

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/04-01/06 A4 A 5 A 6

Date of the original: 14 November 2014

Date of the redacted version: 8 December 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 THE CONGO

IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public Redacted Version

Decision on the Prosecutor's second request for redactions for the purposes of disclosure



Decision to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Ms Catherine Mabile
Mr Jean-Marie Biju Duval

Legal Representatives of Victims V01
Mr Luc Walley
Mr Franck Mulenda

Legal Representatives of Victims V02
Ms Carine Bapita Buyangandu
Mr Paul Kabongo Tshibangu
Mr Joseph Keta Orwinyo

REGISTRY

Registrar
Mr Herman von Hebel

LK

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Thomas Lubanga Dyilo against Trial Chamber I's decision entitled "Judgment pursuant to Article 74 of the Statute" of 14 March 2012 (ICC-01/04-01/06-2842), and

In the appeals of Mr Thomas Lubanga Dyilo and the Prosecutor against Trial Chamber I's "Decision on Sentence pursuant to Article 76 of the Statute" of 10 July 2012 (ICC-01/04-01/06-2901),

Having before it the "Second Application for Authorisation to Redact Material Intended for Disclosure" dated 10 November 2014 (ICC-01/04-01/06-3117-Conf-Exp),

Renders the following

DECISION

1. The redactions to the interview transcripts of witnesses P-0080, P-0845 and P-0190, as proposed in Annexes A.1, A.2 and A.3 to the Prosecutor's "Second Application for Authorisation to Redact Material Intended for Disclosure" (ICC-01/04-01/06-3117-Conf-Exp), are authorised.
2. The following redactions to the above-mentioned interview transcripts are ordered *proprio motu*:
 - a. [REDACTED];
 - b. [REDACTED];
 - c. [REDACTED];
 - d. [REDACTED];
 - e. [REDACTED];
 - f. [REDACTED].
3. The Prosecutor shall disclose to Mr Thomas Lubanga Dyilo redacted versions of the above-mentioned interview transcripts by 16h00 on 17 November 2014.



4. Mr Thomas Lubanga Dyilo may, by 16h00 on 21 November 2014, request the lifting of any of the redactions that have been authorised or ordered.
5. The Prosecutor shall inform the Appeals Chamber, by 16h00 on 17 November 2014, whether she intends to file a public redacted version of the “Second Application for Authorisation to Redact Material Intended for Disclosure” (ICC-01/04-01/06-3117-Conf-Exp) and if not, provide reasons therefor.

REASONS

I. PROCEDURAL HISTORY

1. On 10 November 2014, the Prosecutor filed, on a confidential and *ex parte* Prosecutor and Victims and Witnesses Unit only basis, the “Second Application for Authorisation to Redact Material Intended for Disclosure”¹ (hereinafter: “Prosecutor’s Request”), in which she requests that the Appeals Chamber authorise, pursuant to article 68 (1) of the Statute and rule 81 (2) and (4) of the Rules of Procedure and Evidence, certain redactions to interview transcripts, which the Prosecutor seeks to disclose to Mr Thomas Lubanga Dyilo (hereinafter: “Mr Lubanga”).
2. On 11 November 2014, the Prosecutor filed the “Confidential Redacted Version of ‘Second Application for Authorisation to Redact Material Intended for Disclosure’ dated 10 November 2014”.²

II. SUBMISSIONS OF THE PROSECUTOR

3. The Prosecutor submits that the Office of the Prosecutor (hereinafter: “OTP”) recently interviewed three individuals in relation to proceedings in the case against Bosco Ntaganda: witnesses P-0080, P-0845 and P-0190.³ The Prosecutor submits that

¹ ICC-01/04-01/06-3117-Conf-Exp, with confidential *ex parte*, only available to the Prosecution and Victims and Witnesses Unit, annexes A.1 to A.3 and B, ICC-01/04-01/06-3117-Conf-Exp-AnxA.1, ICC-01/04-01/06-3117-Conf-Exp-AnxA.2, ICC-01/04-01/06-3117-Conf-Exp-AnxA.3 and ICC-01/04-01/06-3117-Conf-Exp-AnxB (hereinafter: “Annex A.1 to the Prosecutor’s Request”, “Annex A.2 to the Prosecutor’s Request”, “Annex A.3 to the Prosecutor’s Request” and “Annex B to the Prosecutor’s Request”, respectively).

² ICC-01/04-01/06-3117-Conf-Red.

³ Prosecutor’s Request, paras 1, 10, 11, 12, 15.

none of the three individuals was a witness in the present case.⁴ The Prosecutor seeks to disclose the transcripts of the interviews to Mr Lubanga pursuant to article 67 (2) of the Statute and rule 77 of the Rules of Procedure and Evidence.⁵ Prior to disclosure, the Prosecutor seeks the authorisation of the Appeals Chamber to redact certain information from the transcripts of the interviews, under rule 81 (2) and 81 (4) of the Rules of Procedure and Evidence.⁶

4. The Prosecutor submits that some of the restrictions on disclosure for which she seeks authorisation, pursuant to rule 81 (4) of the Rules of Procedure and Evidence, may be necessary to protect the safety and well-being of witnesses, witnesses' family members and other persons at risk on account of the activities of the International Criminal Court (hereinafter: "Court").⁷ The Prosecutor submits that the other information with respect to which she seeks authorisation for non-disclosure pursuant to rule 81 (2) of the Rules of Procedure and Evidence, if disclosed, may prejudice further or ongoing investigations. Under this category of information, the Prosecutor seeks authorisation to redact references to OTP "leads and potential witnesses", as well as the names of OTP investigators.⁸ The Prosecutor avers that the relevant criteria for non-disclosure are met with respect to both categories of information which she seeks to withhold from disclosure.⁹ In particular, the Prosecutor submits that: (i) there is an objectively justifiable risk to the safety of the protected persons concerned by disclosure of the information or to ongoing investigations; (ii) the proposed redactions are necessary as there is no alternative measure short of redaction available and feasible in the circumstances; and (iii) the redactions are not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹⁰

III. MERITS

5. The Prosecutor requests redactions, first, to protect the safety and well-being of witnesses, witnesses' family members and other persons at risk on account of the activities of the Court,¹¹ and, second, to OTP "leads and potential witnesses", as well

⁴ Prosecutor's Request, para. 13.

⁵ Prosecutor's Request, paras 1, 9.

⁶ Prosecutor's Request, paras 2-3.

⁷ Prosecutor's Request, paras 6, 16, 20-30.

⁸ Prosecutor's Request, paras 7, 31-35.

⁹ Prosecutor's Request, paras 6-7.

¹⁰ Prosecutor's Request, paras 6, 21-23, 27, 30, 32-33.

¹¹ Prosecutor's Request, paras 6, 16, 20-30.

as the names of OTP investigators, in order to avoid prejudice to ongoing investigations.¹² For the reasons stated below, the Appeals Chamber determines that the requested redactions are authorised pursuant to article 68 (1) and (5) of the Statute and rule 81 (2) and (4) of the Rules of Procedure and Evidence.

6. Rule 81 (2) and (4) of the Rules of Procedure and Evidence provides:

(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.

7. The Appeals Chamber recalls that “Rule 81 (4) of the Rules of Procedure and Evidence 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 of Procedure and Evidence, 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

8. The Appeals Chamber also recalls its jurisprudence that “[t]he overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-disclosure of information is the exception to this general rule”¹⁴ and that “it will have to be determined on a case-by-case basis whether the non-disclosure of information [...] may be authorised by a Chamber”.¹⁵ In addition,

¹² Prosecutor’s Request, para. 7.

¹³ *Prosecutor v. Germain Katanga*, “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 (OA) (hereinafter: “*Katanga OA Judgment*”), paras 1, 56.

¹⁴ *Katanga OA Judgment*, para. 70.

¹⁵ *Katanga OA Judgment*, para. 93; see also *Prosecutor v. Germain Katanga*, “Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘First Decision on the

the Appeals Chamber has repeatedly held that a decision authorising the non-disclosure of information pursuant to rule 81 (2) and (4) of the Rules of Procedure and Evidence must be sufficiently reasoned.¹⁶

9. With respect to the factors that must be addressed when considering whether to authorise the non-disclosure of information pursuant to rule 81 (2) of the Rules of Procedure and Evidence, the Appeals Chamber has held:

[I]t is for the Prosecutor who is seeking redactions “to establish that such redactions are warranted and, in particular, that disclosure of the information for which redactions are sought ‘may prejudice further or ongoing investigations’” and that, in order to demonstrate this, the Prosecutor has to “establish that the potential prejudice to investigations is objectively justifiable” and “would result from disclosure to the Defence”. Furthermore, when the Prosecutor has met this initial burden, a Chamber then needs to assess whether the proposed redactions are “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.¹⁷ [Footnotes omitted.]

10. Furthermore, the factors pursuant to rule 81 (2) of the Rules of Procedure and Evidence apply *mutatis mutandis* to the authorisation of redactions sought pursuant to rule 81 (4) of the Rules of Procedure and Evidence¹⁸ and have been summarised as follows:

[A] thorough consideration of the danger that the disclosure of the identity of the person may cause; the necessity of the protective measure, including whether it is the least intrusive measure necessary to protect the person concerned; and the fact that any protective measures taken shall not be

Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-476 (OA2) (hereinafter: “*Katanga* OA 2 Judgment”), paras 52, 58; *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber 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’”, 13 October 2006, ICC-01/04-01/06-568 (OA 3) (hereinafter: “*Lubanga* OA 3 Judgment”), paras 36-37, 39; “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’”, 14 December 2009, ICC-01/04-01/06-774 (OA 6) (hereinafter: “*Lubanga* OA 6 Judgment”), para. 63.

¹⁶ “Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’”, ICC-01/04-01/06-773 (OA 5), 14 December 2006, para. 20; *Lubanga* OA 6 Judgment, paras 30-34.

¹⁷ “Decision on the Prosecutor’s request for non-disclosure in relation to document ‘OTP/DRC/COD-190/JCCD-pt’”, 27 May 2013, ICC-01/04-01/06-3031 (A5 A6), para. 10, referring to *Katanga* OA Judgment, paras 97-98; *Lubanga* OA 5 Judgment, paras 21, 33-34.

¹⁸ See *Katanga* OA Judgment, para. 97; *Katanga* OA 2 Judgment, para. 59.

prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial [footnote omitted].¹⁹

11. In respect of the request pursuant to rule 81 (4) of the Rules of Procedure and Evidence to redact certain information regarding the three witnesses and their family members,²⁰ the Appeals Chamber observes that the witnesses in issue are not witnesses in the present case. At any rate, in the present circumstances those persons and members of their families can be considered as “persons at risk on account of the activities of the Court” and the request for non-disclosure of information relating to those persons can be examined under rule 81 (4) of the Rules of Procedure and Evidence.²¹

12. In respect of the redactions proposed in relation to the persons referred to in the preceding paragraph and to the names and identifying information of the other persons who, the Prosecutor submits, are at risk on account of the activities of the Court,²² the Appeals Chamber notes that the redactions are limited to the names and identifying information of the persons concerned. Bearing in mind [REDACTED] the individuals concerned currently [REDACTED],²³ the Appeals Chamber accepts that disclosure of their names and identifying information to Mr Lubanga would result in an objectively justifiable risk to their safety and that the proposed redactions are both necessary and the least intrusive measure available. Furthermore, the Appeals Chamber considers that their implementation would not be prejudicial to or inconsistent with the rights of Mr Lubanga and a fair and impartial trial.

13. In respect of the request pursuant to rule 81 (2) of the Rules of Procedure and Evidence to redact the names and identifying information of OTP investigators, the Appeals Chamber notes that the proposed redactions are limited to the names of investigators who participated in the interviews of the witnesses in question.²⁴ The Appeals Chamber notes further the Prosecutor’s submissions that these persons are based in, or travel frequently to, the field and accepts that disclosure of their identities

¹⁹ *Katanga* OA Judgment, para. 67; referring to *Lubanga* OA 5 Judgment, paras 21, 33-34; *see also* *Lubanga* OA 3 Judgment, para. 37.

²⁰ Prosecutor’s Request, paras 21-27.

²¹ *See Katanga* OA Judgment, paras 1, 56.

²² Prosecutor’s Request, paras 28-30.

²³ Prosecutor’s Request, para. 21; Annex B to the Prosecutor’s Request.

²⁴ Prosecutor’s Request, paras 34-35; Annex A.1 to the Prosecutor’s Request; Annex A.2 to the Prosecutor’s Request; Annex A.3 to the Prosecutor’s Request.

to Mr Lubanga would result in an objectively justifiable risk of potential prejudice to further or ongoing investigations.²⁵ As regards the request for non-disclosure of references to OTP leads and potential witnesses, the Appeals Chamber notes that the proposed redactions are limited to the names and identifying information of certain persons referred to by witness [REDACTED] during the interviews with the OTP.²⁶ The Appeals Chamber also notes the Prosecutor's submissions that the OTP is "pursuing" those persons and is in the process of interviewing them, and that revealing their identity would endanger ongoing investigations.²⁷

14. Given their limited nature, the Appeals Chamber considers that the proposed redactions are the least intrusive measure available and that their implementation would not be prejudicial to or inconsistent with the rights of Mr Lubanga and a fair and impartial trial.

15. Therefore, pursuant to rule 81 (2) and (4) of the Rules of Procedure and Evidence, the Appeals Chamber authorises the redactions sought as proposed in Annexes A.1, A.2 and A.3 to the Prosecutor's Request.

16. Additionally, upon review of the draft transcripts of the interviews of the witnesses in question,²⁸ the Appeals Chamber notes that the Prosecutor has not consistently requested redactions of the names of persons and other references, and that this information would still appear in the transcripts if the requested redactions were implemented. The Appeals Chamber considers that these references constitute identifying information within the meaning of rule 81 (4) of the Rules of Procedure and Evidence that could endanger the safety of the persons concerned, namely:

- a. [REDACTED];
- b. [REDACTED];
- c. [REDACTED];
- d. [REDACTED];
- e. [REDACTED];
- f. [REDACTED].

²⁵ Prosecutor's Request, para. 34.

²⁶ Prosecutor's Request, para. 31; Annex A.2 to the Prosecutor's Request, pp. 6, 9, 14, 17, 23, 24, 31.

²⁷ Prosecutor's Request, para. 32.

²⁸ See Annexes A.1, A.2 and A.3 to the Prosecutor's Request.

17. The Appeals Chamber considers that, pursuant to rule 81 (4) of the Rules of Procedure and Evidence, it may on its own motion take the necessary steps to ensure the confidentiality of information to protect the safety of these persons at risk on account of the activities of the Court. It therefore finds that it is necessary, as well as not prejudicial to or inconsistent with the rights of Mr Lubanga and a fair and impartial trial, to order *proprio motu* the Prosecutor to implement the additional redactions set out in the above paragraph.

18. Finally, the Appeals Chamber recalls its jurisprudence that, “prior to ruling on the application for redactions, the [...] Chamber should give the Defence the greatest possible opportunity to make submissions on the issues involved, necessarily without revealing to the Defence the information which the Prosecutor alleges should be protected”.²⁹ In this specific instance, having regard to the current stage of the proceedings as well as the type and limited extent of the redactions sought, the Appeals Chamber considers it appropriate to authorise the redactions to the interview transcripts without having heard from Mr Lubanga. If necessary, Mr Lubanga may request that the Appeals Chamber lift certain redactions applied to the transcripts. In order to properly regulate its proceedings, the Appeals Chamber has set a time limit for such a request.

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



Judge Erkki Kourula
Presiding Judge

Dated this 8th day of December 2014

At The Hague, The Netherlands

²⁹ *Katanga* OA Judgment, para. 73 (b).