

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 5 May 2009

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***

Public

**Redacted "Decision on 'Prosecution's Application for Non-disclosure of
Information' filed on 14 May 2008"**

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Unrepresented Applicants for Participation/Reparation

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States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Background and Submissions

1. This decision concerns the Office of the Prosecutor's ("prosecution") "Application for Non-disclosure of Information" of 14 May 2008 ("Application") in which it requested the Chamber to authorise redactions, *inter alia*, to protect [REDACTED] who are referred to in material pertaining to 4 witnesses.¹ The 4 witnesses are part of a group of 18 witnesses who provide information of a potentially exculpatory nature, whose material the Chamber ordered the prosecution to disclose to the defence in full on 24 April 2008.² The prosecution was directed to request a hearing and to provide the Chamber with the relevant statements or material if it considered that discrete redactions were necessary (e.g. to protect others).³ Pending a decision of the Chamber, the prosecution submitted it would disclose the evidence relating to the 4 witnesses in redacted form on 16 May 2008.⁴
2. The Defence did not respond to the prosecution's Application. The Chamber notes that there were redactions to the public version of the filing which the defence received that in the main removed the details which would identify the individuals concerned.
3. On 13 June 2008, the Trial Chamber ordered a stay of the proceedings.⁵ Following the resolution of the issues that had necessitated the imposition of the stay, the Chamber lifted the stay at the status conference on 18 November

¹ Prosecution's Application for Non-disclosure of Information, 14 May 2008, ICC-01/04-01/06-1330-Conf-Exp with 5 confidential *ex parte* prosecution only annexes. A public redacted version of the application was filed on 15 May. ICC-01/04-01/06-1331.

² Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, 24 April 2008, ICC-01/04-01/06-1295-US-Exp, paragraph 95 and ICC-01/04-01/06-1295-US-Exp-AnxC. A confidential and a public redacted version of the Decision were issued on 8 May 2008 : ICC-01/04-01/06-1311-Conf-Anx1, ICC-01/04-01/06-1311-Anx2, and ICC-01/04-01/06-1311-Anx3.

³ ICC-01/04-01/06-1295-US-Exp, ICC-01/04-01/06-1311-Conf-Anx1, and ICC-01/04-01/06-1311-Anx2, paragraph 95.

⁴ ICC-01/04-01/06-1330-Conf-Exp and ICC-01/04-01/06-1331, paragraph 25.

⁵ Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401.

2008.⁶ At this status conference, the Chamber provisionally set the date for the commencement of the trial to 26 January 2009.⁷

Redactions to material of 1st witness (Witness DRC-OTP-WWWW-0156)

4. The prosecution requests redactions to an investigator's note, prepared following a meeting with Witness DRC-OTP-WWWW-0156, in order to protect a third party and any further investigations, pursuant to Article 54(3)(f) of the Rome Statute ("Statute") and Rule 81(2) of the Rules of Procedure and Evidence ("Rules"). In particular, the prosecution requests the redaction of the name of [REDACTED]; this [REDACTED] continues to provide [REDACTED] in this and other investigations. The prosecution submits that the disclosure of this [REDACTED] name would compromise his work and safety, as well as the security and safety of the witnesses [REDACTED]. The prosecution points to a decision of the Chamber which authorised the redaction of information relating to a different [REDACTED] and submits that the same factors apply, and in particular that the information is irrelevant to the known issues in the case.⁸

Redactions to material of 2nd witness (Witness DRC-OTP-WWWW-0062)

5. The prosecution requests redactions to the draft, unsigned statement of Witness DRC-OTP-WWWW-0062, in order to protect a third party and any further investigations, pursuant to Article 54(3)(f) of the Statute and Rule 81(2) of the Rules. The witness statement refers to [REDACTED]. The prosecution requests the non-disclosure of this name and that of [REDACTED] as [REDACTED] continue to be sources and to provide leads for the prosecution, assisting its continued work in the field, and their safety may be at risk if their names are disclosed. It is submitted that the Chamber authorised the redaction of this name and that of [REDACTED] in two

⁶ Transcript of hearing on 18 November 2008, ICC-01/04-01/06-T-98-ENG, page 3, lines 22-25, page 4, line 1.

⁷ Transcript of hearing on 18 November 2008, ICC-01/04-01/06-T-98-ENG, page 7, lines 23-25.

⁸ ICC-01/04-01/06-1330-Conf-Exp and ICC-01/04-01/06-1331, paragraphs 4-10.

previous decisions and that the same factors apply, in that the information is irrelevant to the prosecution case and to the defence case, to the extent that the latter is known.⁹

Redactions to material of 3rd witness (Witness DRC-OTP-WWWW-0058)

6. The prosecution requests redactions to the transcripts of the interview of Witness DRC-OTP-WWWW-0058, taken pursuant to Article 55(2) of the Statute and Rule 112 of the Rules, in order to protect a third party and any further investigations, pursuant to Article 54(3)(f) of the Statute and Rule 81(2) of the Rules. The material relating to this witness was disclosed to the defence on 16 May 2008.¹⁰ The witness statement refers to [REDACTED] and to [REDACTED]. The prosecution submits that the Chamber previously authorised the redaction of the [REDACTED] name and [REDACTED], and that of [REDACTED] in two decisions relating to two different witness statements. The prosecution submits that the same factors apply to the redactions sought in the present Application, namely that the information is irrelevant to the prosecution case and defence case, to the extent that the latter is known, and disclosure could endanger the safety of the individuals and organisations [.]¹¹

Redactions to material of 4th witness (Witness DRC-OTP-WWWW-0067)

7. The prosecution requests redactions to the transcript of interview of Witness DRC-OTP-WWWW-0067, taken pursuant to Article 55(2) of the Statute and Rule 112 of the Rules, in order to protect a third party and any further investigations, pursuant to Article 54(3)(f) of the Statute and Rule 81(2) of the Rules. The witness statement refers to [REDACTED] and to [REDACTED]. The prosecution submits that [REDACTED], and the [REDACTED], continue

⁹ *Ibid.*, paragraphs 11-14.

¹⁰ Prosecution's response to "Requête de la Défense aux fins de communication de documents nécessaires à la préparation de sa défense en vertu de la Règle 77", 23 May 2008, ICC-01/04-01/06-1352-Conf-Anx2, items 268 and 269.

¹¹ ICC-01/04-01/06-1330-Conf-Exp and ICC-01/04-01/06-1331, paragraphs 15-18.

to be sources and to provide leads for the prosecution, and their continued work in the field and their safety may be at risk if their names are disclosed. Reference is made to two previous decisions of the Chamber which authorised the redactions of the names of the same individuals [REDACTED] in the statements of three witnesses. It is submitted that the same factors still apply, namely that the information is irrelevant to the prosecution case and defence case, to the extent that the latter is known, and that disclosure could endanger the safety of the individuals and organisations.¹²

Analysis and Conclusions

8. The following provisions of the Statute and Rules are relevant in considering this Application:

Article 54

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

Functions and powers of the Trial Chamber

[. .]

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.

[...]

Rule 81

Restrictions on disclosure

[...]

¹² ICC-01/04-01/06-1330-Conf-Exp and ICC-01/04-01/06-1331, paragraphs 19-22.

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.

[...]

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.

[...]

9. The Appeals Chamber held in the *Katanga* case that “Rule 81(4) of the Rules [...] should be read to include the words “persons at risk on account of the activities of the Court” so as to reflect the intention of the States that adopted the Rome Statute and the Rules [...], as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect that category of persons.”¹³ The Appeals Chamber emphasised that the non-disclosure of information for the protection of persons at risk on account of the activities of the Court requires “a careful assessment [...] on a case by case basis, with specific regard to the rights of the [accused].”¹⁴

10. Notwithstanding that the decision of the Appeals Chamber relates to restrictions on disclosure in the context of the confirmation of charges procedure and strictly is not binding on the Trial Chamber, the Chamber is of the view that the principles outlined are of high relevance to proceedings before the Trial Chamber.

11. Further, the Trial Chamber has previously authorised the permanent redaction of the names of persons referred to as third parties, [REDACTED]

¹³ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-475, paragraph 1.

¹⁴ *Ibid*, paragraph 2.

when, *inter alia*, the information was irrelevant to the issues known in the case and they did not render the document in any way unintelligible.¹⁵

12. In the light of the substance of this Application, the Trial Chamber considers that it has been properly submitted on an *ex parte* basis. The Chamber also notes that a public redacted version of the Application was filed.

Redactions to material of 1st witness (Witness DRC-OTP-WWWW-0156)

13. The redactions sought consist of the name [REDACTED] who [REDACTED], his telephone numbers and his occupation, all of which appear in the first two paragraphs of the investigator's note (Annex 1 of the Application). The Chamber is satisfied that this information is irrelevant to any known or live issue in the case against the accused; the redactions do not render the document unintelligible and no lesser measures appear to be feasible to ensure the continued safety and security of both [REDACTED] and witnesses. In the circumstances, given the lack of identifiable prejudice to the defence, the redactions are granted.

Redactions to material of 2nd witness (Witness DRC-OTP-WWWW-0062)

14. The redactions sought in the witness' statement consist of the name of [REDACTED] and [REDACTED], which appear in paragraph 7 of the statement (Annex 2 of the Application). As noted by the prosecution, the Chamber has previously authorised the redaction of information concerning [REDACTED] on the grounds that the information was irrelevant to the charges and that disclosure may endanger the safety of [REDACTED].¹⁶ The Chamber is satisfied that it is wholly irrelevant to the known issues in the case. For this reason and the reasons previously expressed, the Chamber

¹⁵ Transcript of hearing on 13 December 2007, ICC-01/04-01/06-T-65-ENG, page 3; Order granting prosecution's application for non-disclosure of information provided by a witness, 31 January 2008, ICC-01/04-01/06-1146-Conf-Exp, and (confidential redacted version) ICC-01/04-01/06-1221-Conf-Anx1, paragraph 8.

¹⁶ Transcript of hearing on 13 December 2007, ICC-01/04-01/07-T-66-CONF-EXP-ENG, pages 1 and 5; Annex D to Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, 24 April 2008, ICC-01/04-01/07-1295-US-Exp.

authorises the redactions sought in this statement.

Redactions to material of 3rd witness (Witness DRC-OTP-WWWW-0058)

15. As with the application with respect to Witness **DRC-OTP-WWWW-0062**, the prosecution seeks the redaction of the same [REDACTED], appearing on page 18 of the first transcript of the witness' interview (Annex 3 of the Application, DRC-OTP-0167-0080) and page 1 of the second transcript (2 references, Annex 4 of the Application, DRC-OTP-0167-0083). In addition, the redaction of the name of [REDACTED] is sought (for which there are 4 references on page 1 of the second transcript Annex 4, DRC-OTP-0167-0083). As noted above, the Chamber previously authorised the redaction of [REDACTED] name and that of [REDACTED]. For the same reasons, the Chamber authorises the redaction of the name [REDACTED] and [REDACTED] concerned. The Chamber has also previously authorised the redaction of the name of [REDACTED] on the basis that the information was irrelevant to the known issues in the case and disclosure may endanger the safety of [REDACTED].¹⁷ For similar reasons, the redaction of the name of [REDACTED] is authorised.

Redactions to material of 4th witness (Witness DRC-OTP-WWWW-0067)

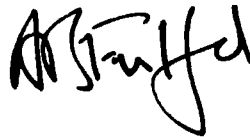
16. As with the applications with respect to Witness **DRC-OTP-WWWW-0062** and Witness **DRC-OTP-WWWW-0058**, the redactions of the names of [REDACTED] and [REDACTED] are sought in the transcript of the witness's interview (references to the name and [REDACTED] appear on pages 6/DRC-OTP-0173-0190 (5 times), 7/ DRC-OTP-0173-0191 (3 times), 8/ DRC-OTP-0173-0192 (1 time), 9/ DRC-OTP-0173-0193 (1 time), 12/ DRC-OTP-0173-0196 (4 times)). In addition, the redaction of the name of [REDACTED] and [REDACTED] is sought (6 references on page 10/ DRC-OTP-0173-0194). As noted by the prosecution, the Chamber previously authorised the redactions

¹⁷ ICC-01/04-01/06-1330-Conf-Exp and ICC-01/04-01/06-1331, paragraph 18; Transcript of hearing on 13 December 2007, ICC-01/04-01/07-T-66-CONF-EXP-ENG, pages 2 and 5.

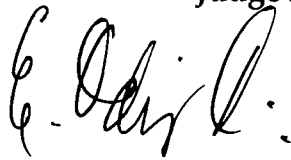
of the names [REDACTED], and the name of [REDACTED] was redacted pursuant to a further decision of the Chamber.¹⁸ The Chamber is satisfied that the names of [REDACTED] and [REDACTED] are not relevant to any known issue in the case and the non disclosure of their identities is necessary for reasons of safety and security.

17. On the basis of Articles 54(3)(f) and 64(6)(e) of the Statute and Rule 81(4) of the Rules the Chamber hereby grants the prosecution's Application and authorises the redactions as stated above.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 5 May 2009

At The Hague, The Netherlands

¹⁸ ICC-01/04-01/06-1330-Conf-Exp and ICC-01/04-01/06-1331, paragraph 22. Transcript of hearing on 13 December 2007, ICC-01/04-01/07-T-66-CONF-EXP-ENG, pages 3 and 5.