

**Cour
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Internationale**



**International
Criminal
Court**

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

Date: 19 June 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 document

**Reasons for the “Decision on the Prosecutor’s 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 Mabilie
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



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),

Hereby, gives its reasons for the "Decision on the Prosecutor's request for redactions for the purpose of disclosure" rendered on 16 May 2014 (ICC-01/04-01/06-3100-Conf-Exp):

I. BACKGROUND

1. On 15 May 2014, the Prosecutor filed, on a confidential and *ex parte* Prosecutor and Victims and Witnesses Unit (hereinafter: "VWU") only basis, the "Application for Authorisation to Redact Material Intended for Disclosure"¹ (hereinafter: "Prosecutor's Request"), in which she requested that the Appeals Chamber authorise, pursuant to article 68 (5) of the Statute and rule 81 (2) and (4) of the Rules of Procedure and Evidence, certain redactions to a transcript of a witness statement taken by the Office of the Prosecutor (hereinafter: "OTP"), which the Prosecutor sought to disclose to Mr Thomas Lubanga Dyilo (hereinafter: "Mr Lubanga") prior to the hearing before the Appeals Chamber of 19 and 20 May 2014.

2. On 16 May 2014, the Appeals Chamber issued the urgent "Decision on the Prosecutor's request for redactions for the purposes of disclosure"² (hereinafter: "Decision"), in which it (i) authorised, pursuant to article 68 (1) of the Statute and rule 81 (2) and (4) of the Rules of Procedure and Evidence, the redactions proposed in Annex 1 appended to the Prosecutor's Request,³ (ii) ordered *proprio motu* additional redactions,⁴ (iii) ordered the Prosecutor to implement the redactions set out in

¹ ICC-01/04-01/06-3096-Conf-Exp, with confidential *ex parte*, only available to the Prosecution and VWU, annexes 1 and 2, ICC-01/04-01/06-3096-Conf-Exp-Anx1, and ICC-01/04-01/06-3096-Conf-Exp-Anx2 (hereinafter: "Annex 1 to the Prosecutor's Request" and "Annex 2 to the Prosecutor's Request", respectively).

² ICC-01/04-01/06-3100-Conf-Exp.

³ Decision, para. (1).

⁴ Decision, para. (2).

paragraph (2) of the Decision without delay and to disclose the transcript of the witness statement to Mr Lubanga,⁵ and (iv) indicated that it would give its reasons for the Decision in due course.⁶

II. REASONS

3. The Prosecutor requests redactions, first, to “protect staff of the OTP and persons who are contracted to work for the OTP in order to avoid prejudice to ongoing or further investigations” and, second, “to protect the identity and location of family members” of the witness in question.⁷ 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.

4. 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.

5. The Appeals Chamber 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”⁸ and that “it will have to be determined on a case-by-case basis whether the non-

⁵ Decision, para. (3).

⁶ Decision, para. (4).

⁷ Prosecutor’s Request, para. 6; Annex 1 to the Prosecutor’s Request.

⁸ “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*”), para. 70.

disclosure of information [...] may be authorised by a Chamber”.⁹ In addition, 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.¹⁰

6. 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”.¹¹ [Footnotes omitted.]

7. 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 Evidence¹² and have been summarised briefly 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

⁹ *Katanga OA* Judgment, para. 93; see also “Judgment on the appeal of Mr Germain Katanga 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-01/04-01/07-476 (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.

¹⁰ “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.

¹¹ “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.

¹² 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].¹³

8. 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 staff members and persons contracted to work for the OTP, the Appeals Chamber notes that the proposed redactions are limited to the names and identifying information of investigators and interpreters who participated in the interviews of the witness in question.¹⁴ The Appeals Chamber notes further the Prosecutor's submissions that these persons are based in, or travel often to, the field and accepts that disclosure of their identities to the Defence would result in an objectively justifiable risk of potential prejudice to further or ongoing investigations. 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.

9. In respect of the request pursuant to rule 81 (4) of the Rules of Procedure and Evidence to redact the names and identifying information of the family members of witness in question,¹⁵ the Appeals Chamber observes that the proposed redactions are limited to the names and identifying information of family members and are in line with the suggestions contained in the report of the Victims and Witness Unit (hereinafter: "VWU Report").¹⁶ Bearing in mind the security situation where the individuals concerned currently reside, the Appeals Chamber accepts that disclosure of their names and identifying information to the Defence 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.

10. 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 Annex 1 to the Prosecutor's Request.

¹³ *Katanga OA Judgment*, para. 67; referring to *Lubanga OA 5 Judgment*, paras 21, 33-34; *see also Lubanga OA 3 Judgment*, para. 37.

¹⁴ Prosecutor's Request, paras 16-17.

¹⁵ Prosecutor's Request, paras 12-15.

¹⁶ *See Annex 2 to the Prosecutor's Request.*

11. Additionally, upon review of the VWU Report and the draft transcripts of the interviews of the witness in question,¹⁷ the Appeals Chamber notes that the Prosecutor has not consistently requested redactions of the names and locations of this witness' family members 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 members of the family of the witness, namely:

- a. The [REDACTED] in line 669 of DRC-OTP-2066-0245 – Track 1;
- b. The [REDACTED] in lines 843 and 850 of DRC-OTP-2066-0245 – Track 1;
- c. The phrase [REDACTED] in lines 843 and 844 of DRC-OTP-2066-0245 – Track 1; and
- d. The phrase [REDACTED] in line 848 of DRC-OTP-2066-0245 – Track 1.

12. 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 the members of the family of the witness in question. 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.

13. 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”.¹⁸

14. In this specific instance, the Appeals Chamber notes that the Prosecutor's Request was only filed on 15 May 2014 and that the redactions were sought for the

¹⁷ See Annex 1 to the Prosecutor's Request.

¹⁸ *Katanga OA* Judgment, para. 73 (b).

purpose of disclosing the document to Mr Lubanga prior the Appeals Chamber's hearing of 19 and 20 May 2014.¹⁹ In light of the urgency of the matter and bearing in mind the very limited redactions sought,²⁰ the Appeals Chamber acted in the interest of Mr Lubanga when it rendered its Decision without hearing him first, doing so in order to allow Mr Lubanga to access the transcript of the statement without delay and to avoid any prejudice to the preparation of his defence leading up to the hearing. Mr Lubanga, if considered necessary, may address the Appeals Chamber in relation to any issue arising in this respect.

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



Judge Erkki Kourula
Presiding Judge

Dated this 19th day of June 2014

At The Hague, The Netherlands

¹⁹ Prosecutor's Request, para. 4; Annex 1 to the Prosecutor's Request.

²⁰ Prosecutor's Request, para. 7.