

**Cour
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**International
Criminal
Court**

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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 the prosecution's disclosure obligations arising out of an
issue concerning witness DRC-OTP-WWWW-0031**

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

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Other

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, delivers the following Decision on the prosecution’s disclosure obligations arising out of an issue concerning witness DRC-OTP-WWWW-0031.

I. Background and Submissions

1. On 5 November 2010 the Chamber questioned the late disclosure of part of an investigator’s internal memorandum related to witness DRC-OTP-WWWW-0031 (“witness 31”) dated 23 February 2006, which was disclosed to the accused on 1 November 2010.¹
2. The relevant document (DRC-OTP-0233-0525) is an internal memorandum prepared in the context of [REDACTED]. It contains an assessment by two investigators that the failure of witness 31 “to submit additional documents that would allegedly be in his possession” had led to “major questions [...] about his credibility and intentions to collaborate with the ICC”.² The memorandum states that “[a]s a consequence investigators decided to suspend contacts for the time being.”³
3. During the hearing on 5 November 2010, the Office of the Prosecution (“prosecution”) justified the original decision to withhold the information on the basis that the material was an “an internal work product”.⁴ The prosecution explained that the original concern as regards the “major questions”⁵ as to the credibility of witness 31 [REDACTED] “changed”

¹ Transcript of hearing on 5 November 2010, ICC-01/04-01/06-T-326-ENG ET WT, page 2, lines 3 – 10.

² DRC-OTP-0233-0525, page 3.

³ DRC-OTP-0233-0525, page 3.

⁴ Transcript of hearing on 5 November 2010, ICC-01/04-01/06-T-326-ENG ET WT, page 2, lines 14 – 15.

⁵ DRC-OTP-0233-0525, page 3.

following a “thorough assessment of his credibility”.⁶

4. The Chamber ordered the prosecution to report to the Chamber in detail, first, on the circumstances surrounding the conclusion calling into question witness 31’s credibility and, second, on the general principles that the prosecution has applied to disclosure during this case.⁷
5. On 9 November 2010, pursuant to the Chamber’s order, the prosecution filed a report explaining the circumstances surrounding the investigator’s memorandum.⁸ The prosecution submitted that the comments about witness 31’s credibility related solely to his failure to provide certain documents that he had promised to supply in the circumstances described in the following paragraph.
6. Witness 31 had provided the prosecution with three videos (VHS), one colour photograph and six documents in [REDACTED]. At that stage he was considered a relevant and consistent witness who was willing to testify. Notwithstanding [REDACTED], the witness remained cooperative and supplied [REDACTED] the demobilisation of child soldiers and other documents in [REDACTED]. However, in February 2006, although the originals of the material just mentioned were returned to witness 31, he failed to provide certain anticipated additional documentation relating to the demobilisation of child soldiers, leading to the adverse credibility assessment set out in DRC-OTP-0233-0525.⁹

⁶ Prosecution Submissions on Disclosure pursuant to Trial Chamber’s I Order of 5 November 2010, ICC-01/04-01/06-2625-Conf, 12 November 2010. Public redacted version filed on 17 November 2010, ICC-01/04-01/06-2625-Red, paragraph 1.

⁷ Transcript of hearing on 5 November 2010, ICC-01/04-01/06-T-326-ENG ET WT, page 3, line 3 to page 4, line 5; page 6, line 12 to page 7, line 12; and page 9 lines 3 – 11.

⁸ *Ex parte* report on the circumstances that led to the credibility assessment of W-0031 in DRC-OTP-0233-0525, (“*ex parte* report”), page 3, first paragraph, sent as an attachment to an email from the prosecution to the Chamber through a Legal Officer to the Trial Division on 9 November 2010.

⁹ *Ex parte* report.

7. However, this determination was later reversed on 19 July 2006 when witness 31 provided the prosecution with [REDACTED], in which [REDACTED] demobilised child soldiers are listed [REDACTED] (these have been admitted into evidence: EVD-OTP-00476 and EVD-OTP-00333). Additionally, he provided [REDACTED] by demobilised child soldiers and [REDACTED].¹⁰
8. In all the circumstances, witness 31 was evaluated by the prosecution as being a credible trial witness. It is considered that his evidence is corroborated by other witnesses.¹¹
9. On 12 November 2010 the prosecution filed the confidential "Prosecution Submissions on Disclosure pursuant to Trial Chamber's I (*sic*) Order of November 2010",¹² in which it contends that it is not obliged to disclose "an internal early opinion by two investigators regarding credibility that was based on an incorrect factual assumption [or...] its internal (and subsequently revised) assessment before the witness himself testified".¹³
10. Additionally the prosecution complains of a suggested lack of disclosure by the defence as regards the content – indeed, the possibility – of the present abuse of process submission.¹⁴
11. The prosecution maintains that it has attempted at all times to follow the requirements of Article 67(2) of the Rome Statute ("Statute"), Rule 77 of the Rules of Procedure and Evidence ("Rules"), and the relevant Chamber's orders as regards disclosure.¹⁵ Regulation 55 of the Regulations of the Office of the Prosecutor provides for the establishment of internal procedures to

¹⁰ *Ex parte* report.

¹¹ *Ex parte* report.

¹² Prosecution Submissions on Disclosure pursuant to Trial Chamber's I Order of 5 November 2010, ICC-01/04-01/06-2625-Conf, 12 November 2010. Public redacted version filed on 17 November 2010, ICC-01/04-01/06-2625-Red.

¹³ ICC-01/04-01/06-2625-Red, paragraph 4.

¹⁴ ICC-01/04-01/06-2625-Red, paragraphs 5 and 6.

¹⁵ ICC-01/04-01/06-2625-Red, paragraphs 7 and 9.

ensure prompt, reliable and efficient disclosure, and the prosecution relies on the approach established by the Court, namely that the Chambers do not routinely oversee or review decisions taken by the prosecution as regards disclosure, but instead they will intervene only if there are good reasons for doubting that the prosecution's duties in this regard have been, or are being, properly fulfilled.¹⁶ The Chamber has been provided with the relevant sections of the prosecution Operational Manual (which was not in force during the opening stages of this case, although other, similar procedures were followed). It is unnecessary to investigate the detail of that manual, save to observe that it is clear that the prosecution has sought, *inter alia*, to reflect the requirements of the Rome Statute framework in its internal disclosure rules.

12. Of critical relevance to this issue, the prosecution has determined that although material may be subject to restrictions on disclosure (*e.g.* Rules 81 and 82 of the Rules), it is appropriate to "isolate information that ought to be disclosed from that which constitutes non-disclosable internal work product" in order to provide it to the accused.¹⁷ The prosecution effects disclosure either in a separate document or by applying redactions to the original. Additionally, the prosecution has followed the instruction of the Chamber that it should disclose material that, according to the prosecution, may not strictly fall within Rule 77 of the Rules but which is relevant to the anticipated abuse of process submissions.¹⁸ The prosecution reviews its disclosure decisions on an on-going basis during the trial.¹⁹

13. As the prosecution has observed, this Chamber has indicated that the internal work product of the prosecution under Rule 81(1) "[...] includes, *inter alia*, the

¹⁶ICC-01/04-01/06-2625-Red, paragraph 8, referring to the Decision on the defence application for additional disclosure relating to a challenge on admissibility, 2 December 2009, ICC-01/05-01/08-632, paragraphs 20 – 22.

¹⁷ ICC-01/04-01/06-2625-Red, paragraphs 8 and 18.

¹⁸ ICC-01/04-01/06-2625-Red, paragraph 9.

¹⁹ ICC-01/04-01/06-2625-Red, paragraph 12.

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 [...].”²⁰ In its 13 October 2010 “Decision on the defence request for disclosure of screening notes”,²¹ the Chamber noted that the “[...] names and locations of protected witnesses and victims, internal assessments on various individuals and work processes [...] clearly fall[] within the scope of non-disclosable material pursuant to Rule 81(1) and Rule 81(3) of the Rules”.²² The prosecution refers to decisions that are consistent with this approach from the Pre-Trial Division and other international tribunals.²³

14. The credibility assessment of witness 31 was disclosed as part of a disclosure exercise concerning intermediaries 143 and 316,²⁴ and it is suggested that the redaction to this particular section was lifted simply “ out of an abundance of caution”, and not because the information fell within any disclosure order.²⁵

II. Applicable Law

15. In accordance with Article 21(1) of the 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:
[...]

²⁰ Decision issuing corrected and redacted versions of "Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing Tu Quoque Information" of 5 December 2008, 2 June 2009, ICC-01/04-01/06-1924, public redacted version ICC-01/04-01/06-1924-Anx2, paragraph 31.

²¹ ICC-01/04-01/06-2585-Conf, reclassified as public pursuant to Trial Chamber I's instruction dated November 10, 2010.

²² ICC-01/04-01/06-2585, paragraph 21.

²³ ICC-01/04-01/06-2625-Red, paragraphs 14 – 16.

²⁴ See ICC-01/04-01/06-2585, paragraph 19.

²⁵ ICC-01/04-01/06-2625-Red, paragraph 26.

(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) 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.

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.

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 Conclusion

16. The prosecution is correct in its contention that the evaluations or assessments of its investigators are not ordinarily disclosable; instead, it is the information and material that led to any relevant evaluations or assessments that, depending on the circumstances, should be provided to the defence under Article 67(2) of the Statute or Rule 77 of the Rules. For example, in this situation, to the extent that the credibility of witness 31 is in issue in this trial, the circumstances of the delay on his part in providing documents and other material to the prosecution (including, for instance, the requests and the opportunities to do so), which led to the investigators' decision to cease contact with this witness for some time, may well have constituted information which should have been provided to the defence. The fact that he eventually supplied additional notebooks and other documents to the prosecution does not "wipe the slate clean" – rather, the circumstances relating to the (lengthy) period whilst this material was not forthcoming may constitute disclosable material.

17. Accordingly, on the basis of the explanation provided by the prosecution in its filing of 12 November 2010,²⁶ the Chamber is persuaded that the principles applied by the Prosecutor to disclosure, in this context, are appropriate and

²⁶ ICC-01/04-01/06-2625-Conf.

conform with the Rome Statute framework and the jurisprudence of the Court. In particular, the examples provided as to the meaning of “internal work product” appear to conform with his obligations:

- i) all preliminary examination reports;
- ii) information related to the preparation of a case, such as internal memoranda, legal research, case hypotheses, and investigation or trial strategies;
- iii) information related to the prosecution’s objectives and techniques of investigation;
- iv) analyses and conclusions derived from evidence collected by the OTP;
- v) investigator’s interview notes that are reflected in the witness statements or audio-video recording of the statement;
- vi) investigator’s subjective opinions or conclusions that are recorded in the investigator’s interview notes; and
- vii) internal correspondence.²⁷

18. However, this is subject to the caveat, set out above, that if information in this category contains disclosable information, it will be provided to the defence (in a suitably usable and intelligible form, either by way of disclosure of redacted documents or in a separate document).

19. In all the circumstances, in this context no further order is necessary as regards document DRC-OTP-0233-0525, and given the prosecution’s explanation as to disclosure set out in its filing of 12 November 2010, the Chamber does not need additionally to define its obligations in this area.

20. Finally, the defence, in an email sent on 5 November 2010,²⁸ requested

²⁷ ICC-01/04-01/06-2625-Red, paragraph 17.

disclosure of material for witness 31 similar to that ordered for intermediaries 143, 316 and 321 (particularly, similar tables based on the “situation contacts management system”²⁹). Witness 31 was introduced to the prosecution by intermediary 143,³⁰ has worked closely with intermediary 321,³¹ and, as indicated by the defence,³² he has had contact with eight child soldiers who are relevant to this abuse of process application.³³ He facilitated meetings between children [REDACTED] and prosecution investigators, and in particular he testified to having set up meetings through social workers, in particular intermediary 321, with witnesses DRC-OTP-WWWW-0157, DRC-OTP-WWWW-0294 and DRC-OTP-WWWW-0008.³⁴ Witness 31 also attended interviews between a number of children and prosecution investigators³⁵ and he [REDACTED] witness DRC-OTP-WWWW-0008.³⁶

21. Although, on the evidence, witness 31 is not in the same position as other intermediaries in relation to whom disclosure has been ordered, given his close involvement with individuals who have potential high relevance for this abuse application, and bearing in mind the factors that led to concerns about his credibility, set out above, disclosure of similar tables, based on the “situation contacts management system,” has become necessary, because they are material to the preparation of the defence, under Rule 77 of the Rules. The

²⁸ Email from the defence to the Chamber through a Legal Officer to the Trial Division on 5 November 2010.

²⁹ See ICC-01/04-01/06-2585, paragraph 22.

³⁰ Prosecution’s communication of information on intermediaries and witnesses pursuant to Trial Chamber’s Order of 12 May 2010, with Confidential, Prosecution and Defence only Annexes A and B, 7 June 2010, ICC-01/04-01/06-2466 and Conf-AnxB, page 3.

³¹ See Transcript of hearing on 2 July 2009, ICC-01/04-01/06-T-202-CONF-ENG-ET, page 80, line 25 to page 82, line 14. See also Transcript of hearing on 6 July 2010, ICC-01/04-01/06-T-310-CONF-ENG CT, page 85, line 4 to page 87, line 3.

³² Email from the defence to the Chamber through a Legal Officer to the Trial Division on 5 November 2010, referring to the table of contacts between witnesses and intermediaries communicated to the defence by the prosecution on 10 October 2010.

³³ DRC-OTP-WWWW-0007, DRC-OTP-WWWW-0008, DRC-OTP-WWWW-0011, DRC-OTP-WWWW-0157, DRC-OTP-WWWW-0213, DRC-OTP-WWWW-0294, DRC-OTP-WWWW-0297, and DRC-OTP-WWWW-0299.

³⁴ Transcript of hearing on 2 July 2009, ICC-01/04-01/06-T-202-CONF-ENG ET, page 80, line 10 to page 81, line 5 and page 83, lines 4 – 8.

³⁵ Transcript of hearing on 2 July 2009, ICC-01/04-01/06-T-202-CONF-ENG ET, page 82, line 17 to page 83, line 5.

³⁶ Transcript of hearing on 2 July 2009, ICC-01/04-01/06-T-202-CONF-ENG ET, page 69, line 11 to page 70, line 18.

procedure set out in paragraph 22 of Decision ICC-01/04-01/06-2585 is to be followed, with the amendment that the table is to be provided to the Chamber for review and to the defence simultaneously by the end of the day on 8 November 2010. The Chamber observes that his identity is already known to the defence.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 20 January 2011

At The Hague, The Netherlands