

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 24 February 2010

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 request for Non-Disclosure of Information
in the statements of Three Individuals providing Rule 77 Information**

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

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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States Representatives

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following Decision on the “Prosecution’s request for Non-Disclosure of Information in the statements of Three Individuals providing Rule 77 Information”.¹

I. Background and Submissions

1. On 10 December 2009, the Trial Chamber rendered its “Decision on the variation of protective measures under Regulation 42 on referral from Trial Chamber II on 22 July 2009”.² The Trial Chamber ordered the disclosure of various statements from witnesses 0047, 0052 and 0068, and it ordered the Office of the Prosecutor (“prosecution”) to make any applications for redactions within 48 hours of notification of the decision.³
2. On 15 December 2009, the prosecution filed the “Prosecution’s request for Non-Disclosure of Information in the statements of Three Individuals providing Rule 77 Information”⁴ which is the subject of the present decision. A public redacted version of this application was filed and notified on 21 December 2009.⁵
3. The prosecution submits that the proposed redactions do not hinder the defence’s ability to assess the Rule 77 information contained in the statements, and it suggests that they do not impact on issues that are relevant to the

¹ Prosecution’s request for Non-Disclosure of Information in the statements of Three Individuals providing Rule 77 Information, 14 December 2009, ICC-01/04-01/06-2210-Conf-Exp with 3 confidential ex parte annexes (notified on 15 December 2009). A public redacted version of this application was also filed and notified on 21 December 2009, ICC-01/04-01/06-2210-Red.

² ICC-01/04-01/06-2209-Conf-Exp.

³ ICC-01/04-01/06-2209-Conf-Exp, page 27.

⁴ Prosecution’s request for Non-Disclosure of Information in the statements of Three Individuals providing Rule 77 Information, 14 December 2009, ICC-01/04-01/06-2210-Conf-Exp with 3 confidential ex parte annexes.

⁵ ICC-01/04-01/06-2210-Red.

defence case. Accordingly, the prosecution submits that the redactions are not prejudicial to or inconsistent with the rights of the Accused.⁶

4. The prosecution requests leave to withhold certain information in the statements of witnesses 0047, 0052 and 0068 pursuant to Articles 54(3)(f), 61, 64, and 68 of the Rome Statute ("Statute") and Rules 77, 81 and 82 of the Rules of Procedure and Evidence ("Rules").⁷
5. The defence and the legal representatives for victims did not file any written responses to this request.

Witness 47

6. The prosecution requests a discrete redaction to the name of the witness's father on page number 1 of the witness's statement.⁸ The prosecution observes that the family members of the witness are not in the ICC Protection Programme [REDACTED]. It is suggested that the proposed redaction does not hinder the defence's ability to assess the Rule 77 information contained in the statement, and that it does not impact on issues that are relevant to the defence's case.

Witness 52

7. The prosecution requests a discrete redaction to the name of the witness's mother on page number 1 of the witness's statement.⁹ The prosecution observes that the family members of the witness are not in the ICC Protection Programme [REDACTED]. It is suggested that the proposed redaction does not hinder the defence's ability to assess the Rule 77 information contained in

⁶ ICC-01/04-01/06-2210-Conf-Exp, paragraph 5.

⁷ ICC-01/04-01/06-2210-Conf-Exp, paragraph 2.

⁸ ICC-01/04-01/06-2210-Conf-Exp Annex 1, page 1 (DRC.00150.119).

⁹ ICC-01/04-01/06-2210-Conf-Exp Annex 2, page 1 (DRC.00090.603).

the statement, and that it does not impact on issues that are relevant to the defence's case.

Witness 68

8. The prosecution requests a discrete redaction to the name of the witness's father in paragraph 9, to his cousin's name and employer in paragraph 29 and to his family's whereabouts in paragraph 23.¹⁰ The prosecution submits that the family members of the witness are not in the ICC Protection Programme [REDACTED]. Furthermore, the prosecution requests a redaction on [REDACTED] on page number 1 of the witness's unsigned statement. It is argued that since the [REDACTED] involves the prosecution's internal work product, a redaction should be authorized pursuant to Rule 81(1). It is suggested that the limited redactions proposed do not hinder the defence's ability to assess the Rule 77 information contained in the statement, and that they do not impact on issues that are relevant to the defence's case.

II. Applicable law and relevant decisions

9. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

Article 54 of the Statute

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 of the Statute

Functions and powers of the Trial Chamber

[...]

¹⁰ ICC-01/04-01/06-2210-Conf-Exp Annex 3, pages 1, 4 and 5 (DRC-OTP-0164-0206, DRC-OTP-0164-0208, DRC-OTP-0164-0209).

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.

[...]

Article 68 of the Statute

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.

[...]

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.

[...]

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.

[...]

10. The Chamber has previously set out its approach concerning Rule 81(1) as follows:

31. Rule 81(1) of the Rules explicitly excludes from disclosure the internal documents ("reports, memoranda or other internal documents") prepared by "a party, its assistants or representatives" in connection with the investigation or preparation of the case. It is of note that the ICTY Rules of Procedure and Evidence contain an almost identical provision: Rule 70(A). It would be unhelpful to attempt in the context of this decision to define the material covered by this provision, but it includes, inter alia, the 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. The Chamber further ensured that the relevant material was limited only to internal documents of the prosecution, and redactions were only authorised if the information was not of a kind that required disclosure under the Statute. It is to be stressed that the material covered by this provision can be entire documents or parts thereof. Furthermore, the Chamber ensured the redactions did not change the

substance of the relevant parts of the documents, and in each instance they remained intelligible and usable.¹¹

The Chamber has applied this approach to the redactions made by the prosecution on the basis of Rule 81(1) in this Decision.

11. In the present case, the Appeals Chamber held that "... three of the most important considerations for an authorisation of non-disclosure of the identity of a witness pursuant to rule 81 (4) of the Rules of Procedure and Evidence [are]: the endangerment of the witness or of members of his or her family that the disclosure of the identity of the witness may cause; the necessity of the protective measure; and why [...] the measure would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."¹² The Appeals Chamber emphasised that this should include an examination of whether less restrictive protective measures are sufficient and feasible.¹³

12. Although the relevant decisions of the Appeals Chamber relate to restrictions on disclosure in the context of the confirmation of charges stage and accordingly they are not strictly binding on the Trial Chamber, the Bench is of the view that the principles outlined are of high relevance generally to proceedings before the Trial Chamber.

13. In all the circumstances, in accordance with this approach, the Chamber has reviewed the information provided by the prosecution and it has applied a

¹¹ Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" of 5 December 2008, 9 April 2009, ICC-01/04-01/06-1814-Conf, and public redacted version, ICC-01/04-01/06-1924-Anx2, paragraph 31.

¹² 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, 14 December 2006, ICC-01/04-01/06-773 OA 5, paragraph 21. See also 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 67.

¹³ 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, 14 December 2006, ICC-01/04-01/06-773 OA 5, paragraph 33.

case-by-case analysis of the circumstances relevant to each individual witness, as set out below.

III. Analysis

Redaction to witness 47's statement

14. The discrete redaction requested by the prosecution to the name of the witness's father, on page number 1 of the witness's statement,¹⁴ is necessary to ensure the safety of members of the witness' family. The witness's father is not in the ICC Protection Programme [REDACTED].¹⁵

15. Furthermore, this information is irrelevant to any known or live issue in the case; the proposed redaction does not hinder the defence's ability to assess the Rule 77 information contained in the statement; it does not render the document unintelligible or unusable; and no lesser measures appear to be feasible to ensure the continued safety and security of the witness's father. In all of the circumstances, given the lack of identifiable prejudice to the defence, this suggested redaction is necessary and proportionate, and is authorised pursuant to Article 64(6)(e) of the Statute and Rule 81(4) of the Rules.

Redaction to witness 52's statement

16. The redaction requested by the prosecution to the name of the witness's mother, on page number 1 of the witness's statement,¹⁶ is necessary to ensure the safety of members of the witness' family. The witness's mother is not in the ICC Protection Programme [REDACTED].¹⁷

17. Furthermore, this information is irrelevant to any known or live issue in the case; the proposed redaction does not hinder the defence's ability to assess the

¹⁴ ICC-01/04-01/06-2210-Conf-Exp Annex 1, page 1 (DRC.00150.119).

¹⁵ ICC-01/04-01/06-2210-Conf-Exp, paragraph 3.

¹⁶ ICC-01/04-01/06-2210-Conf-Exp Annex 2, page 1 (DRC.00090.603).

¹⁷ ICC-01/04-01/06-2210-Conf-Exp, paragraph 3.

Rule 77 information contained in the statement; it does not render the document unintelligible or unusable; and no lesser measures appear to be feasible to ensure the continued safety and security of the witness's mother. In all of the circumstances, given the lack of identifiable prejudice to the defence, this suggested redaction is necessary and proportionate, and is authorised pursuant to Article 64(6)(e) of the Statute and Rule 81(4) of the Rules.

Redaction to witness 68's statement

18. The discrete redactions requested by the prosecution to the name of the witness's father in paragraph 9, to his cousin's name and employer in paragraph 29 and to his family's whereabouts in paragraph 23, are necessary to ensure the safety of members of the witness's family.¹⁸ The prosecution submits that the family members of the witness are not in the ICC Protection Programme [REDACTED].¹⁹

19. Furthermore, the prosecution requests a redaction on a hand written note made by the prosecution on page number 1 of the witness's unsigned statement. The hand written note involves, as submitted by the prosecution, internal documents,²⁰ which, pursuant to Rule 81(1), are not disclosable.

20. In any event, this information is irrelevant to any known or live issue in the case; the proposed redaction do not hinder the defence's ability to assess the Rule 77 information contained in the statement; it does not render the document unintelligible or unusable; and (with respect to the name of the witness's father and cousin, the latter's employer, and the whereabouts of the witness's family) no lesser measures appear to be feasible to ensure their continued safety and security. In all of the circumstances, given the lack of

¹⁸ ICC-01/04-01/06-2210-Conf-Exp Annex 3, page 1, 4 and 5 (DRC-OTP-0164-0206, DRC-OTP-0164-0208, DRC-OTP-0164-0209).

¹⁹ ICC-01/04-01/06-2210-Conf-Exp, paragraph 3.

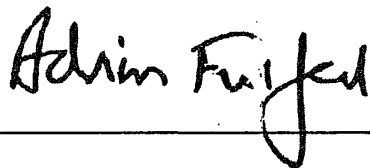
²⁰ ICC-01/04-01/06-2210-Conf-Exp, paragraph 3.

identifiable prejudice to the defence, these suggested redactions are necessary and proportionate, and are authorised pursuant to Article 64(6)(e) of the Statute and Rule 81(1) and (4) of the Rules.

IV. Conclusions

21. For the above reasons, the Chamber hereby grants the prosecution's application for non-disclosure of information as set out above.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 24 February 2010

At The Hague, The Netherlands