

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06
Date: 17 November 2014

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Anita Ušacka
Judge Ekaterina Trendafilova

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF

***THE PROSECUTOR
v. THOMAS LUBANGA DYILO***

**Public Redacted Version
with Confidential, *EX PARTE*, only available to the Prosecution and VWU
Annexes A.1-A.3 and B**

**Public Redacted Version of “Second Application for Authorisation to Redact
Material Intended for Disclosure” dated 10 November 2014 (ICC-01/04-01/06-3117-
Conf-Exp)**

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

Ms Fatou Bensouda
Mr James Stewart
Mr Fabricio Guariglia

Counsel for Thomas Lubanga Dyilo

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval
Ms Caroline Buteau

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations Other
Section**

INTRODUCTION

1. The Office of the Prosecutor (“Prosecution” or “OTP”) recently interviewed three individuals in relation to the proceedings against Bosco Ntaganda. All three individuals were members of the UPC/FPLC during the period of the charges against Thomas Lubanga, and all three provide information that the Prosecution has determined is disclosable in the present case under article 67(2) of the Rome Statute (“Statute”) and rule 77 of the Rules of Procedure and Evidence (“Rules”).
2. Pursuant to article 68(1) of the Statute, the Prosecution seeks the authorisation of the Appeals Chamber under rules 81(2) and 81(4) of the Rules to redact certain information from the interview transcripts prior to disclosing them. The redactions sought do not affect the value of the information being disclosed nor do they render the documents in any way unintelligible or unusable.
3. The Prosecution will disclose these materials immediately upon receiving a decision from the Appeals Chamber on this application for redactions. [REDACTED].

CLASSIFICATION

4. This filing is classified “*Confidential, EX PARTE, only available to the Prosecution and VWU*” as it seeks relief on the basis of provisions about protective measures and the information cannot be disclosed to the Defence in advance of a determination as to whether disclosure is necessary.¹ Moreover, the Statute provides that applications pursuant to rule 81(2) “shall be heard on an *ex parte* basis”. Since this application is made, in part, under rule 81(2), an *ex parte* classification is justified. There are no alternative procedures to deal with this request. The Prosecution will file a confidential redacted following the submission of this document.

¹ ICC-01/04-01/06-568 (Appeals Chamber), paras. 37 and 65-67.

PROSECUTION SUBMISSIONS

I. Overview of the present request

5. The Prosecution requests certain limited redactions to the interview transcripts of witnesses P-0080, P-0845 and P-0190 under rules 81(2) and 81(4), prior to disclosing them to the Defence.
6. Restrictions on disclosure, including redactions, may be necessary to protect, *inter alia*, the safety and well-being of witnesses, victims and other persons at risk on account of the activities of the Court, pursuant to rule 81(4).² The following criteria has been applied to assess whether a redaction is authorised under rule 81(4): (i) there is an objectively justifiable risk to the safety of the protected person concerned by disclosure of the information to the Defence (as opposed to disclosing the information to the public at large); (ii) the proposed redaction is necessary as there is no alternative measure short of redaction available and feasible in the circumstances; and (iii) the redaction is proportionate so is not prejudicial to or inconsistent with the rights of the Accused and a fair and impartial trial.³
7. Rule 81(2) permits the Prosecution to seek non-disclosure of material or information that, if disclosed, may “prejudice[s] further or ongoing investigations”. The criteria applicable to redactions being sought under rule 81(4) apply *mutatis mutandis* to redactions sought under rule 81(2).⁴

² ICC-01/04-01/07-475 OA, paras. 54-58 and 62, and ICC-01/04-01/06-1486 OA, paras. 46-47.

³ ICC-01/04-01/06-773, para. 21 and ICC-01/04-01/07-475, paras. 71-73.

⁴ ICC-01/04-01/07-476 OA2, paras. 59-60 and ICC-01/04-01/07-475 OA, paras. 98-99.

8. Indeed, the Appeals Chamber has previously authorised redactions to material collected in the course of investigations in the *Ntaganda* proceedings that were determined disclosable to the *Lubanga* Defence and the Accused.⁵

II. Rationale for disclosure of the transcripts

9. The Prosecution has determined that the transcripts of these three interviews should be disclosed under article 67(2) and/or rule 77.
10. Witness P-0080 states he was a [REDACTED]. Although in his interview he claims that he never visited any of the training camps [REDACTED], he maintains that he did not see any child soldiers in the UPC/FPLC. This interview was conducted under article 55(2) of the Statute.
11. Witness P-0845, who was a [REDACTED], confirms there were *kadogo* (child soldiers) in the UPC/FPLC. He also states that Thomas Lubanga issued a demobilisation order in June 2003 which was followed. Witness P-0845 [REDACTED] child soldiers to be handed over to non-government organisations for demobilisation. This interview was conducted under article 55(2) of the Statute.
12. Finally, witness P-0190 was a [REDACTED]. In his interview, he states that there were many child soldiers in the UPC/FPLC, but that he did not personally see any in Thomas Lubanga's escort. This interview was conducted under article 55(2) of the Statute.
13. None of these individuals were witnesses in the *Lubanga* proceedings.
14. The Prosecution does not consider that the information in these transcripts will affect the pending appeal, but nonetheless seeks to disclose the materials in order to allow the Defence to make the necessary assessment.

⁵ ICC-01/04-01/06-3100-Red.

15. The Prosecution interviewed witness P-0080 on [REDACTED] 2014. The transcription of this interview was finalised on [REDACTED] 2014. Witness P-0845 was interviewed on [REDACTED] 2014 and the transcription of his interview was finalised on [REDACTED] 2014. The Prosecution interviewed witness P-0190 on [REDACTED] 2014 and the transcription of his interview was finalised on [REDACTED] 2014. It is necessary to wait for the transcription of interview to be completed to be in a position to assess comprehensively the relevance of the evidence provided by a witness. The transcript is also the most usable form of evidence for the Defence to review, and the most effective form to apply necessary redactions.

III. Redaction Categories

16. Pursuant to rule 81(4), the Prosecution seeks to redact identifying and contact information of the witnesses' family members, and identifying and contact information of other persons at risk on account of the activities of the Court. The Prosecution also seeks to redact [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

17. Pursuant to rule 81(2), the Prosecution requests authorisation to redact the identity of staff members of the Prosecution who are based in or travel frequently to the field. The Prosecution also seeks to redact identifying information about [REDACTED].⁶ These redactions are sought in order to avoid prejudice to further or ongoing investigations.

18. A chart for each witness that details the requested redactions is contained in the accompanying annexes. These charts identify: (i) the documents for which redactions are sought; (ii) the category of information to which the redactions pertain; (iii) the proposed redactions; and (iv) the justification for the redactions.

⁶ [REDACTED].

Each transcript is also contained in these annexes in a format that permits the Appeals Chamber to view the information that the Prosecution proposes for redaction.

19. As set out above, additional support for the Prosecution's request consisting of an [REDACTED].

IV. Redactions pursuant to rule 81(4)

i. Contact and identifying information of family members of witnesses

20. The Prosecution requests authorisation, pursuant to rule 81(4), to redact the names and identifying information of family members. The detailed justification for these redactions is set out in the redaction chart for each witness.
21. Disclosure of this information would pose an unjustifiable risk to the safety of these individuals. Based on the information available to the Prosecution, the persons concerned currently [REDACTED]. Disclosing to the Defence the names and identifying information of family members of Prosecution witnesses – including information that could lead to the disclosure of their current whereabouts – could pose an additional risk to the safety and/or physical well-being of these family members, as well as to the safety of the witnesses themselves.⁷
22. The Prosecution requests that its witnesses [REDACTED]. The Prosecution also [REDACTED] in order to safeguard the confidentiality of the witness's cooperation with the Prosecution and to [REDACTED]. As such, [REDACTED].

⁷ ICC-01/04-01/07-160, paras. 43, 45, 47 and 48; ICC-01/04-01/07-249, paras. 18, 19, 21 and 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.

23. Non-disclosure of the names and whereabouts of family members is necessary and no lesser measures exist to ensure their continued safety. The redactions are not prejudicial to the rights of the Accused and the requirements of a fair and impartial trial because the redactions do not affect the intelligibility or use of the documents and do not affect the article 67(2) and rule 77 value of the information for the Defence.

ii. Contact and identifying information of witness and witness' family members

24. Under this category of redactions, the Prosecution seeks to redact the [REDACTED]. [REDACTED], it is [REDACTED] related to this individual that has no disclosure value.

25. The Prosecution also seeks to redact certain [REDACTED]. As mentioned above, the Prosecution has particular [REDACTED]. [REDACTED].

26. This protective measure is consistent with the Court's duty under article 68(1) of the Statute to "protect the safety, physical and psychological well-being, privacy and dignity of victims and witnesses". In addition to the effect on [REDACTED], disclosure of this information could also [REDACTED], and as such, these redactions are also sought [REDACTED].

27. The information that the Prosecution seeks to redact in these portions of [REDACTED] interview transcript is immaterial to the Defence as it does not address any matter going to the witness' evidence. It relates solely [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. As such, the Prosecution urges a particularly cautious approach to [REDACTED] about [REDACTED].

iii. Persons at risk as a result of the activities of the Court

28. The Prosecution requests authorisation, pursuant to rule 81(4) and article 54(3)(f) to redact references in the interview transcripts to innocent third parties (“other persons at risk as a result of the activities of the Court”), where disclosure to the Defence would expose them to an objectively identifiable risk. The Prosecution submits that non-disclosure of this information is a necessary and proportionate measure to reduce or overcome the risks.
29. Persons identified as innocent third parties are not witnesses or otherwise related to the case, but may wrongly be perceived to be cooperating with the Prosecution or associated with the Court should their identity become known, which would create an unjustifiable risk to their safety. These individuals are likely unaware of being referred to in these materials. They have not chosen to collaborate with the Court nor agreed for their identity to be disclosed. None of the security processes have been explained to them; indeed, their current location is not known to the Prosecution.
30. In order to protect these individuals whose safety may be at risk on account of the activities of the Court, the Prosecution requests that their names and identifying information remain undisclosed. The Prosecution is of the view that there are no less restrictive measures that can be taken to avoid the risk. Additionally, the redactions are not prejudicial to or inconsistent with the rights of the Accused, and do not affect the underlying content or value of the information.

V. Redactions pursuant to rule 81(2)

i. Prosecution leads and potential witnesses

31. The Prosecution requests authorisation, pursuant to rule 81(2), to redact references to Prosecution leads and potential witnesses. In his interview, witness [REDACTED]. The Prosecution [REDACTED]. [REDACTED]. As set out in the redaction chart, the Prosecution is also seeking to redact the [REDACTED]. [REDACTED]. The Prosecution also seeks to redact this as lead information.
32. Revealing the names and other information of individuals whom the Prosecution is pursuing (and in the process of interviewing) would also endanger ongoing investigations. These individuals are particularly vulnerable at this point, and the Prosecution seeks to redact their identity at least until [REDACTED].
33. The Prosecution submits that there are no less restrictive protective measures. The redactions are not prejudicial to or inconsistent with the rights of the Accused as the redactions do not affect the intelligibility of the information. [REDACTED].

ii. Staff working in and/or for the OTP

34. The Prosecution requests authorisation, pursuant to rule 81(2), to protect its further or ongoing investigations by redacting the names of the investigators who work for the Prosecution and are participating in these interviews. This is standard practice in other cases before the Court.⁸ These individuals are based in or travel frequently to, the field. Disclosure of the identity of investigators (and other staff working for the OTP, such as intermediaries, interpreters and psycho-social experts) poses an objectively identifiable risk to the further or ongoing

⁸ See, ICC-02/05-03/09-524, paras. 36-42; ICC-02/11-01/11-74-Red, paras. 87-91; ICC-02/05-03/09-58, para. 4; ICC-02/05-03/09-265-Red, paras. 34-36; and ICC-01/09-02/11-495-AnxA-Corr, paras. 32-35 (Categories "A.2" and "A.3").

investigations of the Prosecution, as well as to the safety of witnesses with whom they meet.

35. The Prosecution submits that there are no less restrictive protective measures. The redactions are not prejudicial to or inconsistent with the rights of the Accused and the requirements of a fair and impartial trial because they are limited and do not affect the intelligibility of the information.⁹

RELIEF

36. Based on the foregoing, the Prosecution requests the Appeals Chamber to authorise the non-disclosure of information as submitted in this Application and accompanying Annexes.



Fatou Bensouda,
Prosecutor

Dated this 17th day of November 2014
At The Hague, The Netherlands

⁹ ICC-01/04-01/06-2209-Red, para. 12; ICC-02/11-01/11-74-Red, paras. 99-102; ICC-01/05-01/08-135-Red, para. 80; ICC-01/04-01/07-1551-Red2, paras. 55-66, in particular, para. 63.