

**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 the prosecution's application for non-disclosure of
information filed on 7 May 2008"**

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyanganda
Mr Joseph Keta Orwinyo
Mr Jean Louis Gilissen
Mr Jean Chrysostome Mulamba
Nsokoloni
Mr Paul Kabongo Tshibangu
Mr Hervé Diakiese

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

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

1. On 24 April 2008 the Trial Chamber ordered the Office of the Prosecutor (“prosecution”), *inter alia*, to disclose the statements of eight witnesses and other related potentially exculpatory material by 6 May 2008, with the redactions necessary to protect the identity and whereabouts of the witnesses. In the event that further redactions are considered necessary, the prosecution was directed to file an application and to request a hearing.¹
2. Following a request from the prosecution on 29 April 2008, the Trial Chamber extended the deadline for disclosure from 6 May to 9 May 2008.²
3. On 8 May 2008, the prosecution filed the “Prosecution’s Application for Non-disclosure of Information” (“application”). The prosecution requested permanent redactions to some of the statements and material and the non-disclosure of parts of materials pursuant to Articles 54(3)(f) and 68 of the Rome Statute (“Statute”) and Rules 81(1), (2) and (4) of the Rules of Procedure and Evidence (“Rules”).³
4. On 9 May 2008 the Trial Chamber granted the prosecution’s application on a temporary basis and ordered the prosecution to file an *inter partes* version of its application by 13 May 2008. The defence was ordered to file its response no later than 26 May 2008.⁴
5. On 13 May 2008 the prosecution filed a public redacted version of its

¹ Decision on disclosure issues, responsibilities for protective measures and other procedural matters and Separate and Dissenting Opinion of Judge Blattmann, 24 April 2008, ICC-01/04-06-1295-US-Exp, pages 53-54 and under seal *ex parte* Annex C. Confidential and public versions of the decision and opinion were issued on 8 May 2008. Decision issuing a confidential and a public redacted version of “Decision on disclosure issues, responsibilities for protective measures and other procedural matters”, ICC-01/04-06-1311, and confidential Annex 1, public Annexes 2 and 3.

² Email communications to the Trial Chamber through the Legal Adviser to the Trial Division on 29 April 2008.

³ ICC-01/04-06-1309-Conf-Exp.

⁴ Order on “Prosecution’s Application for Non-disclosure of Information”, 9 May 2008, ICC-01/04-06-1316.

application.⁵

6. On 26 May 2008 the defence filed the “Réponse de la Défense à la “Prosecution’s Application for Non-Disclosure of Information” datée du 13 mai 2008”. The defence requested that all exculpatory information be disclosed in a non-redacted form and consequently invited the Chamber to reject the prosecution’s application.⁶
7. Oral submissions were made at the status conference on 28 May 2008.⁷
8. On 6 June 2008 the Registry filed its “Rapport du Greffe sur la question de la coopération de certains témoins avec la Court conformément à la décision de la Chambre en date du 24 avril 2008” (“Registry’s report”). This document was reclassified as *ex parte*, Registry and prosecution only on 14 June 2008.⁸ This document concerns all of the witnesses referred to in the prosecution’s application.
9. On 13 June 2008, the prosecution provided further information in relation to its application.⁹
10. On the same day the Trial Chamber imposed a stay in the proceedings, which was lifted on 18 November 2008.¹⁰

⁵ ICC-01/04-06-1324.

⁶ ICC-01/04-06-1357.

⁷ Transcript of hearing on 28 May 2008, ICC-01/04-01/06-T-88-ENG.

⁸ ICC-01/04-06-1382-US-Exp; ICC-01/04-06-1403-Conf.

⁹ Prosecution's Submission pursuant to the Trial Chamber's Oral Order on 10 June 2008, ICC-01/04-01/06-1400 and confidential prosecution and defence only Annex A; Corrigendum to “Prosecution's Submission pursuant to the Trial Chamber's Oral Order on 10 June 2008”, 14 June 2008, ICC-01/04-01/06-1400-Conf-Corr and confidential prosecution and defence only Annex A.

¹⁰ 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; Transcript of hearing on 18 November 2008, ICC-01/04-01/06-T-98-ENG ET, page 3, line 25 to page 4, line 1.

Applicable Law

11. Article 54(3)(f) of the Statute, on the 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.

12. Article 64(6)(e) of the Statute, on the 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; and

13. Article 68(1) of the Statute, on Protection of the victims and witnesses and their participation in the proceedings:

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

14. Rule 81 (1), (2) and (4) of the Rules, on 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.

[...]

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.

Analysis and Conclusions

15. 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.”¹¹ 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].”¹²

16. Notwithstanding that the decision of the Appeals Chamber relates to restrictions on disclosure in the context of the pre-trial confirmation of charges 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.

17. Further, the Trial Chamber has previously authorised the permanent redaction of the names of persons referred to as third parties [REDACTED], as well as [REDACTED], when, *inter alia*, the information was irrelevant to the known issues in the case and the redactions did not render the document(s) in any way unintelligible.¹³

¹¹ 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.

¹² *Ibid.*, paragraph 2.

¹³ 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.

18. 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.

Witness DRC-OTP-WWW-0003

19. Two orders are sought in relation to this witness.

20. First, the prosecution requests the temporary non-disclosure of the taped recordings of the interview of this individual, who is identified as [REDACTED] who could be at risk if his identity is disclosed to the accused. On the basis of the Trial Chamber's decision of 24 April 2008, which authorised redactions to identifying information for this witness, the prosecution requests the non-disclosure of the audio/video recording which clearly depicts the witness's image and voice, since disclosure would immediately identify him. The prosecution submits that the verbatim transcript of the recording will be disclosed to the defence and thus the defence will not be prejudiced.¹⁴ The prosecution requests the non-disclosure of this recording whilst the Chamber explores whether the witness will cooperate with the Court and, if so, determines how this evidence is to be disclosed to the defence.

21. In the Registry's report, the Chamber was informed that [REDACTED].¹⁵

22. The Trial Chamber considers that since the issue of whether this individual will cooperate with the Court is still pending, the reasons expressed by the Chamber in its 24 April 2008 decision remain applicable. Since disclosure of the recording to the defence would reveal his identity, the Trial Chamber authorises its temporary non-disclosure under Articles 54(3)(f) and 64(6)(e) of

¹⁴ ICC-01/04-06-1309-Conf-Exp, paragraph 7.

¹⁵ ICC-01/04-06-1403-Conf, paragraph 2.

the Statute and Rule 81(4) of the Rules in order to protect the witness. Once the individual is contacted by the Registry and it has been established whether or not he will be able to cooperate with the Court, the Chamber will consider whether further disclosure is necessary.

23. The prosecution also requests additional permanent redactions to the transcript of the interview, where the name of the third-party is referred to. The prosecution informed the Chamber that this individual was formerly [REDACTED] and [REDACTED], and thus would be at risk if this information is disclosed.¹⁶ The transcripts with the limited redactions are included in Annexes 1 and 2 of the prosecution's application.¹⁷ In the Trial Chamber's decision of 24 April 2008 redactions to the identity of this individual were authorised in relation to another document.¹⁸

24. In relation to the limited redactions now requested by the prosecution, which concern information that identifies this individual (who is referred to in the transcript of the interview), the Chamber authorises the redactions sought on the basis of Articles 54(3)(f) and 64(6)(e) of the Statute and Rule 81(4) of the Rules as the individual may be at risk on account of the activities of the Court.¹⁹ The Chamber considers that the provisions of Articles 64(6)(e) and 68(1), when appropriately interpreted to take into account the Appeals Chamber decision in *Katanga* set out above (thereby extending their operation in this regard to include persons at risk on account of the activities of the Court) render this order necessary. Moreover, since the redactions are limited and are irrelevant to any live issue in the case against the accused, the Chamber is satisfied that they will cause no identifiable prejudice to the defence.

¹⁶ ICC-01/04-06-1309-Conf-Exp, paragraph 10.

¹⁷ ICC-01/04-06-1309-Conf-Exp, footnote 6, Annex 1, pages 7-8, and 47 (DRC-OTP-0161-0155); and Annex 2, page 9 (DRC-OTP-0161-0219).

¹⁸ ICC-01/04-06-1295-US-Exp and under seal *ex parte* Annex B.

¹⁹ ICC-01/04-01/07-475, paragraph 1.

Witness DRC-OTP-WWW-0034

25. The prosecution requests non-disclosure of information in relation to this individual, who the prosecution categorises as a [REDACTED] and who would be at risk if his identity is disclosed to the defence. The prosecution submits that redactions have already been applied to the unsigned statements and to the transcripts of the interviews of this witness, in accordance with the Trial Chamber's decision of 24 April 2008. The prosecution now requests the non-disclosure of the audio/video recordings of the interviews (from which the transcripts were generated) as the image and voice of the witness depicted in the recording would immediately identify this individual upon disclosure. The prosecution submits that the defence will be served the transcripts of the interview, which is a verbatim transcription of the recording and thus the non-disclosure will not prejudice the defence. The prosecution requests the non-disclosure of this recording whilst the Chamber explores whether the witness will cooperate with the Court and, if so, determines how this evidence is to be disclosed to the defence, in accordance with the Trial Chamber's decision of 24 April 2008.²⁰

26. In the Registry's report, the Chamber was informed [REDACTED], who [REDACTED].²¹

27. In relation to the non-disclosure of the recording, the Trial Chamber considers that since there is a possibility that the individual will be called as a witness of the Court, his identity may need to be disclosed to the defence in the near future. However, since protective measures will first need to be put in place, the non-disclosure of the recordings are authorised for the time being and until appropriate protective measures are implemented, as necessary, in

²⁰ ICC-01/04-06-1309-Conf-Exp, paragraphs 13-16.

²¹ ICC-01/04-06-1403-Conf, paragraph 8 and page 7.

accordance with Articles 54(3)(f) and 64(6)(e) of the Statute and Rule 81(4) of the Rules.

Witness DRC-OTP-WWW-0005

28. The prosecution requests the non-disclosure of information related to this witness, who is identified as a [REDACTED] who could be at risk if his identity is disclosed to the defence. The prosecution requests the non-disclosure of [REDACTED] and [REDACTED] referred to by the witness in various relevant statements, as well as some redactions to an unsigned witness statement made by him, on the basis of Rule 81(4) of the Rules, in order to protect his identity.²² The prosecution submits that the documents [REDACTED], and could lead to his identification. Furthermore, [REDACTED]. The prosecution also requests the redaction of [REDACTED], as the information therein could identify the individual.²³

29. The prosecution notes however that [REDACTED] may, in some respects, be considered potentially exculpatory or Rule 77 information, since it refers to the participation of the UPC/FPLC in the Pacification Commission of Ituri. The prosecution notes that although Thomas Lubanga Dyilo did not participate, several UPC/FPLC members attended as observers. The prosecution requests non-disclosure of [REDACTED] pending the outcome of the Registry's mission to explore the preparedness of this witness to cooperate with the Court and the subsequent determinations of the Chamber on disclosure, balancing the rights of the accused and protection of the individual.²⁴

²² ICC-01/04-06-1309-Conf-Exp, footnote 10. The statement is included in annex 3 (DRC-OTP-0174-0057); the handwritten documents in annexes 4-10 (DRC.00110.002, DRC.00110.398, DRC.00115.002, DRC.00115.133, DRC.00115.197, DRC.00115.287, DRC.00115.400); and the photographs in annexes 11-17 (DRC.00113.212, DRC.00113.213, DRC.00113 214, DRC.00113.215, DRC.00113.216, DRC-OTP-0164-0469, DRC-OTP-0164-0470).

²³ ICC-01/04-06-1309-Conf-Exp, paragraphs 17-19.

²⁴ ICC-01/04-06-1309-Conf-Exp, paragraphs 20-21.

30. The prosecution further requests redactions to the witness statement where [REDACTED] referred to.²⁵
31. As regards [REDACTED], the prosecution requests their non-disclosure since they could identify this individual. The prosecution also requests redactions to the witness statement where he refers to [REDACTED]. The prosecution requests the non-disclosure of [REDACTED] whilst the Chamber explores whether the witness will cooperate with the Court and, if so, determines how this evidence is to be disclosed to the defence, balancing the interests of the accused and the proper level of protection for the witness.²⁶
32. The prosecution further informed the Chamber that it seeks redactions to the unsigned witness statement, on the basis of Rule 81(1), to protect internal work of the prosecution.²⁷
33. In the Registry's report, the Chamber was informed [REDACTED].²⁸
34. In an *ex parte*, Registry only, status conference on 17 November 2008, the Chamber was informed that [REDACTED].²⁹
35. In a further e-mail communication between the Legal Adviser to the Trial Division and the Registry, the Trial Chamber instructed the Registry [REDACTED] so as to explore measures to enable the witness to testify in Court, if he is called.³⁰
36. The Trial Chamber considers that since there is a possibility that he will be called as a witness of the Court, his identity may be disclosed to the defence

²⁵ ICC-01/04-06-1309-Conf-Exp, paragraph 22.

²⁶ ICC-01/04-06-1309-Conf-Exp, paragraphs 23-24.

²⁷ ICC-01/04-06-1309-Conf-Exp, paragraph 25.

²⁸ ICC-01/04-06-1403-Conf, paragraph 5 and page 6.

²⁹ ICC-01/04-06-T-97-CONF-EXP-ENG

³⁰ E-mail communication of 18 November 2008.

in the near future. However, pending further developments in relation to his ability to give evidence and the need for him to be called, the Chamber authorises the requested non-disclosure and redactions, on a temporary basis, in accordance with Articles 54(3)(f) and 64(6)(e) of the Statute and Rule 81(4) of the Rules in order to protect the witness until the Chamber takes a final decision as to his status in the trial and any necessary protective measures are implemented.

Witness DRC-OTP-WWW-0110

37. The prosecution requests redactions to the statement of this witness, who has been identified by the prosecution as [REDACTED]. The prosecution requests redactions to protect the identity of [REDACTED] pursuant to Article 54(3)(f) of the Statute. The prosecution reminds the Chamber that the [REDACTED].³¹

38. The Chamber authorises the requested redactions temporarily under Articles 54(3)(f) and 64(6)(e) of the Statute and Rule 81(4) of the Rules since these individuals could be at risk on account of the activities of the Court, if their identities were disclosed to the defence. The Chamber will re-evaluate these redactions once it has taken a final decision as regards the disclosure of the other documents in which the names of [REDACTED] are included.³²

Witness DRC-OTP-WWW-0040

39. The prosecution requests permanent redactions to the statement of this witness, who has been identified by the prosecution as [REDACTED]. The prosecution requests redactions to protect the identity of a third person who is mentioned in the statement, [REDACTED].³³ The prosecution requests the

³¹ Prosecution's Application for lifting of redactions, non-disclosure of information and disclosure of summary evidence, 13 December 2007, ICC-01/04-01/06-1081. The application for the lifting of redactions is pending in relation to Annexes 46-48 and 51-52. The witness statement of WWW-0110 is included in annex 27 of the same filing and paragraphs 47-48 contain the names in relation to which redactions are requested (DRC-OTP-0162-0060).

³² ICC-01/04-01/07-475, paragraph 1.

³³ ICC-01/04-01/06-1309-Conf-Exp-Anx18, paragraph 22

redactions pursuant to Article 54(3)(f) and Rule 81(2) so as to ensure its further investigations are not prejudiced by disclosing the names of sources or leads, and to avoid compromising the security of the named individual [REDACTED], in order to permit continued work in the field. The prosecution notes that redactions to the name [REDACTED].³⁴

40. Since the disclosure of the name of the individual referred to in the witness statement may compromise his security [REDACTED], and given the Chamber has previously authorised the redaction of information concerning this individual [REDACTED], it authorises the permanent redactions sought in the prosecution's application on the basis of Articles 54(3)(f) and 64(6)(e) of the Statute and Rule 81(4) of the Rules.³⁵ In particular, the Chamber considers that the provisions of Articles 64(6)(e) and 68(1), when appropriately interpreted to take into account the Appeals Chamber decision in *Katanga* set out above (thereby extending their operation in this regard to include persons at risk on account of the activities of the Court), render this order necessary. Moreover, since the redactions are limited and are irrelevant to any live issue in the case against the accused, the Chamber is satisfied that they will cause no identifiable prejudice to the defence.

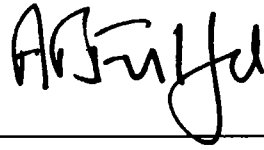
41. The Trial Chamber orders the prosecution to disclose to the defence all documents referred to in this decision with the authorised redactions forthwith.

42. A public redacted version of this decision will be issued in due course.

³⁴ [REDACTED]

³⁵ ICC-01/04-01/07-475, paragraph 1.

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