

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 15 August 2006

PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
v. THOMAS LUBANGA DYILO**

Public Document

**Reply to the Prosecution's Response to Conclusion de la défense quant aux
divulgations de documents expurgés par le Procureur**

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Counsel for the Defence
Mr. Jean Flamme
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Introduction

1. During the Status Conference convened on 14 July 2006, the Prosecutor informed the Single Judge and the Defence of its stance regarding its right to *proprio motu* redact materials which the Prosecution is obliged to disclose or provide to the Defence pursuant to articles 67(2) and 61(3) and Rule 77. As a consequence of these redactions, the Prosecution has also adopted the practice of filing redacted copies of such materials which fall under article 61(3) as opposed to the originals.
2. The Honourable Single Judge requested the Defence to respond to these submissions in a motion which was to be filed by 24 July 2006. The Defence duly filed its objections.
3. On 28 July 2006, the Prosecution filed its 'Prosecution's Response to Conclusions de la défense quant aux divulgations de documents expurgés faites par le Procureur'. Although the Prosecution incorporated by reference its submissions from the 14 July 2006 Status Conference, it provided further elaboration regarding its justification for the redactions,¹ and legal arguments as to why Rule 81(4) would not apply to the materials in question.²
4. In addition, the Prosecution delineated a proposal for processing Defence requests for access to unredacted versions, which had not been put before the Defence for consideration when it filed its initial motion on 24 July 2006. The Prosecution also appeared to alter its stance regarding the filing of original copies, although its new position is contingent on the Court's acceptance of the Prosecutor's "independent right" to *proprio motu* redact the materials in question.
5. The Defence requested, and was granted permission to file a reply to the Prosecution's response.³

2. Submissions

2.1 Whether the Prosecution is entitled to redact the identities of persons who are neither witnesses nor victims.

6. The scope of the redactions encompass the names of witnesses, potential witnesses, and "individuals Thomas LUBANGA DYILO may rightly or wrongly

¹ See para 10 of Prosecution Response dated 28 July 2006.

² See para 11 of Prosecution Response dated 28 July 2006.

³ Decision on the Defence Request to file a Reply to the Prosecution's Response to the Conclusion de la défense quant aux divulgations de documents expurgés par le Procureur, dated 2 August 2006, ICC-01/04-01/06-236

– believe to be Prosecution witnesses”.⁴ The information redacted includes telephone numbers, fax-numbers, email-addresses and similar potentially identifying elements, and marks made by investigators including the initials of the witnesses or sources that provided the document.⁵

7. The categories of documents which the Prosecution intends to redact in this manner are documents falling under articles 61(3)(b), 67(2) of the Rome Statute, and Rule 77 of the Rules of Procedure and Evidence.⁶ Thus, it includes documents which the Prosecution intends to rely on during the confirmation hearing, material which is exculpatory or impacts on the credibility of Prosecution evidence, and information which is material to the preparation of the Defence.
8. In their response, the Prosecution assert that they have both a right and a statutory duty to undertake the redactions in question. In support of this assertion, they cite articles 68(1) and 54(3)(f) and allege that the scheme for protective measures set out in Rule 81(4) is inapplicable.
9. Article 68(1) imposes an obligation on the Court and the Prosecution to take appropriate measures to protect victims and witnesses. The term victim in this context refers to persons who have requested to participate in the proceedings as a victim. Article 68(1) therefore has a narrow scope and would not extend to persons who are neither witnesses nor victims. In addition, article 68(1) also has the clear caveat that such measures “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.
10. The Prosecution also subsequently contradict their rationale for employing article 68(1). At paragraph 11, the Prosecution argue that Rule 81(4) does not apply to the redactions in question because Rule 81(4) provides for the protection of witnesses and victims, and as such is “not applicable to potential witnesses, sources, or other individuals named in documents”. If Rule 81(4) is inapplicable because it provides for the protection of victims and witnesses, how is article 68(1), which also provides for the protection of victims and witnesses, applicable?
11. With respect to Article 54(3)(f), it allows the Prosecutor to “take necessary measures or request that necessary measure be taken, to ensure the confidentiality of information, the protection of any person, or the preservation of evidence”. Although the reference to ‘any person’ broadens the ambit of this provision (as compared to article 68(1)), the Defence respectfully submits that the measures

⁴ Para. 7 of Prosecution Response

⁵ Para. 7 of Prosecution Response

⁶ Footnotes 1 and 2 of Prosecution Response.

which the Prosecution can take *proprio motu* are limited, otherwise, the reference to their ability to “request that necessary measures be taken” would be superfluous. The use of the word request implies that there are certain categories of measures for which prior authorisation is required.

12. The discretionary power vested in the Prosecution in article 54(3)(f) is also subject to the overriding obligations of the Prosecution to “establish the truth”, and to “[f]ully respect the rights of persons arising under this Statute”.⁷
13. In terms of the obligation to ‘establish the truth’, Bergsmo and Krueger have opined with respect to article 54 that “[m]aterial collected during the investigative phase should be collected with a view to their ultimate utilisation in Court proceedings”.⁸ In this regard, how will the truth out if the Defence is hamstrung from presenting relevant or exculpatory evidence/witnesses in court? It is self-evident that if the identities of persons mentioned in the materials are redacted, the Defence will not be able to use this information to conduct further investigations, to verify the reliability of the information, or to invite the persons who provided the information to testify on behalf of the Defence. Even if the persons in question are not willing to be contacted by the Defence, the Defence must still be in a position to identify who they are in order to request the Chamber to issue a subpoena to call them to testify, and to be able to conduct background checks on their credibility before requesting such measures.
14. A key consideration in construing the extent of the Prosecutor’s disclosure obligations should thus be the fact that “by seizing material, the Prosecution denies such accused persons access to that material. Experience has demonstrated that the results can be seriously deleterious to the rights of the accused.”⁹ Hence, the Defence respectfully submits that the Prosecutor does not fulfil its obligation to establish the truth by merely collecting evidence, even if it alerts the Defence to the fact that such evidence exists; in order to preserve the fairness of adversarial

⁷ Article 54(1)(a) of the Rome Statute.

⁸ M. Bergsmo P Krueger, ‘Duties and Powers of the Prosecutor’ page 715-725 in Commentary on the Rome Statute of the International Criminal Court (O. Triffterer ed 1999) Nomos Verlagsgesellschaft at page 719, para 29.

⁹ Decision of Duty Judge on Search and Seizure Warrant, Case IT-02-55-Misc4, cited in G McIntyre, ‘Equality of Arms – Defining Human Rights in the Jurisprudence of the ICTY’, 25 August 2003, Outreach Seminar. Convergence of Criminal Justice Systems: Building Bridges – Bridging the Gaps < <http://www.isrc.org/Papers/McIntyre.pdf> >

proceedings, the Prosecution must actually put the Defence in a position to use that information in court.¹⁰

15. The Defence further submits that the caveat in article 54(1)(a) that the Prosecutor must exercise his powers under article 54 in a manner which respects the rights of persons under the Statute, necessarily encompasses the rights of the accused set out in article 67(1), and the rights of the defence set out elsewhere in the Statute (including article 67(2)).
16. Article 67(1)(e) of the Statute enshrines the right of the accused to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, and to raise defences and present other evidence admissible under the Statute. If this right is to be interpreted in a real and effective manner, the Defence must also be given the means to find such witnesses and evidence.
17. In this regard, Bergsmo and Krueger concur that article 54(3)(f) is “naturally subject to disclosure orders by the Court pursuant to the Statute and Rules of Procedure and Evidence”.¹¹ In terms of applicable disclosure orders, in the 19 May 2006 decision,¹² the Single Judge observed that the injunction against redacting potentially exculpatory excerpts extended beyond the documents which the Prosecution intended to rely on during the confirmation hearing. The Single Judge cited a statement of May R and Wierda M in relation to the “broader question of the Prosecution’s obligation to disclose potentially exculpatory sensitive information” to the effect that the “Prosecution is not relieved of its duty to disclose exculpatory material by rules concerning confidentiality or witness protection”, although “in exceptional circumstances some redactions of “irrelevant but sensitive portions of a document” can be authorised by the Chamber (May R, Wierda M, *International Criminal Evidence*, Transnational Publishers, 2002, page 79).”
18. The identities of persons could hardly be categorised as irrelevant. As noted above, without such information, the documents provided by the Prosecution are useless for the Defence.

¹⁰ Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Prosecutor v. Blaskić, Decision of the Appeals Chamber dated 26 September 2000, at para. 41 < <http://www.un.org/icty/blaskic/appeal/decision-e/00926PN313780.htm> >

¹¹ M. Bergsmo & P. Krueger, ‘Duties and Powers of the Prosecutor’ page 715-725 in *Commentary on the Rome Statute of the International Criminal Court* (O. Triffterer ed. 1999) Nomos Verlagsgesellschaft page 724 para 29

¹² Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute, ICC-01/04-01/06-108 at footnote 27.

19. With respect to the approach of the ad hoc Tribunals on this issue, the jurisprudence of the ICTY has emphasised that the Prosecution is obliged to disclose exculpatory material in a format which is sufficiently cohesive and comprehensible, and which facilitates its use by the Defence in court.¹³ Thus, the Prosecution must provide the evidence in its original format, rather than in summary form, and must provide exculpatory excerpts in their context¹⁴
20. The Prosecution must also disclose any additional information which may be required by the Defence to ascertain the authenticity, source or credibility of the exculpatory information. In this regard, the Trial Chamber held in the Blaskic case that “in respect of Rule 68 regarding exculpatory material, it is reasonable to hold that in transmitting material of this kind the Prosecution must also include any information going to the authenticity of the document so as to enable the Defence to make full use of it. Indeed, if there is other material which tends to establish the authenticity of the document, such other material itself becomes part of the exculpatory evidence as being beneficial to the accused. Moreover, if the Prosecution possesses evidence which tends to suggest that some specific material being ruled on by it may not be authentic, the Prosecutor would, of course, be obliged to transmit such evidence as exculpatory evidence”.¹⁵
21. This statement underscores the necessity of providing the Defence with sufficient information to verify both the relevance of the information to the Defence case, and its evidential authenticity and credibility. The identities of persons named in a document are a key component of any assessment of its authenticity and credibility.
22. It is also arguable that the present issue is analogous to the situation in which the Prosecution is obliged to disclose exculpatory materials in the first case, which are subject to protective measures in a second, related case, since in both scenarios, the statements/evidence emanate from persons who will not be Prosecution

¹³ “Decision On The Defence Motion For “Sanctions For Prosecutor’s Repeated Violations Of Rule 68 Of The Rules Of Procedure And Evidence”, Prosecutor v. Blaskic, 29 April 1998 < <http://www.un.org/icty/blaskic/trialc1/decisions-e/80429FV113450.htm> > . Prosecutor v Blagojevic et al, Joint Decision on Motions Related to the Production of Evidence, 12 December 2002, at para 24 < <http://www.un.org/icty/blagojevic/trialc/decision-e/021212.pdf> >

¹⁴ Decision on “Motion for Relief From Rule 68 Violations by the Prosecutor and For Sanctions to be Imposed Pursuant to Rule 68bis and Motion for Adjournment While Matters Affecting a Fair Trial and Justice can be Resolved”, Prosecutor v. Brdjanin, 30 October 2002, at para 26 < <http://www.un.org/icty/brdjanin/trialc/decision-e/31123823.htm> > See also Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, Prosecutor v Sesay, Case No SCSL-04-15-T, 9 July 2004 at para. 34 < <http://www.sc-sl.org/Documents/SCSL-04-15-T-189.pdf> >

¹⁵ Decision on the Defence Motion for Reconsideration of the Ruling to Exclude From Evidence Authentic and Exculpatory Documentary Evidence, Prosecutor v Blaskic, 30 January 1998, <http://www.un.org/icty/blaskic/trialc1/decisions-e/80130EV113316.htm> at para.15.

witnesses in the first case. In this situation, both the Rules of Procedure and Evidence of the ICTY and ICTR¹⁶ and the jurisprudence¹⁷ on this subject clearly stipulate that the Prosecution is obliged to disclose such materials irrespective of the protective measures.

23. In practice, the Defence are provided with the relevant materials subject to the condition that they adhere to the conditions of confidentiality imposed in the other case. Indeed, in choosing between the potentially conflicting requirements of witness protection measures and the obligation to disclose exculpatory materials, the ICTY has opined that "the exculpatory character of the confidential documents tendered by the Defence in support of its case and the Prosecutor's resulting disclosure obligation take precedence over their confidential nature insofar as the protection of the witnesses concerned is maintained, or even increased".¹⁸

24. In conclusion on this point, the Defence notes that the drafters of the Rome Statute were aware that the Defence "would not be able to wield similar authority [as the Prosecutor] to enlist support or assistance with a view to preparing the defence as broadly, if necessary. This is one area where the civil law approach of an investigative judge showed the way to a workable solution to this problem, which relates essentially to potential inequality of recourse between parties."¹⁹ The Prosecutor was therefore vested with strong investigative powers subject to a "clear and binding mandate for the Prosecutor to investigate both sides of the case

¹⁶ Rule 75(F) of the ICTY (IT/32/Rev.37) and ICTR (as last amended on 7 June 2005) Rules of Procedure and Evidence provides that:

(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures

(i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule, but

(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings

<<http://www.un.org/icty/legaldoc-e/index.htm>>, <<http://69.94.11.53/ENGLISH/rules/070605/070605.doc>>

¹⁷ 'Decision On Appellant's Motion For Disclosure Pursuant To Rule 68 And Motion For An Order To The Registrar To Disclose Certain Materials', Appeals Chamber, Prosecutor v. Brdjanin, Appeals Chamber decision of 7 December 2004, < <http://www.un.org/icty/brdjanin/appeal/decision-e/041207.htm>, > Appeals Chamber judgement of 29 July 2004, Prosecutor v. Blaskic, at para. 267 < <http://www.un.org/icty/blaskic/appeal/judgement/bla-aj040729e.pdf> >

¹⁸ 'Decision on the Prosecution and Defence Motions dated 25 January 1999 and 25 March 1999 Respectively', 22 April 1999 Prosecutor v. Blaskic, < <http://www.un.org/icty/Supplement/supp4-e/blaskic.htm> >

¹⁹ M. Bergsmo P. Krueger, 'Duties and Powers of the Prosecutor' page 715-725 in Commentary on the Rome Statute of the International Criminal Court (O. Triffler ed. 1999) Nomos Verlagsgesellschaft at page 716 para 2.

equally”.²⁰ However, the rationale for doing so would be completely vitiated if the Prosecution chooses to construe their disclosure obligations in the narrowest manner possible (indeed, such that it is narrower than the corresponding obligations at the ad hoc Tribunals, where the Prosecutorial disclosure obligations are less onerous). The result can only be a manifest inequality of arms, with little, if any prospects for a fair trial.

2.2 In the alternative, even if such a right exists, the Prosecution has not adduced sufficient justification for the measures imposed

25. The Prosecution has adduced no objective justification as to why the existence of names in a document would in itself lead to a real possibility that the persons named may face threats or intimidation.
26. In its response, the sole justification for redacting the materials is that “Thomas Lubanga Dyilo may – rightly or wrongly – believe [those persons names in the documents] to be Prosecution witnesses”.²¹
27. This highly subjective conjecture could hardly be said to meet the requirements of necessity and proportionality required for imposing the extreme measure of redacting exculpatory material.
28. The Defence vigorously disputes that the Prosecution can ever presume that the mere disclosure of witness identities to the Defence will create a risk for the safety of the witnesses. However, this holds doubly true for persons who are named in exculpatory documents or documents which are of material relevance for the Defence. What possible objective justification could there be for the Defence wishing to threaten or jeopardise the safety of persons who could assist the Defence case?

2.3 The Procedure Proposed by the Prosecution for Processing Defence Requests

29. In its response, the OTP delineates a proposed procedure whereby the burden would be on the Defence to inform the Prosecution of the documents it wishes to consult in unredacted form and to “explain its reasoning for its request. In the event the Prosecution assesses that there is a need to maintain the redactions as a

²⁰ M. Bergsmo P. Krueger, ‘Duties and Powers of the Prosecutor’ page 715-725 in Commentary on the Rome Statute of the International Criminal Court (O. Triffterer ed. 1999) Nomos Verlagsgesellschaft at page 716 para 2

²¹ At para 7

precautionary measure, the Defence must show good cause supporting its need to have access to the redacted portion of the documents concerned. The Single Judge may, after reviewing the documents concerned, determine whether good cause has been shown.”²²

30. This procedure essentially makes redactions the norm, and access the exception, whereas, as argued above, the Prosecution has singularly failed to provide any objective justification for such redactions. It also inappropriately shifts the burden from the Prosecution having to justify the existence of redactions to the Defence having to justify access to unredacted versions. In this regard, the Statute obliges the Prosecution to disclose the material in question (i.e. Article 67(2) provides that the Prosecutor shall, as soon as possible, disclose to the Defence...). It therefore follows that if the Prosecution wishes to modify or abrogate its obligations in any degree, it must seek the prior authorisation of the Chamber to do so. The burden should not be on the Defence to convince the Chamber that the Prosecution must comply with its statutory obligations.
31. The requirement that the Defence must demonstrate ‘good cause’ in order to access the unredacted portions would also force the Defence to disclose specific details of its Defence strategy to the Prosecution.
32. Finally, the Defence observes that the procedure bears an uncanny resemblance to a proposal suggested by the ICTY Prosecution in the Brdjanin and Talic case, which was resoundingly rejected by the Chamber as being in violation of the Statute and Rules. In particular, the Chamber held that:

Such a proposal, however, has two basic defects. First, it continues to assume that *every* witness (or at least those who ask for their identity not to be disclosed) is in fact “in danger or at risk” (as Rule 69(A) describes them), or “vulnerable” (as the Motion describes them) As already decided, that is not so. Secondly, the proposal completely reverses the appropriate onus. Rule 69(A) places the onus upon the Prosecution to demonstrate the exceptional circumstances justifying an order for non-disclosure, whereas this proposal places the onus upon the accused to justify disclosure.

There is another problem. The Prosecution asserted that, as it has a responsibility to ensure that the accused is given a fair trial, it should be trusted in effect to perform the role which the Rules give to the Trial Chamber in

²² Paragraph 12 of Prosecution Response.

determining which victims and witnesses are vulnerable. It asks the accused "to accept that there are very good reasons why the identity is not being provided". This does not even begin to discharge the onus which the Prosecution bears under Rule 69(A).[...] The proposal was opposed by both accused, and the Trial Chamber accepts that its implementation would be contrary to both the Statute and the Rules.²³

33. Although the ICC is not directly bound by the decisions of the ICTY, the Defence respectfully suggests that the ICC should do its utmost to avoid resurrecting procedures and proposals, which have already been discredited as being manifestly incompatible with the requirements of fair trial.

2.4 Provision of Originals to the Registry

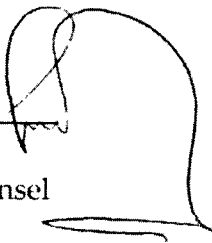
34. The Defence is of the view that in order to preserve the integrity and accuracy of the judicial record, it is necessary for the Prosecution to provide the Registry with originals.
35. However, to the extent that the Prosecution refusal to disclose originals was connected to its refusal to disclose/provide unredacted versions of the material to the Defence, the Defence submits that the issue would be rendered moot by an order of the Chamber to provide unredacted versions to the Defence.

3. Relief Sought

36. In light of the above arguments, the Defence respectfully requests the Honourable Pre-Trial Chamber to
- i. order the Prosecution to disclose/provide unredacted versions of the material in question; and
 - ii. order the Prosecution to provide the Registry with the original versions of this material, where applicable.

²³ 'Decision on Motion by Prosecution for Protective Measures', *Prosecutor v. Brdjanin and Tadic* 3 July 2000, at para 16-18 < <http://www.un.org/icty/brdjanin/trialc/decision-e/00703PM213035.htm> >.

11/11


A handwritten signature in black ink, consisting of a large, stylized 'J' and 'F' that are intertwined. The signature is written over a horizontal line.

Jean Flamme, Defence Counsel

Dated this 15th day of August, 2006

At The Hague