosecution’s Request for Non-Disclosure of Information” of 19 December 2008, and the “Prosecution’s Request for Non-Disclosure of Information” of 4 February 2009, ICC-01/04-01/06-2208-Conf-Exp, paras. 28, 39, 42, 58 – 59, 63, 69, 74, 77, 80; 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, paras. 34 – 35. Corrected version: Annex 1 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”, 2 June 2009, ICC-01/04-01/06-1924-Conf-Anx 1, paras. 34 – 35. Public redacted version: Annex 2 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”, 2 June 2009, ICC-01/04-01/06-1924-Anx2, paras. 34 – 35.

¹⁰ ICC-01/04-01/07-90, paras. 27–28. The redactions were authorised in a Confidential Ex Parte annex to the decision.

20. The Prosecution recalls that Trial Chamber I authorised similar redactions in its decision of 10 December 2009.¹¹

Whereabouts of Witness Intermediaries – Rule 81(4)

21. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact references to “[REDACTED]” and other information that could reveal the current location of intermediary DRC-OTP-WWWW-0321 in 6 of the transcripts of his interview.
22. The identity of this individual has been disclosed to the Defence; the Prosecution is requesting only limited redactions to information that may reveal his current location. Although the role of 0321 has been raised as an issue in the present case, the Prosecution submits that his current location is irrelevant to a determination of these issues and that non-disclosure is necessary for his protection as a person at risk on account of the activities of the Court. No lesser measures exist to ensure his continued safety.

III. *Ex Parte* Filing

23. The Prosecution submits that the classification of the present filing and annexes as *Confidential - Ex Parte - Prosecution Only* is necessary.¹²
24. 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

¹¹ ICC-01/04-01/06-2208-Conf-Exp, paras. 34–35, 58–59.

¹² 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).

is necessary.¹³ 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.

25. 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 and its legal basis as the Prosecution will file a public redacted version of the present filing.
26. The expense documents, transcripts and recordings have all been disclosed to the Defence, with the proposed redactions, in order to ensure that the Defence has access to these documents at the earliest opportunity. Should the Trial Chamber decline to authorise any of the proposed redactions, the Prosecution will re-disclose the relevant documents.

¹³ 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.

IV. Relief Requested

27. Based on the foregoing, the Prosecution requests that the Trial Chamber authorise the non-disclosure of information contained in the fourteen documents as set out in the annexes, and the 4 additional items, as set out in the chart in Annex A, in accordance with Articles 54(3)(f), 64 and 68 and Rules 81(2) and (4).



Luis Moreno-Ocampo
Prosecutor

Dated this 2nd day of March 2010
At The Hague, The Netherlands