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Date: 7 May 2009

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 Redacted Version

**Prosecution's application for non-disclosure of information contained in screening
note of witness DRC-OTP-WWWW-0024**

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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Section**

Background

1. In preparation for the examination of witness DRC-OTP-WWWW-0024, who is scheduled to testify on 7 May 2009, the Prosecution discovered that a screening note created after the preliminary meeting with the witness on 24 July 2005 at the outset of his interview had not been registered in the Prosecution's evidence management system.¹
2. The Prosecution registered the screening note and informed the Defence of its existence on 29 April 2009. On that day, the Prosecution provided an electronic copy of the screening note to the Defence.²

Prosecution's request for non-disclosure of information

3. Pursuant to Rules 81 (2) and (4) and Articles 54(3)(f) and 68(1), the Prosecution seeks authorisation to redact: (i) the name and identifying information of an intermediary for the Office of the Prosecutor (OTP), (ii) the witness DRC-OTP-WWWW-0024's telephone number, and (iii) the name of a third party who provided information to the witness about events which the Prosecution has investigated.
4. Pursuant to Rules 81 (2) and (4), the Prosecution seeks to redact the identity of the intermediary who put witness DRC-OTP-WWWW-0024 in touch with the OTP, which appears on the first page of the screening note. The intermediary, REDACTED. Although he currently lives REDACTED. Revealing his identity could not only expose him as a source for the OTP, but could also expose his known sources, which could prejudice future investigations of the OTP as well

¹ The screening note had been registered in the Prosecution's document management system (TRIM), but due to oversight had not been transferred into the evidence management system (RingTail).

² The screening note, DRC-OTP-0210-0027, was formally disclosed to the Defence on 1 May 2009.

as his security.³ The Prosecution notes that a previous application to redact this name was granted by the Trial Chamber.⁴

5. Pursuant to Rule 81(4) and Article 68(1), the Prosecution seeks to redact the telephone number of witness DRC-OTP-WWWW-0024, which appears on the first page of the screening notes. The telephone number was in use at the time of the 2005 interview and the witness continues to use the same telephone number. The Prosecution submits that the witness is not REDACTED. Accordingly, this proposed redaction limits the circulation of his private telephone number and affords the witness a form of protection against any difficulties he might face on account of his cooperation with the OTP where no other preventive protective measures are in place. The redaction is an appropriate measure to protect his safety and privacy, as provided for in Article 68(1). Finally, the Prosecution submits that the requested protective measure will cause no prejudice to the Accused, insofar as he is aware of the witness' identity and, where necessary, would be able to contact the witness with the assistance of the Victims and Witnesses Unit and through a conduit which is acceptable to the witness, in compliance with the Trial Chamber's order regulating contact with witnesses.⁵

³ The Prosecution has previously filed an application for redaction of this intermediary's identity, which is currently pending. See ICC-01/04-01/06-1820-Conf-Exp, para 9.

⁴ See ICC-01/04-01/06-1545-Conf-Exp, para 85 and Annex V1, and ICC-01/04-01/06-1632-Conf-Exp, para 48 and Annex Z, pp 11-12. This application for redactions was granted by the Trial Chamber. See ICC-01/04-01/06-1814-Conf-Exp-Anx, pp 36-37. The Prosecution informs the Trial Chamber that REDACTED and REDACTED are the same person.

⁵ ICC-01/04-01/06-1372, para 14. The Trial Chamber's order regulating contact would require the Defence to inform the OTP of its intention to contact witness DRC-OTP-WWWW-0024 before actually doing so.

6. Finally, pursuant to Rule 81(4) and Article 54(3)(f), the Prosecution seeks to redact the name of the person identified as REDACTED at paragraph 6 of the screening note, who is referred to as REDACTED from the village of REDACTED (REDACTED territory, Ituri)⁶ who would have given witness DRC-OTP-WWWW-0024 REDACTED of a massacre at REDACTED.⁷ The Prosecution informs the Chamber that on the basis of the information currently in its possession, it is unable to contact REDACTED for the purposes of confirming his current place of residence and offering him an opportunity to express any relevant concerns on the disclosure of his identity. The Prosecution submits that the REDACTED and their origin are wholly irrelevant to the case against the Accused, and that there will therefore be no prejudice if the name of the source remains redacted.

7. In the Prosecution's submission, none of the redactions requested above hinder the Defence's ability to assess the information contained in the screening note on issues that are relevant to the case. The redactions are discrete and do not render the screening note unintelligible. In the case of the two persons whose identity the Prosecution seeks to redact, there are no measures of a less intrusive nature that would be feasible for their protection. The Prosecution submits that the redactions are not prejudicial to or inconsistent with the rights of the Accused.

⁶ The Prosecution informs the Trial Chamber that REDACTED is a small village in the vicinity of REDACTED, all REDACTED localities which were reportedly attacked by the REDACTED in early 2003.

⁷ The REDACTED provided by REDACTED, copies of which were disclosed to the Defence, REDACTED following a massacre at REDACTED, which reportedly occurred in this time period. The Prosecution notes that its application to redact the name of the person listed as the source of the copies of these REDACTED which have been disclosed, REDACTED, is pending with the Chamber. See ICC-01/04-01/06-1820-Conf-Exp, para 8.

Ex Parte Filing

8. The Prosecution submits that the classification of the present filing as *Confidential- Ex Parte – Prosecution Only* is necessary.⁸ First, the Rules provide that applications pursuant to Rule 81(2) “shall be heard on an *ex parte* basis”. Second, the present filing seeks relief on the basis of provisions on protective measures, including Articles 54(3)(f) and 68(1), and Rules 81(2) and (4). The Prosecution submits that the information discussed, namely the identity of an OTP intermediary, contact information for a trial witness and the name of an innocent third party, must be treated confidentially and cannot be disclosed to the Defence in advance of the implementation of protective measures.⁹ To do so would run afoul of the Court’s obligation under Article 68(1) to protect these individuals and their families.

9. The Prosecution submits that the rights of the Accused are maintained to the extent that he will be made aware of the filing and its legal basis through a public redacted version which will be filed as soon as practicable, but that the Accused 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.

⁸ ICC-01/04-01/06-1058, 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.

⁹ ICC-01/04-01/06-568, paras 37 and 65-67.

Relief Requested

10. Based on the foregoing, the Prosecution requests that the Trial Chamber authorise:

- (i) The non-disclosure of the identity of two individuals, as set out in paragraphs 4 and 6 above;
- (ii) The non-disclosure of the telephone number of witness DRC-OTP-WWWW-0024, as set out in paragraph 5 above.



Luis Moreno-Ocampo
Prosecutor

Dated this 7th day of May 2009

At The Hague, The Netherlands