

1 International Criminal Court

2 Trial Chamber I

3 Situation Democratic Republic of the Congo - ICC 01/04-01/06

4 Hearing - Open Session

5 Friday, 18 January 2008

6 The hearing starts at 10.01 a.m.

7 COURT USHER: All rise. The International Criminal Court is now
8 in session. Please be seated.

9 PRESIDING JUDGE FULFORD: For the benefit of counsel, copies of
10 the relevant sections of the decision that is going to be delivered
11 today will be provided by e-mail very shortly this hearing, so I hope
12 that will save you from having to try to take a note.

13 The public section of this oral decision.

14 Introduction.

15 This is the Chamber's oral decision on six filings of the
16 Prosecutor that all relate to redactions.

17 The first filing.

18 This is dated 12 December 2007 (1081) and concerns 17 witnesses,
19 5 of whom were relied on during the Confirmation Hearing. The
20 Prosecution apply for three things:

- 21 (i) to lift certain redactions under Rule 81(4) of the Rules of
22 Procedure and Evidence ("The Rules");
23 (ii) to be permitted to withhold certain information, in most
24 instances on a temporary basis; and
25 (iii) for authorisation to disclose certain material in summary

1 form only until protective measures are in place.

2 The second filing.

3 This is dated 13 December 2007 (1085) filed ex parte, 1086 filed
4 publicly) and concerns four videos that have been disclosed to the
5 Defence in distorted or redacted form without previous authorisation.
6 The Prosecution seek leave to retain non-disclosure of the relevant
7 portions indefinitely.

8 The third filing.

9 This is also dated 13 December 2007 (1087) and concerns 71
10 documents in relation to which redacted disclosure was ordered by the
11 Pre-Trial Chamber and 2 documents not covered by any order from a
12 Chamber. The Prosecution apply for four things:

- 13 (i) authorisation to lift redactions to 11 documents;
14 (ii) to be permitted to retain redactions to one document under
15 Rule 81(2) on the basis of ongoing investigations;
16 (iii) authorisation to retain throughout the trial redactions to
17 27 documents; and
18 (iv) permission to retain temporary redactions to 42 documents
19 until protective measures are in place.

20 The fourth filing.

21 This is dated 19 December 2007 (1098) and concerns two witnesses.
22 The Prosecution seek to rectify certain errors that have occurred in
23 relation to providing information.

24 The fifth filing.

25 The fifth is dated 21 December 2007 (1102) and concerns the

1 Prosecution's application to retain permanently redactions to 153
2 witness statements, screening notes, investigators' notes and
3 transcripts from a total of 88 witnesses, all of which is in the
4 category of potentially exculpatory material. This material has been
5 served in a heavily edited form; indeed, in many instances only a
6 short section is set out in the disclosed material, extracted from
7 complete documents. In each instance the identity of the witness is
8 hidden.

9 The sixth filing.

10 Additionally, two matters arise for determination arising out of
11 an ex parte, Prosecution only filing on 14 January 2008 (1115).

12 The history.

13 On 9 November 2007 the Trial Chamber ordered the Prosecution to
14 disclose its incriminatory materials, including witness statements, by
15 14 December 2007. It additionally ordered that if the Prosecution
16 considers redactions are necessary, it must explain and justify each
17 redaction.

18 On 13 December 2007 the Chamber delivered an oral decision (the
19 first part of which was public, the latter part confidential,
20 Prosecution only) which addressed three applications filed on 31
21 October 2007, 7 December 2007 and 10 December 2007 respectively. In
22 outline only, the Chamber was asked to deal with the lifting,
23 retention and imposition of redactions to certain passages in
24 documents that have arisen for consideration in the context of this
25 trial. It is unnecessary for the purposes of this decision to detail,

1 even in outline, the document-by-document analysis that is set out in
2 the decision of 13 December.

3 THE INTERPRETER: The interpreters request that the President
4 slow down.

5 PRESIDING JUDGE FULFORD: Instead, it is of value to summarise
6 the conclusions of general applicability that the Chamber reached in
7 that decision that are relevant to the present issues. They are as
8 follows:

9 (i) The Prosecution will not be permitted to maintain or to
10 impose on a permanent basis any redactions in documents
11 that relate to the issues in the current case against the
12 accused if they are potentially of assistance to the
13 accused (transcript page 2). It follows that any
14 permanent redactions that the Chamber maintains or imposes
15 will relate to material that is irrelevant to the charges
16 Mr. Thomas Lubanga Dyilo faces, in the sense that they
17 neither tend to undermine the Prosecution case on the
18 charges confirmed by the Pre-Trial Chamber nor give any
19 support for the Defence case, namely that the accused is
20 innocent of the charges.

21 (ii) All material relevant to the charges against the accused
22 shall be disclosed prior to the trial, in accordance with
23 the detailed timetable that the Chamber has established
24 (transcript page 2).

25 (iii) The Prosecution shall disclose all information that is

1 potentially exonerating pursuant to Rule 67(2) of the
2 Rules of Procedure and Evidence or any material that falls
3 for inspection under Rule 77 (transcript page 2).

4 (iv) In order to maintain the trial date of 31 March 2008, if
5 this is reasonably achievable, the date of
6 14 December 2007 shall be held for the service of the
7 Prosecution case in full, save for the exceptions listed
8 below.

9 (v) The witnesses who have been referred to the Victims and
10 Witnesses Unit for protection (whether or not they have
11 been accepted by the unit) the statements and accompanying
12 documents may be served by way of redactions, summaries,
13 or, where indicated in the filing, by withholding certain
14 items of evidence, but only until 31 January 2008. Any
15 delay in service of non-redacted material thereafter will
16 have to be justified following an application (transcript
17 page 10).

18 (vi) The Prosecution expert evidence shall be served by 29
19 February 2008 (transcript page 16).

20 (vii) The statements and the audio/videotapes of the
21 re-interviews of certain witnesses shall be served by
22 31 January 2008, with the transcripts by 29 February 2008
23 (transcript page 16).

24 (viii) All statements dealing with the age of witnesses shall be
25 served by 31 December 2007 (unless the 31 January deadline

1 applies) (transcript page 16).

2 Further submissions on outstanding issues relating to redactions
3 were advanced at the Status Conference of 10 January 2008.

4 The submissions.

5 As regards the present applications, the Defence (in written
6 submissions filed on 4 and 10 January 2008, that were supplemented by
7 oral submissions on 10 January 2008) submitted that it may wish to
8 contact potentially exculpatory witnesses (see, in the main, the fifth
9 filing) and for this it needs full details of each of them. It is
10 suggested that it is unrealistic to argue that the Defence would seek
11 to harm potentially exculpatory witnesses, although it is accepted
12 there may be good reason for keeping this information from the wider
13 public. As such, it was argued in the Defence's written submission
14 (Document 1112) that the criteria for the application of Article
15 54(3)(f) are not fulfilled in this case. Furthermore, the Defence
16 asserted that it has the right to request an order from the Chamber
17 for disclosure by the Prosecution of the entirety of those statements
18 from which extracts have been served.

19 The Defence argued that although the use of child soldiers by
20 other armed groups could not be a reason excluding criminal
21 responsibility (transcript pages 50-57), for the purposes of
22 preparation "it appeared necessary ... to be able to inspect a maximum
23 amount of information with regards to the phenomenon of the use of
24 child soldiers in Ituri during this period" (transcript page 62).

25 In relation to the temporary redactions to incriminating

1 material, the Defence stressed the need for early service to enable
2 proper pre-trial investigations. The Defence also submitted that
3 temporary non-disclosure should be an exception and not the rule, and
4 that the Prosecution had not offered sufficient case-specific
5 justifications for this measure, relying instead upon the insecurity
6 in Ituri.

7 In relation to the videos (filing 1086) the Defence suggested
8 that it is critical that they have full information concerning any
9 person who makes allegations against the accused, whether or not they
10 are witnesses.

11 Finally the Defence argued that the Rome Statute framework does
12 not provide for a situation in which an accused is facing a trial at
13 this court in relation to events in Ituri whilst concurrently being
14 the subject of other criminal investigations by the International
15 Criminal Court that also relate to events in the same province. It is
16 contended that to proceed in this way violates the "principle of
17 fairness in proceedings" and that it is procedurally impermissible to
18 conduct the trial and the investigation simultaneously when the events
19 in the trial and the further investigations concern the same overall
20 situation in Ituri. On that footing, the Defence submits that
21 non-disclosure on the basis of further investigations within this
22 category is without legal foundation.

23 The Prosecution stressed (at pages 46-50 of the transcript) that
24 the exculpatory evidence is often contained in material that is
25 incriminatory. It emphasised that the use of child soldiers by other

1 individuals or organisations does not constitute exculpatory material
2 and, in any event, the Prosecution indicated it will make relevant
3 admissions on the use of child soldiers as a phenomenon if this is
4 revealed in due course to be a live issue in the case. As regards
5 ongoing investigations, there are only 13 relevant documents in the
6 filings under consideration. Finally, the Chamber was informed that
7 some potentially exculpatory material relates to the ongoing
8 investigations of people other than the accused.

9 Analysis and conclusions.

10 In deciding each of these applications the Bench will apply the
11 principles outlined above, which do not require repetition. It is
12 only necessary to set out, additionally, by way of general approach
13 that the Chamber is unpersuaded, on the basis of the material before
14 it, that evidence relating to the use of child soldiers by other
15 individuals or groups is relevant to the charges the accused faces.
16 Any evidence on this subject will not undermine the Prosecution case
17 and on the basis of what has been revealed by the Defence (following
18 an invitation from the Bench for assistance on this issue), it does
19 not support any defence or line of argument to be relied on by the
20 accused. Put otherwise, this area of evidence has not been
21 demonstrated to relate to a live issue in the case and it is not one
22 that could assist the accused. The sole argument of the Defence on
23 this subject - that they wish to be provided with the maximum
24 information on the phenomenon of the use of child soldiers in Ituri -
25 does not sufficiently support the argument that it is necessary for

1 the Prosecution to disclose this material. Nothing has been revealed
2 that tends to indicate that an investigation of this phenomenon will
3 materially assist Mr. Thomas Lubanga Dyilo.

4 The Defence declined an invitation from the Chamber to set out
5 the defences the accused is likely to rely on, together with the
6 anticipated issues in the case. At this stage his stance is that he
7 relies on the right to silence, which is his undoubted entitlement.
8 However, unreasonable decisions by the Defence to make late disclosure
9 may have an effect on determinations by the Chamber as to what
10 constitutes a fair trial. For instance, given the need to protect
11 witnesses and others who have provided information to the Court, if
12 the Bench is -- let me start that part again -- if the Bench is put in
13 a position at a late stage of the proceedings, without any proper
14 justification, of being asked to order the disclosure of exculpatory
15 witnesses when at that point in time it is impossible to secure their
16 necessary protection, the possibility exists that the Court will
17 conclude that the continued trial is fair notwithstanding the failure
18 to reveal their identities to the accused. Accordingly, if the
19 Defence identifies lines of defence or issues at a significantly and
20 unnecessarily advanced stage this may have consequences for decisions
21 that relate to disclosure to the accused.

22 On the issue of simultaneous trial proceedings and ongoing
23 investigations into events that occurred in the same province
24 (although not necessarily at the same time or in the same
25 circumstances), the issue under consideration by the Bench is the

1 accused's entitlement to disclosure. It is stressed that the Chamber
2 will ensure that all relevant material is served regardless of the
3 circumstances in which it came into the possession of the Prosecution:
4 the Prosecution will not be permitted to withhold material of
5 potential assistance to the accused because it relates to other
6 inquiries. It is not appropriate in the context of this ruling on
7 redactions and disclosure for the Chamber to express a view on the
8 illegality, as suggested by the Defence, of the Prosecution's
9 continued investigations into the accused.

10 The Chamber makes the following public orders:

- 11 (i) The Prosecution are not under an obligation to serve
12 material that relates to the general use of child soldiers
13 in the DRC.
- 14 (ii) The orders of the Chamber made on 13 December 2007 are to
15 be complied with in full.
- 16 (iii) In the public filing 1086 at paragraphs 13-17 the
17 Prosecution deal with video DRC-OTP-1002-0006 and the
18 interview with an unidentified person. The Chamber orders
19 the Prosecution to provide to the Defence by 4.00 p.m. on
20 Friday, 18 January 2008 --

21 I'm going to start that sentence again.

22 The Chamber orders the Prosecution to provide a note to the
23 Defence by 4.00 p.m. on Friday, 18 January 2008, setting
24 out which sections are relied on by the Prosecution as
25 incriminatory material, the fact that the individual is not

1 going to be known --

2 Sorry, I start that phrase again:

3 -- the fact that the individual is not going to be called
4 and that his whereabouts and identity are unknown.

5 Thereafter, the Defence have leave to raise any disclosure
6 or admissibility issues.

7 Otherwise, the Chamber will address each of the discrete requests
8 of the Prosecution individually during the private, Prosecution only
9 part of this decision.

10 That concludes the public element of this decision.

11 For the sake of the record, I should indicate that Mr. MacDonald
12 and Mr. Bulmer, assisted by another member of their team, appear for
13 the Prosecution. Ms. Buteau, accompanied by two others, appears for
14 the defendant, who has elected not to attend today. The Office of
15 Public Counsel for Victims and the legal representatives of the
16 victims have asked to be excused and have raised no objections to this
17 decision being rendered in their absence, and of course we have
18 excused their attendance today.

19 Thank you very much indeed for your attendance today, Ms. Buteau.
20 I'm grateful to you for filling the breach at relatively short notice.

21 We are going to have to rise, I'm afraid, Mr. Bulmer and
22 Mr. MacDonald, for half an hour while the Court is reconfigured for
23 closed session. I hope this doesn't disturb your day to too great an
24 extent.

25 We'll sit again at 11.00.

1 The hearing ends at 10.29 a.m.

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25