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

Date: **13 May 2008**

TRIAL CHAMBER I

Before: Judge Adrian Fulford, President
Judge Elizabeth Odio Benito, Judge
Judge René Blattmann, Judge

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

**Public Document
Public Redacted Version
with Confidential, *Ex Parte* – Prosecution Only Annexes
Prosecution's Application for Non-disclosure of Information**

Source: Office of the Prosecutor

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

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I. Background

1. On 24 April 2008, the Trial Chamber rendered its "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters" (the Decision).¹
2. In the Decision, the Trial Chamber considered information that is of a potentially exculpatory nature emanating from eight witnesses.² The Trial Chamber ordered the Prosecution to disclose the statements of these eight witnesses and other relevant materials by 6 May 2008, with redactions as necessary to protect their identity and whereabouts.³ The Trial Chamber directed that if the Prosecution determines that additional redactions are necessary (for example, to protect either third parties or further investigations), it must request a hearing, after having first filed the necessary application.⁴
3. Further to a request by the Prosecution to the Legal Advisor to the Trial Chamber, by telephone and by email on 29 April 2008, on the same date the Trial Chamber extended the deadline for disclosure of the statements and related documents and for any necessary applications to the Trial Chamber from 6 May to 9 May 2008.

II. Scope of the Present Submission

4. In the present application, the Prosecution seeks the non-disclosure of information pursuant to Article 54(3)(f) and 68 of the Rome Statute (Statute) and Rules 81(2) and (4) of the Rules of Procedure and Evidence (Rules) in relation to the four of the eight witnesses referenced above.

¹ ICC-01-04-01-06-1295-US-Exp, 24 April 2008, with Confidential *ex parte* Annexes A-D.

² ICC-01-04-01-06-1295-US-Exp, pages 50-54 and Annex C.

³ ICC-01-04-01-06-1295-US-Exp, page 53.

⁴ ICC-01-04-01-06-1295-US-Exp, pages 53-54.

(i) [REDACTED] (DRC-OTP-WWWW-0003)

5. The OTP met with the witness in April, May, July, September and October 2005. The witness can be categorized as a [REDACTED].
6. In relation to this witness, the Prosecution requests (i) non-disclosure of the taped recordings of the interview, and (ii) redactions to protect a third party.⁵
7. First, in accordance with the Order of the Trial Chamber on 24 April 2008, the Prosecution has applied redactions to the signed statement and the transcripts of the interviews of the witness, in order to protect the identity of the witness. Accordingly, the Prosecution requests authorization for non-disclosure of the audio/video recordings of the interviews, from which the transcripts were generated. The audio/video recording clearly depicts the witness' image and voice and would immediately identify the witness upon disclosure. The Defence will be served the transcripts of the interview which is a verbatim transcription of the audio/video recording. Accordingly, the Prosecution submits that the non-disclosure of the audio/ video recording will not prejudice the Defence and will serve to protect the identity of the witness.
8. The Prosecution requests this relief for the period during which the Chamber will explore whether the witness will cooperate with the Court, and determine how the evidence should be made available to balance the interests of the accused and the proper level of protection for the witness.

⁵ The Prosecution informs the Trial Chamber that an Investigator's Note was prepared following the first meeting with this witness in which the Prosecution has applied redactions to protect its internal work product further to Rule 81(1).

9. Second, in two sections of the transcription of the interview, the witness refers to an individual named [REDACTED]. The witness indicates that [REDACTED] and that [REDACTED] helped facilitate the interview in April 2005 between the Office of the Prosecutor and the witness. The witness indicates that the interview took place at [REDACTED], although [REDACTED] was not present for the interview.⁶

10. In its 6 February 2008 filing,⁷ with respect to a different witness ([REDACTED] DRC-OTP-WWWW-0011) the Prosecution sought redactions to the name [REDACTED], now [REDACTED], with whom the witness [REDACTED] had regular contact. [REDACTED] full name is [REDACTED] and the Prosecution submitted that if his name is known in connection to witness [REDACTED], his regular contact with the witness could expose them. During an *ex parte* hearing on 12 February 2008,⁸ the Prosecution further submitted that [REDACTED] is well-known [REDACTED], that he [REDACTED], and that his role placed him in danger beyond that inherent [REDACTED]. Finally, the Prosecution submitted that no contentious issue is connected to [REDACTED] role [REDACTED] for trial.

11. On 24 April 2008, the Trial Chamber authorized the requested redactions to [REDACTED] name and role.⁹

⁶ Attached hereto as Annexes 1 and 2 are the two transcript sections that contain references to [REDACTED] and that contain the Prosecution's proposed redactions pursuant to Article 54(3)(f). The references to [REDACTED] are located at [REDACTED] (Annex 1), and at [REDACTED] (Annex 2).

⁷ ICC-01/04-01/06-1157-Conf-Exp.

⁸ ICC-01/04-01/06-T-74-Conf-Exp-ENG, pages 97-100.

⁹ ICC-01/04-01/06-1295-US-Exp, Annex B.

12. The Prosecution informs the Trial Chamber that the individual referred to as [REDACTED] in the interview of [REDACTED] is the same individual referred to in the interview of witness [REDACTED]. The Prosecution requests that the name and role of [REDACTED] be redacted permanently in the transcripts of the interview of the witness.

(ii) [REDACTED] (*DRC-OTP-WWW-0034*)

13. The OTP met with the witness in June and September 2005 and the interview continued in November 2007. The witness can be categorized as a [REDACTED].

14. In relation to this witness, the Prosecution requests non-disclosure of the taped recordings of the interview.

15. In accordance with the Order of the Trial Chamber on 24 April 2008, the Prosecution has applied redactions to the unsigned statements and to the transcripts of the interviews of the witness, in order to protect the identity of the witness. Accordingly, the Prosecution requests authorization for non-disclosure of the audio/video recordings of the interviews (from which the transcripts were generated). The audio/video recording clearly depicts the witness' image and voice and would immediately identify the witness upon disclosure. The Defence will be served the transcripts of the interview which is a verbatim transcription of the audio/video recording. Accordingly, the Prosecution submits that the non-disclosure of the audio/ video recording will not prejudice the Defence and will serve to protect the identity of the witness.

16. The Prosecution requests this relief for the period during which the Chamber will explore whether the witness will cooperate with the Court, and determine how the evidence should be made available to balance the interests of the accused and the proper level of protection for the witness.

(iii) [REDACTED] (*DRC-OTP-WWW-0005*)

17. The OTP met with the witness in August and December 2005 and in October 2007. The witness provided one unsigned statement as a result of the 2005 interview and one signed statement following the continuation of the interview in 2007. The witness can be characterized as a [REDACTED]. [REDACTED]. [REDACTED].

18. In relation to this witness, the Prosecution requests non-disclosure of [REDACTED] and [REDACTED] referenced by the witness in his statements, on the basis of Rule 81(4) to protect the identity of the witness.¹⁰ The Prosecution notes that in the witness' statement, it has redacted [REDACTED].

19. First, the witness has provided the Office of the Prosecutor with [REDACTED]. These documents are [REDACTED]. Based on the information of the Office of the Prosecutor, [REDACTED]. The documents are [REDACTED] which may identify the witness. Additionally, [REDACTED]. Furthermore, [REDACTED].

20. The Prosecution notes that [REDACTED].

¹⁰ Attached hereto as Annex 3 is the signed statement of the witness in which reference is made to the [REDACTED]. Attached hereto as Annexes 4-17 are the [REDACTED] for which the Prosecution is seeking non-disclosure in order to protect the identity of the witness.

21. In this particular instance, the Prosecution maintains its request for non-disclosure [REDACTED].

22. In addition, the Prosecution has redacted references [REDACTED] in the witness' statement that could identify him.

23. Second, the witness comments on [REDACTED]. [REDACTED]. The Prosecution has redacted references to [REDACTED] in the witness statement because of the increased risk to disclosing the identity of the witness, [REDACTED].

24. Based on the foregoing, the Prosecution requests that [REDACTED] not be disclosed, for the period during which the Chamber will explore whether the witness will cooperate with the Court, and determine how the evidence should be made available to balance the interests of the accused and the proper level of protection for the witness.

25. The Prosecution further informs the Trial Chamber that it has made redactions on the basis of Rule 81(1) to protect internal work product in the unsigned statement of the witness.

(iv) [REDACTED] (DRC-OTP-WWWW-0110)

26. The OTP met with the witness in August 2006. The witness provided a signed statement as a result of the interview.

27. The witness has worked for [REDACTED]. In [REDACTED]. [REDACTED]. The witness was involved in [REDACTED]. In this context, [REDACTED]. The witness was also [REDACTED].

28. The Prosecution requests redactions to protect the identity of [REDACTED]. The redactions are sought pursuant to Article 54(3)(f), to ensure the "protection of any person".¹¹ [REDACTED].¹² [REDACTED].

(v) [REDACTED] (*DRC-OTP-WWWW-0040*)

29. The OTP met with the witness in November 2005 and February 2006. The witness provided a signed statement as a result of the interview.

30. The witness can be characterized as a [REDACTED]. [REDACTED].

31. In paragraphs 22, 159 and 182 of his statement, the witness states that [REDACTED].¹³

32. In relation to this witness, the Prosecution requests permanent redactions to these paragraphs on the basis of Rule 81(2) and Article 54(3)(f), so as neither to prejudice its further investigations by disclosing the names of certain sources and leads, nor to compromise the security of the named individual [REDACTED].

33. The Prosecution notes that it has sought a redaction to the name of [REDACTED].¹⁴

34. In order to comply with the Trial Chamber's Decision and subsequent extension of the time limits regarding disclosure of this evidence, the Prosecution submits that it will proceed to disclose the materials that are the subject of this application (and will not

¹¹ Witness statement of [REDACTED]. The names of [REDACTED].

¹² ICC-01/04-01/06-1081 with Confidential, *ex parte* Attachment A and Annexes.

¹³ Attached hereto as Annex 18 is the statement of the witness with proposed redactions in [REDACTED]. The Prosecution notes that [REDACTED]. The Prosecution has [REDACTED] in this context, [REDACTED]. The name of [REDACTED].

¹⁴ ICC-01/04-01/06-T-66-ENG, 13 December 2007, pages 1-2 and pages 5, lines 8-15 and ICC-01/04-01/06-1295-US-Exp, 24 April 2008, at Annex D.

disclose the documents that are the subject of an application for non-disclosure) on 9 May 2008, pending a decision of the Chamber on these issues. Should the Chamber determine that the redactions are not justified, the Prosecution will re-disclose the statements and related documents immediately following such a decision in accordance with the Chamber's decision on the issue.

III. *Ex Parte* Filing

35. The Prosecution submits that the classification of the present filing and annexes as *Confidential-Ex Parte – Prosecution Only* is necessary.¹⁵

36. First, the present filing seeks relief on the basis of provisions on protective measures, including Articles 54(3)(f), 68 and Rule 81(4). The Prosecution submits that the information discussed, including the identity of witnesses and their whereabouts, must be treated confidentially and cannot be disclosed to the Defence in advance of the implementation of protective measures.¹⁶ To do so would run afoul of the Court's obligation under Article 68(1) to protect these individuals and their families. Further, the Trial Chamber has ordered the disclosure of these statements and related documents with redactions to protect the identity of the witnesses.¹⁷

¹⁵ Decision on the procedures to be adopted for *ex parte* proceedings, 7 December 2007, ICC-01/04-01/06-1058 at para. 12. On 6 December 2007, the Trial Chamber determined that *ex parte* procedures are only to be used exceptionally when other procedures are not available. The Court must ensure that the use of the *ex parte* procedure is proportionate given the potential prejudice to the Accused.

¹⁶ See the Decision of the Appeals Chamber, "Decision Establishing General Principles Governing

Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", ICC-01/04-01/06-568, 13 October 2006 at paras. 37, 65-67.

¹⁷ ICC-01/04-01/06-1295-US-Exp, 24 April 2008, page 53.

37. Second, the Statute provides that applications pursuant to Rule 81(2) "shall be heard on an *ex parte* basis". This application is made, in part, further to Rule 81(2) and accordingly the Prosecution submits that an *ex parte* classification is justified.

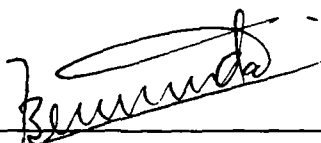
38. The rights of the Accused are maintained to the extent that he will be made aware of the filing and its legal basis once the Trial Chamber's decision upon which this application is based is reclassified, but cannot be privy to the specifics of the information that needs to be addressed. The Prosecution submits that no alternative procedures exist to deal with this request.

39. The Prosecution will file a Confidential version of the present filing once the Decision is reclassified.

IV. Relief Requested

40. Based on the foregoing, the Prosecution requests that the Trial Chamber authorize:

- (i) the non-disclosure of information in accordance with Rule 81(2);
- (ii) the non-disclosure of information in accordance with Articles 54(3)(f), 68 and Rule 81(4); and
- (iii) the non-disclosure of 14 documents in order to protect the identity of witnesses, further to Article 68 and Rule 81(4).



 Fatou Bensouda, Deputy Prosecutor
 on behalf of
 Luis Moreno-Ocampo, Prosecutor

Dated this 13th day of May 2008
 At The Hague, The Netherlands