

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

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

Date: 26 September 2007

TRIAL CHAMBER I

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

Registrar: Mr Bruno Cathala

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

**Annex 1
Public**

Redacted version of "Decision on the prosecution's filing entitled "Prosecution's provision of information to the Trial Chamber" filed on 3 September 2007"

Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy
Prosecutor
Mr Ekkehard Withopf, Senior Trial
Lawyer

Counsel for the Defence

Ms Catherine Mabilie
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Background

4. This decision concerns six witnesses who have provided witness statements to the Office of the Prosecutor (the "prosecution"). They are **[names of witnesses]**⁴. At the request of the prosecution, they were each admitted by the Registry's Victims and Witnesses Unit into the Court's witness protection programme on 7 July 2006.
5. In the "Document Containing the Charges, Article 61(3)(a)" ("Document containing the charges") dated 28 August 2006 (as submitted to the Pre-Trial Chamber by the prosecution), it is alleged that these six witnesses are former child soldiers who were conscripted, enlisted and used in hostilities. It is unnecessary to set out the detail of their accounts for the purposes of this decision.
6. It needs to be stressed that two versions of the Document containing the charges were filed with the court: the first was confidential, the second public. The confidential⁵ version was restricted to the Registrar, counsel for the defence and the Office of Public Counsel for the Defence. In the public redacted version⁶ the names of each of these witnesses and other identifying factors were removed.
7. On 3 September 2007 the prosecution filed, on an urgent, under seal and *ex parte* basis, a document entitled "Prosecution's Provision of Information to the Trial Chamber"⁷ that related solely to these six witnesses. The stated purpose of the filing was "*to advise the Trial Chamber of information recently obtained by the Prosecution related to the living conditions of five of the witnesses and related to*

⁴ The use of brackets, bold type and underlining at this point indicates there has been a redaction. Neutral words have been used instead to protect confidential material.

⁵ ICC-01/04-01/06-356-Conf-Anx1.

⁶ ICC-01/04-01/06-356-Anx2.

⁷ ICC-01/04-01/06- 944-US-Exp, filed on 3 September 2007.

the protection of one of the witnesses” (para 4). No relief was sought and no subsequent applications have been based on this material.

8. The filing was made under seal and *ex parte* because *“the filing contains details on protected Prosecution witnesses”* (para 5). The document went beyond updating the Chamber about the living conditions and the protection of the six witnesses, in the sense that the prosecution drew attention to their proposal to re-interview the six witnesses, starting on 10 September 2007 in [**at a certain location**]⁸, and their wish for the witnesses to be kept separate during this process. Additionally, the prosecution indicated they had learned for the first time on 28 August 2007 during a meeting with the Victims and Witnesses Unit that all of the witnesses, save for [redacted], had been housed together since their resettlement (para 7).
9. It is submitted that this led the prosecution to have two main concerns: first *“that the witnesses have had the continuous opportunity to communicate for more than one year, including on matters that are directly linked to their statements”* and *“that the witnesses will be able to engage in discussions about the content of their statements after the re-interviews take place”* (para 8).
10. As regards the five witnesses who have shared accommodation since resettlement, it is set out that *“the prosecution and the VWU are currently involved in a dialogue to ensure that a resolution to the issue of common living arrangements is found following the re-interviews, so as not to impact on the credibility of the witnesses at trial”* (para 9).
11. The situation in respect of [redacted] is dealt with separately. In her case, the Trial Chamber is told she was discharged voluntarily from the witness protection programme by the Victims and Witnesses Unit on 1 August 2007,

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without consultation with the prosecution. At her request, the Victims and Witnesses Unit brought her to [a particular location]⁹ and having been informed of her whereabouts, measures have been taken by the prosecution to provide for her security. [redacted] continues to cooperate with the prosecution, and she seeks re-admission into the witness protection programme (para 14).

12. Furthermore, [particular details are set out that relate to a witness who is referred to as « X » hereafter]¹⁰, although the Victims and Witnesses Unit is seeking further information on this [matter]¹¹. The Chamber was told that "if the information is indeed accurate then the Prosecution will take the necessary steps to disclose such information to the defence" (ibid). The Trial Chamber reminds the prosecution that the test laid out in Article 67(2) (see paragraph 16 below) for disclosure is not, in fact, whether the information is accurate. Rather, the test required in Article 67(2) carries two main elements. The first element requires the prosecution to have evidence in its possession or control. Secondly, the Prosecutor must assess whether that evidence may affect the credibility of the prosecution evidence. If these two elements are met, it is the duty of the Prosecutor to disclose as soon as is practicable the information to the defence.

13. On 5 September 2007, the Trial Chamber issued an order scheduling an *ex parte* hearing on 7 September in order to hear further submissions with regard to the prosecution's filing.¹² Concurrently, the Trial Chamber issued "The Trial Chamber's Agenda for the Hearing on Friday 7th September",¹³ notifying the prosecution and the Victims and Witness Unit that the Trial Chamber

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¹² Order scheduling *Ex parte* hearing, ICC-01/04-01/06-945.

¹³ ICC-01/04-01/06-946-US-Exp, filed on 5 September 2007.

sought submissions, *inter alia*, on “*whether the Prosecution’s Provision of Information to the Trial Chamber ...is a document that properly deserves ex parte status (in whole or in part)*”.

The Ex Parte Hearing on Friday 7 September 2007

14. In oral submissions, the prosecution indicated that they had decided to postpone any re-interviews with the six witnesses, in order to give the Chamber time to resolve any issues arising out of the filing, without undue pressure of time.¹⁴

15. Addressing the *ex parte* nature of the filing, the prosecution accepted that *ex parte* filings should be the exception to the general rule. They pointed out that the defence and the victims had been informed in an email sent on Friday 31 August at 16.35 that there may be an *ex parte* filing, although the email did not reveal the subject matter of the filing, save that it was an issue that was connected with discussions between the prosecution and the Victims and Witnesses Unit. Otherwise, the defence were not informed that an *ex parte* filing was to take place, or its subject matter.¹⁵

16. The email was addressed to the Legal Adviser to the Trial Division, and was copied to the accused, along with the representatives of the victims who, with the leave of the Chamber, are currently participating in the proceedings. It set out the following:

“Please be informed that, depending on the outcome of discussions between the OTP and VWU, the Prosecution may file on Monday, 3 September 2007, an urgent ex parte - available only to the Prosecution and the Registry - request to

¹⁴ Transcript of hearing on 7 September 2007, ICC-01/04-01/06-T-51-CONF-EXP-ENG, page 4.

¹⁵ Transcript of hearing on 7 September 2007, ICC-01/04-01/06-T-51-CONF-EXP-ENG, page 5.

the Trial Chamber to add a number of items to the Court's agenda, preferably to be addressed at the 4 September 2007 hearing.

In the event of a filing, the Prosecution will request to discuss these additional agenda items in an ex parte closed session hearing, with the Prosecution and the representatives of VWU being present.

In respect of ex parte filings and ex parte hearings, the Prosecution recalls the 13 October 2006 public Judgement of the Appeals Chamber (ICC-01/04-01/06-568), at paragraphs 65 to 67."

17. The reference in the email to 4 September 2007 was to a hearing, listed at the instigation of the Chamber, at which a timetable was agreed for the filing of submissions and the listing of hearings, to ensure that such admissibility and procedural issues as require early determination are resolved well in advance of the trial.¹⁶ The Chamber observes that notwithstanding the terms of this email, the "Prosecution's Provision of Information to the Trial Chamber" of 3 September 2007 contained no application to add items to the agenda of 4 September 2007 and during the hearing on that day no submissions were advanced that related to this *ex parte* filing. Instead, the bench of its own initiative listed the hearing on 7 September 2007 in order for the filing to be considered before the re-interviews commenced on 10 September 2007.

18. In justification of the *ex parte* filing the prosecution relied on Rule 83 and Article 67(2).¹⁷

19. Article 67(2) provides:

¹⁶ See Order setting out schedule for submissions and hearings regarding the subjects that require early determination, ICC-01/04-01/06-947.

¹⁷ Transcript of hearing on 7 September 2007, ICC-01/04-01/06-T-51-CONF-EXP-ENG, page 6.

“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.”

20. Rule 83 provides:

“Ruling on exculpatory evidence under article 67, paragraph 2

The Prosecutor may request as soon as practicable a hearing on an ex parte basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2.”

21. The prosecution argued that, although no request had been made for relief or for a hearing on the issue, nonetheless Rule 83 was relevant because the filing allowed *“the Office of the Prosecutor to continue its communication with the Registry and ... with the Victims and Witnesses Unit in order to solve the problem”*, even though it was not known whether at a *“certain point in time”* the prosecution would request a hearing. The prosecution indicated that whether or not a ruling was sought from the Chamber depended, certainly in part, on any submissions that may be made by the representatives of the Registry during the hearing itself.¹⁸ The Chamber observes at this juncture, however, that it was never explained satisfactorily how the filing was necessary in order

¹⁸ Transcript of hearing on 7 September 2007, ICC-01/04-01/06-T-51-CONF-EXP-ENG, page 6.

to allow the prosecution “to continue its communication with the Registry”, because any discussion between those two bodies can take place irrespective of any filing that is made “advising the Chamber of information”.

22. Additionally, the prosecution suggested that support was to be found for this *ex parte* filing in the decision of the Appeals Chamber of 13 October 2006,¹⁹ and particularly at paragraphs 65 – 67, in which the majority of the judges²⁰ set out the following:

65. In relation to the third ground of appeal, the Appeals Chamber determines that, for the reasons explained below, the decision by the Pre-Trial Chamber that whenever an application pursuant to rule 81 (2) and (4) of the Rules of Procedure and Evidence is filed *ex parte*, the other participant must be made aware in an *inter partes* filing of the fact that such an application was filed as well as of its legal basis and, with respect to an application under rule 81 (4), of any request for *ex parte* proceedings that might be contained in such an application is erroneous to the extent that it does not provide for any exception.

66. This decision by the Pre-Trial Chamber must be seen in light of the discretion of a Chamber to determine, within the framework of the applicable law, whether applications by participants are kept *ex parte* or are made *inter partes* and whether or not to hold proceedings on an *ex parte* basis. The decision of the Pre-Trial Chamber that is the object of the third ground of appeal is an anticipated and general exercise by the Pre-Trial Chamber of this discretion.

67. The decision of the Pre-Trial Chamber that is the object of the third ground of appeal does not provide for any flexibility. The Pre-Trial Chamber’s

¹⁹ Judgment on the Prosecutor’s appeal against the decision of Pre-Trial I entitled “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.

²⁰ Judge Pikis dissenting.

approach that the other participant has to be informed of the fact that an application for ex parte proceedings has been filed and of the legal basis for the application is, in principle, unobjectionable. Nevertheless, there may be cases where this approach would be inappropriate. Should it be submitted that such a case arises, any such application would need to be determined on its own specific facts and consistently with internationally recognized human rights standards, as required by article 21 (3) of the Statute. By making a decision that does not allow for any degree of flexibility, the Pre-Trial Chamber precluded proper handling of such cases.

23. Applying that approach to these facts, the prosecution argues, as the Chamber understands it, that this filing comes within the category of a situation where the prosecution are justified in not disclosing to the defence the fact that information has been supplied *ex parte* or the legal basis for the filing.

24. Furthermore, the prosecution submitted that the *ex parte* nature of this filing is appropriate for the added reason that “*the re-interviews of the former child soldiers fall within the parameters of ongoing investigations*” and that in the circumstances Rule 81(2) and (4) apply.²¹ These provide as follows:

Rule 81(2)

“Restrictions on 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

²¹ Transcript of hearing on 7 September 2007, ICC-01/04-01/06-T-51-CONF-EXP-ENG, page 8.

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."

25. When asked to set out the factual basis for the suggestion that providing this material could prejudice further or ongoing investigations, or why it was necessary to protect the safety of witnesses, victims and members of their families, the prosecution argued that the fact that the five witnesses are living together at the same location "*may be a reason to file this information ex parte*" because of the risk that the defendant or the public may become aware of that single address.²² The prosecution agreed that there was no greater likelihood that this single address would become known than five separate addresses (had the witnesses being living in different places), but they submitted that there would be an increased risk to the group if the single address became known because of its common occupancy.²³

26. As regards [X], separate arguments were advanced. In essence, the prosecution's concerns were centred on the revelation that she is now living in [a certain location, the disclosure of]²⁴, which could significantly focus any

²² Transcript of hearing on 7 September 2007, ICC-01/04-01/06-T-51-CONF-EXP-ENG, page 9.

²³ Transcript of hearing on 7 September 2007, ICC-01/04-01/06-T-51-CONF-EXP-ENG, page 10.

²⁴ The use of brackets, bold type and underlining at this point indicates there has been a redaction. Neutral words have been used instead to protect confidential material.

attempt to discover her whereabouts. The prosecution indicated that their “*main concern*” leading to the *ex parte* filing was the position of [X]^{25,26}

Analysis and Decision

27. In arriving at our decision as regards the validity of this *ex parte* filing, the Chamber has paid careful regard to two critical principles. First, that of public proceedings. This approach is derived, in part, from the Rome Statute: for instance, Article 64(7) provides that the trial should be held in public unless special circumstances necessitate a departure from that norm, and Article 63(1) stipulates that the accused shall be present during the trial. Second, the Chamber has borne in mind the importance of taking such steps as are necessary to protect victims and witnesses, along with members of their families. As the bench indicated in court on 4 September 2007, it is our intention to ensure that *ex parte* filings and *ex parte* hearings are only used appropriately, and that the bench shall scrutinise carefully each and every occasion when it is suggested that there should be a departure from the principle of public proceedings. As the court made clear during that hearing, in our view this area is one that calls for careful evaluation whenever the *ex parte* procedure is invoked, to ensure that private communications with the court are really justified. These observations are not meant to deter the parties and participants from initiating appropriate confidential communications with the court, but instead they underline our determination to ensure that this procedure is not abused.

28. This issue – a failure to provide relevant evidence to the defendant – was dealt with by the Appeals Chamber in its decision of 13 October 2006 (*supra*), at

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²⁶ Transcript of hearing on 7 September 2007, ICC-01/04-01/06-T-51-CONF-EXP-ENG, page 11.

paragraph 37, in the context of proposals to edit witness statements and to withhold the identity of witnesses:

"... the Pre-Trial Chamber was ... correct in deciding that the non-disclosure of the identity of witnesses or of portions of prior witness statements would be authorised by the Chamber pursuant to rule 81 (4) of the Rules of Procedure and Evidence only after an evaluation of the infeasibility or insufficiency of less restrictive protective measures. Such evaluation has to be made on a case-by-case basis. The Statute and the Rules of Procedure and Evidence place much importance on disclosure to the defence, as is evidenced not only by article 61 (3) (b) of the Statute and rule 76 (1) of the Rules of Procedure and Evidence, but also, for example, by rule 81 (2), third sentence, and rule 81 (5) of the Rules of Procedure and Evidence. Rule 81 (4) of the Rules of Procedure and Evidence itself points in that direction by requiring the Chambers to take the "necessary steps to ensure the confidentiality of information". The use of the word "necessary" emphasises the importance of witness protection and the obligation of the Chamber in that respect; at the same time, it emphasises that protective measures should restrict the rights of the suspect or accused only as far as necessary."

29. The court is dealing here with a somewhat different situation, in the sense that an *ex parte* procedure is being used to provide information to the Chamber concerning six particular witnesses, but not to the accused, notwithstanding the fact that the detail of that information, or part of it, may be of significance to the accused.

30. The Chamber is of the view that the principles identified by the Appeals Chamber, as set out at paragraph 25, are wholly applicable to the issue we are considering: there should be a fact-dependent evaluation to establish whether

it is necessary to withhold this relevant evidence, or any part of it, from the defendant.

31. In that regard, it has not been argued by the prosecution that any part of the content of the "Prosecution's Provision of Information to the Trial Chamber" is irrelevant or would not ordinarily merit disclosure (save that additional material is being sought in relation to [X's particular position]²⁷). Furthermore, Article 67(2) provides a strong basis for ruling that this information, apart from the possible exception concerning [X]²⁸, should be disclosed to the defence at this stage, unless it is necessary to withhold some or all of it, because it "*may affect the credibility of prosecution evidence*".

32. It is necessary to turn, finally, therefore to the matters relied on by the prosecution to justify this *ex parte* filing. It seems to us that exceptional circumstances will need to exist in order to justify any party or participant providing information to the court on an *ex parte* basis when no relief is sought or subsequent application is made on the basis of the material, and when the Chamber has not invited that course of action. Not least, it could cause uncertainty at a later stage in the proceedings: if the bench is merely asked to "receive" private information, judicial inactivity could later be interpreted as approval by the Chamber either of any action proposed by the party or participant, or of any past events that are revealed.

33. Save for the factors set out at paragraph 22 (the safety of the witnesses), nothing has been advanced before the court to justify the suggestion that disclosing this filing to the defence "*may prejudice further or ongoing investigations*" (Rule 81(2) *supra*). In the view of the bench it is insufficient merely to rehearse provisions of this kind – it is not enough simply to invoke a

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principle, an article, a rule or a regulation – without providing the facts or matters which support the submission or the particular proposed course of action. Therefore, in order for the Chamber to appraise the legitimacy of *ex parte* filings on a case-by-case basis, it is necessary for the party or participant to provide the full factual basis relied on. On this occasion none was revealed in support of the suggestion that this step was necessary to protect the prosecution's ongoing or future investigations.

34. Turning to the next issue – whether this course is necessary to protect the witnesses – the Chamber is unpersuaded with the argument that revealing to the defence the fact that at one stage (and possibly in the future) five of the witnesses lived together potentially undermines their safety. These witnesses are under the protection of the Victims and Witnesses Unit, and they have been housed in an appropriately safe location (certainly no submission to the contrary has been advanced). There is no reason to suppose that this single address is any more likely to be discovered by someone intending the witnesses harm than five separate addresses. The bench acknowledges that if the address is discovered then all five would be endangered, particularly should they still be living together. However, in our view, the essential point is that there is no reason to suppose that the single address is materially at risk of being revealed. Accordingly, the Chamber does not accept that this argument provides a justification for retaining the *ex parte* status of this filing.

35. As regards [X's]²⁹ whereabouts the point can be taken shortly. The Trial Chamber accepts without hesitation that revealing her [current location]³⁰ could better facilitate attempts to locate her – that information, particularly when coupled with other information which may be available about the witness, could make it materially easier to locate her current location, and

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accordingly the Trial Chamber approves a redaction of the relevant part of paragraph 15 of the "Prosecution's Provision of Information to the Trial Chamber" (see para 34). Her present address is otherwise irrelevant to any of the known issues in the case.

36. As indicated at paragraph 28, in the view of the bench there is a possible exception to the proposition that the material covered in the filing "*may affect the credibility of prosecution evidence*" of the six witnesses. The representative of the Registry raised the issue that in paragraph 15 of the prosecution's filing there is a piece of information concerning [X]³¹. That [redacted] information is directed solely to **her particular position**³², and at present the Chamber has insufficient information to decide whether or not this may have an impact on her believability. Furthermore, as provided in Article 67(2), it is the prosecution's obligation to assess whether this evidence may affect her credibility. If there is doubt on the issue, then the matter is to be referred to the court. In the circumstances, the Trial Chamber orders a redaction of the relevant passage, but the prosecution must discharge their obligations under Article 67(2) in the way just described.

37. The Trial Chamber orders, therefore, that the "Prosecution's Provision of Information to the Trial Chamber", currently filed "Under Seal, *Ex Parte* – Prosecution and Registry only" should be provided to the defence only, save that the following passages should be redacted:

- i) paragraph 6, last sentence [redacted];
- ii) footnote 2 on page 3 [redacted]
- iii) Paragraph 13 [redacted].

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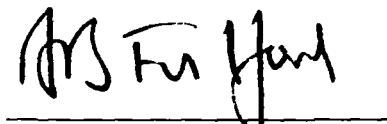
- iv) The entirety of paragraphs 15 and 16, together with their heading [redacted].

38. For the avoidance of doubt, in the view of the Chamber passages i) – iii) have a tendency to reveal the current whereabouts of the witnesses; they do not impact on their credibility; and in consequence it is necessary and fair to order the redactions to ensure the safety of all six witnesses. Passage iv) may require disclosure, but the necessary assessment must be made by the prosecution applying the provisions of Article 67(2).

39. It follows that at present the bench limits the ambit of disclosure (in the redacted form described in para 34) to the defence. In due course the Trial Chamber will hear submissions on whether the "Prosecution's Provision of Information to the Trial Chamber" should be made a public document, and in the meantime we invite consideration by the parties and the Victims and Witnesses Unit as to whether there are further redactions that are necessary in order to facilitate the wider publication of this filing.

40. Once that has been decided, the Trial Chamber shall consider releasing this decision as a public document, having carried out any necessary redrafting in order to remove any passages that would undermine the protection that we are providing to the six witnesses. The Chamber is of the provisional view that it will be helpful, in due course, to publish this decision, once redacted, not least because potentially important issues of principle are dealt with that may have an impact on the use that is made of the *ex parte* procedure in the future.

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


Judge Adrian Fulford
Judge Elizabeth Odio Benito
Judge René Blattmann

Dated this 26 September 2007

At The Hague, The Netherlands