

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 13 October 2010

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***

Confidential

Decision on the defence request for disclosure of screening notes

Decision/Order/Judgment 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 defence request for disclosure of screening notes:

I. Background and Submissions

Defence request

1. On 25 June 2010, the defence submitted a request for disclosure of the full non-redacted screening notes relating to intermediaries DRC-OTP-WWWW-0031 ("intermediary 31"), DRC-OTP-WWWW-0321 ("intermediary 321"), DRC-OTP-WWWW-0316 ("intermediary 316") and DRC-OTP-WWWW-0143 ("intermediary 143").¹ The defence highlights that although the reports or summaries of the investigators' notes may give some clues as to the activities of the Office of the Prosecutor ("prosecution"), they only provide partial information. The defence attached to its application an "Investigator's Report" and an "Investigator's Note" previously disclosed to the defence as examples of documents that, in its submission, demonstrate numerous irregularities in the conduct of intermediary 316.² The defence argues that it will only be able to assess the position and determine a response to these suspected irregularities if they are in possession of the screening notes in their entirety.³
2. The defence observes that although this material is usually excluded from the prosecution's disclosure obligations under Rule 77 of the Rules of Procedure and Evidence ("Rules"), in the present case the suggested irregularities referred to above form a material part of its abuse of process application.⁴ Particularly, the defence wishes to explore whether the prosecution was

¹ Requête de la Défense aux fins de divulgation de notes d'enquêteurs en lien avec les intermédiaires W-0031, W-0321, W-0316 et W-0143, 25 June 2010, ICC-01/04-01/06-2503-Conf with two confidential annexes.

² ICC-01/04-01/06-2503-Conf, paragraphs 6 – 7; ICC-01/04-01/06-2503-Conf-AnxI and ICC-01/04-01/06-2503-Conf-AnxII.

³ ICC-01/04-01/06-2503-Conf, paragraph 8.

⁴ ICC-01/04-01/06-2503-Conf, paragraph 10.

aware of these alleged irregularities and, if so, whether any measures were taken to address them.⁵ Accordingly, the defence argues that these internal notes constitute material that is valuable for understanding the responsibility of the prosecution for the behaviour of its intermediaries and other agents.⁶

Prosecution's observations

3. On 30 June 2010, the prosecution submitted its response to the defence request.⁷
4. The prosecution suggests that in response to the defence allegations of abuse of process, it has disclosed a number of documents entitled "Investigator's Reports" that collate and organise, for the convenience of the defence, the relevant communications between the prosecution, trial witnesses and the intermediaries.⁸ The prosecution sets out that these "Investigator's Reports" were created by incorporating relevant information from an internal "situation contacts management system" that records communications between the prosecution, trial witnesses and the intermediaries.⁹ The prosecution observes that it has disclosed other internal documents called "Investigator's Notes", which contain contemporaneously-recorded information about contact with witnesses and intermediaries.¹⁰ It is submitted that the "Investigator's Notes" are unrelated to the information within "situation contacts management system".¹¹
5. The prosecution contends that the defence wrongly assumes that complete, disclosable versions of the "Investigator's Notes" exist and are being

⁵ ICC-01/04-01/06-2503-Conf, paragraph 11.

⁶ ICC-01/04-01/06-2503-Conf, paragraph 12.

⁷ Prosecution's Response to the "Requête de la Défense aux fins de divulgation de notes d'enquêteurs en lien avec les intermédiaires W-0031, W-0321, W-0316 et W-0143" of 25 June 2010, 30 June 2010, ICC-01/04-01/06-2510-Conf, with five confidential annexes and two *ex parte* prosecution only annexes.

⁸ ICC-01/04-01/06-2510-Conf, paragraph 1.

⁹ ICC-01/04-01/06-2510-Conf, paragraph 1.

¹⁰ ICC-01/04-01/06-2510-Conf, paragraph 2.

¹¹ ICC-01/04-01/06-2510-Conf, paragraph 2.

withheld. It submits that nothing is being withheld from the defence and that the relevant "Investigator's Notes" have been, and continue to be, disclosed to the defence.¹²

6. The prosecution opposes any proposal that would allow the defence to gain access to the prosecution's "situation contacts management system". The prosecution suggests that this system is highly confidential and contains critically sensitive information concerning the safety and security of witnesses and intermediaries, as well as the contacts and activities of the prosecution. It contends that granting "blanket disclosure" of the information in this system to the defence would put the safety of those individuals in jeopardy, and this is unacceptable. It is further argued that this information is not relevant to the defence.¹³

7. The prosecution maintains that it has reviewed the "situation contacts management system" in depth, and that it had disclosed the relevant entries in the system to the defence in an "Investigator's Report".¹⁴ The prosecution provided seven annexes to demonstrate its approach, particularly as regards its analysis of the database containing the relevant extracts which have been incorporated into the Investigator's Report.¹⁵ The prosecution observes that the testimony of two of the intermediaries, and the three relevant representatives of the prosecution, will enable the Chamber to assess the activities, credibility and due diligence of the intermediaries and the prosecution, when the accounts of these witnesses are tested in court.¹⁶

¹² ICC-01/04-01/06-2510-Conf, paragraphs 3 – 4.

¹³ ICC-01/04-01/06-2510-Conf, paragraph 5.

¹⁴ ICC-01/04-01/06-2510-Conf, paragraph 6.

¹⁵ ICC-01/04-01/06-2510-Conf, footnote 4 and Annexes A – G.

¹⁶ ICC-01/04-01/06-2510-Conf, paragraph 7.

8. Finally, the prosecution argues that pursuant to Rule 81(1) of the Rules, the "system contacts management system" should not be disclosed.¹⁷

II. Applicable Law

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

Article 54(3)(f) of the Statute

Duties and powers of the Prosecutor with respect to investigations

[...]

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(2) and 64(6)(e) of the Statute

Functions and powers of the Trial Chamber

[...]

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[...]

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 67(2) of the Statute

Rights of the accused

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

¹⁷ ICC-01/04-01/06-2510-Conf, paragraph 8.

Rule 77 of the Rules**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.

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.

3. Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with those articles. When the disclosure of such information may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance.

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.

[...]

III. Analysis and Conclusions

10. The defence request focuses solely on disclosure of the screening notes and other similar documents prepared by the prosecution in relation to intermediaries 31, 143, 316 and 321. However, in light of the submissions, the

Chamber has addressed the suggested access to the "situation contacts management system".

11. In its "Decision on Intermediaries", the Chamber determined that the precise role of the intermediaries (together with the manner in which they discharged their functions) has become an issue of major importance in this trial, leading to the disclosure of certain information under Rule 77 of the Rules.¹⁸

12. As regards the individuals who are the subject of the present application, the Chamber determined in this earlier Decision that there is evidence demonstrating that intermediaries 316 and 321 (whose identities are already known to the defence) may have misused their positions. The Chamber ordered that they are to be called as witnesses.¹⁹

13. Although the Chamber found that the evidence concerning intermediary 143 did not meet the criteria to require his attendance as a witness during the abuse of process application, it determined that the threshold for disclosure of his identity to the defence was met, under Rule 77 of the Rules.²⁰

14. In relation to intermediary 31, whose identity is known to the defence and who has given evidence as a prosecution witness, the Chamber found that it was not aware of additional disclosure that could usefully be effected.²¹

15. In the result, the Chamber ordered the prosecution to disclose confidentially the names and other identifying information of intermediary 143, as well as a short account of the professional background of intermediaries 143, 316 and

¹⁸ Decision on Intermediaries, 12 May 2010, ICC-01/04-01/06-2434-Conf-Exp, paragraph 135. This decision was issued as confidential *ex parte* prosecution and VWU only and a corrigendum was issued on 27 May 2010, ICC-01/04-01/06-2434-Conf-Exp-Corr. A confidential redacted version was issued on 20 May 2010, ICC-01/04-01/06-2434-Conf-Red and a corrigendum was issued on 27 May 2010, ICC-01/04-01/06-2434-Conf-Red-Corr. A public redacted version was issued on 31 May 2010, ICC-01/04-01/06-2434-Red2.

¹⁹ ICC-01/04-01/06-2434-Red2, paragraphs 140 and 141.

²⁰ ICC-01/04-01/06-2434-Red2, paragraph 143.

²¹ ICC-01/04-01/06-2434-Red2, paragraph 144.

321. The prosecution was also ordered to provide the defence with a schedule setting out the known contacts between the 23 intermediaries, between the intermediaries and the witnesses, and between the relevant witnesses.²²

16. The failure by the prosecution to implement its order to disclose the identity of, and the identifying information for, intermediary 143 led to the stay of proceedings on 8 July 2010.²³

17. The Appeals Chamber lifted the stay of proceedings on 8 October 2010.²⁴

18. Addressing the request for disclosure of the full non-redacted investigator's notes, in its submissions the prosecution has undertaken that the relevant "Investigator's Notes" have been and continue to be disclosed.²⁵ The Chamber accepts this assurance and therefore no further order is required with regard to the "Investigator's Notes".

19. The Chamber emphasises, however, that under Rule 77 of the Rules, disclosure of information in these circumstances is not a matter of courtesy but an obligation under the Rome Statute framework, given the ambit of the abuse of process application the Chamber is considering. Any information in the possession of the prosecution that relates to the knowledge of the prosecution about, or its actions or involvement with, intermediaries 143, 316 and 321 in the context of any alleged irregular behaviour is disclosable. The prosecution's assurance that the defence "has received significant amounts of information, all the disclosable information in the possession of the OTP, that

²² ICC-01/04-01/06-2434-Red2, paragraph 150.

²³ Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, 8 July 2010, ICC-01/04-01/06-2517-Conf. A public redacted version of this decision was issued on the same day, ICC-01/04-01/06-2517-Red.

²⁴ Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, ICC-01/04-01/06-2582.

²⁵ ICC-01/04-01/06-2510-Conf, paragraph 4.

might be relevant to the credibility of its witnesses and intermediaries",²⁶ needs to be reviewed on that basis.

20. The prosecution provided the Chamber, *ex parte*, with two tables that appear to include a selection of the information provided to the defence.²⁷ These tables are non-redacted excerpts of the "situation contacts management system" relating to intermediaries 316 and 321. Based on a comparison with the annexes provided by the prosecution, the Chamber concludes that whilst some of the information from the tables has been made available to the defence in the "Investigator's Report" and other documents, the tables contain additional relevant information, organized in a manner that provides a useful context (which may not be apparent to the defence from the format in which they received the information). For example, while details concerning payments to the intermediaries have been disclosed in the form of a number of invoices, the table allows a more complete understanding of the relationship between the prosecution and its intermediaries. In addition, the format of the excerpts is itself useful.

21. However, the Rules of Procedure and Evidence contain restrictions on disclosure for some of the other information found within the tables, e.g. the names and locations of protected witnesses and victims, internal assessments on various individuals and work processes. This information clearly falls within the scope of non-disclosable material pursuant to Rule 81(1)²⁸ and Rule 81(3) of the Rules. While the database in a general sense is exempt from

²⁶ ICC-01/04-01/06-2510-Conf, paragraph 7.

²⁷ ICC-01/04-01/06-2510-Conf-Exp-AnxA and ICC-01/04-01/06-2510-Conf-Exp-AnxE.

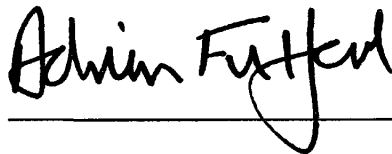
²⁸ In its Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" of 5 December 2008, 9 April 2009, ICC-01/04-01/06-1814-Conf, paragraph 31, the Chamber addressed Rule 81(1) of the Rules as follows:

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 [...].

disclosure under Rule 81(1) of the Rules, and some of the material is protected under Rule 81(3) of the Rules, insofar as information therein relates to intermediaries 143, 316 and 321 and their dealings with witnesses and the prosecution in the context of the current abuse of process application, it is to be disclosed under Rule 77 of the Rules.

22. In lieu of disclosing redacted excerpts of the prosecution database "situation contacts management system", the prosecution is ordered to disclose within 7 days comparable tables concerning intermediaries 143, 316 and 321, setting out all the relevant information from the "situation contacts management system", whilst excluding the protected information and assessments that fall within the scope of Rule 81(1) and (3) of the Rules. The tables are to be organized in the same manner and shall contain, *inter alia*, all the relevant financial details relating to the intermediaries. Before disclosing the tables to the defence, the prosecution is to submit them (by email) 24 hours in advance to the Chamber for review.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 13 October 2010

At The Hague, The Netherlands