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Date: 15 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 *ex parte* Confidential – 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 eighteen witnesses.² The Trial Chamber ordered the Prosecution to disclose the statements of these eighteen witnesses and other relevant materials by 16 May 2008, in a non-redacted form.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

II. Scope of the Present Submission

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

(i) [REDACTED] (DRC-OTP-WWWW-0156)

4. The Office of the Prosecutor (OTP) met with the witness in January 2006. An Investigator’s Note was prepared as a result of this meeting.

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 49-50 and Annex C.

³ ICC-01-04-01-06-1295-US-Exp, page 50.

⁴ ICC-01-04-01-06-1295-US-Exp, page 50.

5. In relation to this witness, the Prosecution requests redactions to protect a third party and OTP further investigations, under both Rule 81(2) and Article 54(3)(f).⁵
6. In the first two paragraphs of the Investigator's Notes, the witness refers to [REDACTED] and provides his contact details. The named [REDACTED].
7. The Prosecution requests redaction of the name of [REDACTED] under Rule 81(2) as he is [REDACTED] and continues to provide [REDACTED] in this and other investigations. [REDACTED] must work in the strictest confidence [REDACTED]. If his name were to be disclosed, it would compromise all the work he has done and continues to do as well as the safety and security of the witnesses [REDACTED].
8. Alternatively, the Prosecution requests redaction of this person's name under Article 54(3)(f) in order to 'protect any person'. [REDACTED] safety could be at risk if he were to become known [REDACTED].
9. The Prosecution notes that the redaction of information related to a different OTP [REDACTED] was previously authorized by the Trial Chamber in its oral decision of 18 January 2008.⁶ In its oral decision, the Chamber stated that the information is irrelevant to the known issues in the case. The Prosecution submits that the same factors are at issue in the present application.

⁵ Attached hereto as Annex 1 is the Investigator's Note with Rule 81(2)/ Article 54(3)(f) redactions in paragraphs 1 and 2 for the Trial Chamber's consideration. The Prosecution further notes that it has applied redactions to protect its internal work product further to Rule 81(1) at paragraph 16.

⁶ Transcript, ICC-01-04-01-06-T-72-CONF-EXP-ENG, 18 January 2008, page 2, lines 8-17.

10. The Prosecution requests that the name [REDACTED] be redacted in the Investigator's Note of the interview of the witness.

(ii) [REDACTED] (DRC-OTP-WWW-0062)

11. The OTP met with the witness in June and September 2005. A draft, unsigned statement was prepared as a result of these meetings.

12. In relation to this witness, the Prosecution requests redactions to protect a third party and OTP further investigations, under Rule 81(2) and Article 54(3)(f).

13. In paragraph 7 of the draft, unsigned witness statement, the witness makes reference to [REDACTED].⁷ The Prosecution seeks authorization to redact [REDACTED] on the basis of Rule 81(2), as [REDACTED] continue to be sources and leads for the OTP and disclosure may prejudice or compromise that relationship. In addition, the Prosecution seeks the redaction on the basis of Article 54(3)(f) because the continued work [REDACTED] on the ground, as well as their safety, may be at risk if disclosed.

14. The Prosecution notes that the redaction of information related to both [REDACTED] was previously authorized by the Trial Chamber in its oral decision of 13 December 2007 and in the Decision dated 24 April 2008, in relation to two different witness statements.⁸ In its oral decision, the Chamber stated that the information is irrelevant to the Prosecution case and to the Defence case to the extent that it is known and that disclosure could endanger the safety of the individuals and the organisations. The

⁷ Attached hereto as Annex 2 is the draft, unsigned statement with Rule 81(2)/ Article 54(3)(f) redactions in paragraph 7 for the Trial Chamber's consideration.

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

Prosecution submits that the same factors are at issue in the present application.

(iii) [REDACTED] (DRC-OTP-WWW-0058)

15. The OTP interviewed the witness in January 2006 in accordance with the provisions of Article 55(2) and Rule 112.

16. In relation to this witness, the Prosecution requests redactions to protect third parties and OTP further investigations, under Rule 81(2) and Article 54(3)(f).

17. In two sections of the witness' interview taken pursuant to Article 55(2), the witness makes reference to [REDACTED] as well as a [REDACTED].⁹ The Prosecution seeks authorization to redact both [REDACTED], as well as the name [REDACTED], on the basis of Rule 81(2), as [REDACTED] continue to be sources and leads for the OTP and disclosure may prejudice or compromise that relationship. In addition, the Prosecution seeks a redaction on the basis of Article 54(3)(f) because the continued work [REDACTED] on the ground, as well as their safety, may be at risk if disclosed.

18. The Prosecution notes that redactions of information related to [REDACTED] were previously authorized by the Trial Chamber in its oral decision of 13 December 2007 and in the Decision dated 24

⁹ Attached hereto as Annexes 3 and 4 are the two transcript sections that contain references to [REDACTED] and that contain the Prosecution's proposed redactions pursuant to Article 54(3)(f) and Rule 81(2). The references are located at DRC-OTP-0167-0062 at page 19 and 46 (Annex 3), and at DRC-OTP-0167-0082 at page 2 (Annex 4). The Prosecution notes that in a different context, witness [REDACTED] makes reference in paragraphs 6, 10 and 14 to [REDACTED], but in this general context the Prosecution is not seeking redactions to the name [REDACTED].

April 2008, in relation to two different witness statements.¹⁰ In its oral decision, the Chamber stated that the information is irrelevant to the Prosecution case and to the Defence case to the extent that it is known and that disclosure could endanger the safety of the individuals and the organisations. The Prosecution submits that the same factors are at issue in the present application.

(iv) [REDACTED] (DRC-OTP-WWWW-0067)

19. The OTP interviewed the witness in November and December 2006 in accordance with the provisions of Article 55(2) and Rule 112.

20. In relation to this witness, the Prosecution requests redactions to protect third parties and OTP further investigations, under Rule 81(2) and Article 54(3)(f).

21. In one section of the witness' interview taken pursuant to Article 55(2), the witness makes reference to [REDACTED] as well as a [REDACTED].¹¹ The Prosecution seeks authorization to redact the names of [REDACTED], on the basis of Rule 81(2), as they continue to be sources and leads for the OTP and disclosure may prejudice or compromise that relationship. In addition, the Prosecution seeks the redactions on the basis of Article 54(3)(f) because the continued work [REDACTED] on the ground, as well as their safety, may be at risk if disclosed.

¹⁰ Redactions authorized to the statement of [REDACTED] : Transcript, ICC-01-04-01-06-T-66-ENG, 13 December 2007, pages 1-2 and page 5, lines 8-24 ; and to the statement of [REDACTED] : ICC-01/04-01/06-1295-US-Exp, 24 April 2008 at Annex D.

¹¹ Attached hereto as Annex 5 is the transcript section that contains references to [REDACTED] and that contain the Prosecution's proposed redactions pursuant to Article 54(3)(f) and Rule 81(2). The references are located at DRC-OTP-0173-0184 at page 7-11 and 13. The Prosecution notes that in a different context, witness [REDACTED] makes reference in paragraph 69 to [REDACTED], but in this general context the Prosecution is not seeking redactions to the name of this individual.

22. The Prosecution notes that redactions of information related to [REDACTED] were previously authorized by the Trial Chamber in its oral decision of 13 December 2007 and in the Decision dated 24 April 2008, in relation to three different witness statements.¹² In its oral decision, the Chamber stated that the information is irrelevant to the Prosecution case and to the Defence case to the extent that it is known and that disclosure could endanger the safety of the individuals and the organisations. The Prosecution submits that the same factors are at issue in the present application.

23. The Prosecution notes that it has made redactions on the basis of Rule 81(1) to investigator's working comments in: (i) the draft, unsigned statement of witness [REDACTED] (DRC-OTP-WWWW-0147) at pages 1-7, 9, 11-14, 17; (ii) the Investigator's Note of [REDACTED] (DRC-OTP-WWWW-0123) at paragraph 19, in order to protect internal work product; and (iii) the draft, unsigned statement of [REDACTED] at pages 5, 9, 12, 18, 21, 24, 28, 32, 34, 36.

24. The Prosecution confirms that the proposed redactions contained in the attached witness statements do not seek to redact information that must be disclosed as either potentially exonerating information under Rule 67(2) or that must be provided for inspection as material to the Defence under Rule 77.

25. 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

¹² Redactions authorized to the statement of [REDACTED]: Transcript, ICC-01-04-01-06-T-66-ENG, 13 December 2007, pages 1-2 and page 5, lines 8-24; to the statement of [REDACTED]: ICC-01/04-01/06-1295-US-Exp, 24 April 2008 at Annex D; and to the statement of [REDACTED]: Transcript, ICC-01-04-01-06-T-66-ENG, 13 December 2007, page 3, lines 15-19 and page 5, lines 8-24.

the materials that are the subject of this application on 16 May 2008, pending a decision of the Chamber on these issues.

III. *Ex Parte* Filing

26. The Prosecution submits that the classification of the present filing and annexes as *Confidential-Ex Parte – Prosecution Only* is necessary.¹³

27. First, the present filing seeks relief on the basis of provisions on protective measures, in this case Article 54(3)(f). The Prosecution submits that the information discussed must be treated confidentially and cannot be disclosed to the Defence in advance of a determination as to whether disclosure is necessary.¹⁴

28. 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.

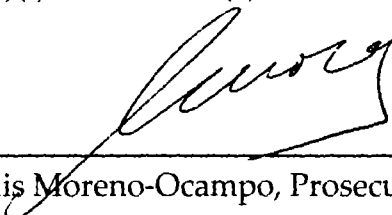
29. The Prosecution submits that no alternative procedures exist to deal with this request. The rights of the Accused are maintained to the extent that he will be made aware of the filing and its legal basis as the Prosecution will simultaneously file a public redacted version of the present filing.

¹³ 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.

¹⁴ 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.

IV. Relief Requested

30. Based on the foregoing, the Prosecution requests that the Trial Chamber authorize the non-disclosure of information in accordance with Article 54(3)(f) and Rule 81(2).



Luis Moreno-Ocampo, Prosecutor

Dated this 15th day of May 2008
At The Hague, The Netherlands