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Date: 14 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 Sources contained in the meta-
data in compliance with the Consolidated E-Court Protocol**

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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Background

1. On 13 March 2008, the Trial Chamber rendered the “Second Decision on the E-Court Protocol”,¹ according to which redactions to the identity of persons contained in the meta-data available in e-court must be subject of an application to the Chamber. The Chamber held that “[i]f, in the submission of the prosecution, the information contained in the meta-data field requires further protection, such as the implementation of additional temporary redactions, leave is to be sought from the Chamber in each instance, as has been the practice hitherto with redactions.”² The Trial Chamber stated that redactions it has previously authorized to the identity of persons would remain in effect in meta-data fields without the need for a fresh application for redactions.³

Prosecution’s Submissions

2. Pursuant to Articles 54(3)(f), 64 and 68 of the Rome Statute and Rules 81 (2) and (4) of the Rules of Procedure and Evidence (Rules), the Prosecution hereby seeks authorisation to redact the identity of four sources of nine items of disclosed materials. The nine items concerned have been disclosed to the Defence in unredacted form along with the meta-data required by the e-court protocol;⁴ however, the sources of these nine items were referred to by court

¹ ICC-01/04-01/06-1223.

² ICC-01/04-01/06-1223, at para 14.

³ ICC-01/04-01/06-1223, at para 13.

⁴ DRC-OTP-0077-0033, a photograph, was disclosed 22 November 2007 under Article 67(2); DRC-OTP-0077-0304, a report, was disclosed on 28 September 2007 under Rule 77 and on 22 November 2007 as incriminating information; DRC-OTP-0077-0306, a report, was disclosed 20 September 2007 as incriminating information; DRC-OTP-0126-0216, a non-ICC statement, was disclosed on 20 September 2007 as incriminating information; DRC-OTP-0126-0257 was disclosed on 21 May 2007 as incriminating information; DRC-OTP-0077-0293, DRC-OTP-0077-0294 and DRC-OTP-0077-0295, all photographs, were disclosed under Rule 77 on 16 January 2009; DRC-OTP-0126-0411, a report, was disclosed on 28 September 2007; The e-court meta-data for these materials was disclosed on 13 February 2009.

code rather than by name in the “source” and “chain of custody” meta-data fields required by the e-court protocol. Should the Trial Chamber decide not to authorize the requested redactions, the Prosecution will immediately re-disclose the meta-data containing the identity of the source.

3. In addition to the four sources mentioned above for which no previous request for redactions has been submitted by the Prosecution, the Prosecution includes in the present filing a request for redactions to the identity of one other individual for whom such an application is currently pending before the Chamber.⁵
4. It is the Prosecution’s submission that the redactions to the source meta-data do not hinder the Defence’s ability to assess the information contained in the materials or impact on issues that are relevant to the Defence case. The documents have been disclosed to the Defence under the provisions of Article 67(2) or Rule 77, or as incriminating information without redactions to content and with all other relevant meta-data. The Prosecution submits that the redactions are not prejudicial to or inconsistent with the rights of the Accused.
5. The Prosecution sets out below the details of its request to redact the identity of the four sources for which no pending applications exist.
6. First, under Rules 81(2) and Rule 81(4), the Prosecution requests authorisation to redact the name of the intermediary REDACTED (DRC-OTP-WWWW-0154) in the meta-data fields for three items: DRC-OTP-0077-0033 (a photograph), DRC-OTP-0077-0304 (a report) and DRC-OTP-0077-0306 (a report). REDACTED resides in REDACTED and continues to serve as an intermediary to the Office of the Prosecutor (OTP)REDACTED. REDACTED must work in

⁵ See Prosecution filing ICC-01/04-01/06-1542 in respect of witness DRC-OTP-WWWW-0101 (see Conf-Exp-Anx14 and 15), dated 8 December 2008. Attached to the confidential *ex-parte* version of the filing as Annex 1 is a table setting out the requested redactions to the source identity. The table includes reference to all of the sources who are the subject of this application, including the four sources (of nine items) for which the Prosecution applies for redactions for the first time and the additional source (also of nine items) for whom a request is pending.

the strictest confidence as he regularly meets with REDACTED. If his name were to be disclosed, it would compromise the work he has done and continues to do as well as the safety and security of the witnesses REDACTED in the ambit of ongoing investigations. For these reasons REDACTED's identity warrants protection and should not be revealed.

7. Second, under Rules 81(2) and (4), the Prosecution requests authorisation to redact the name of a non-trial witness and intermediary REDACTED (DRC-OTP-WWWW-0138) in the meta-data fields for two items DRC-OTP-0126-0216 (a non-ICC statement) and DRC-OTP-0126-0257 (an e-mail). Both items have been disclosed as incriminating evidence. REDACTED resides in REDACTED and works as REDACTED. He furthermore serves as an intermediary to the OTP REDACTED in REDACTED. Currently this intermediary is the only point of contact for REDACTED. REDACTED therefore must work with utmost diligence under strict confidentiality. Disclosure of his name would compromise his work as well as the safety and security of the witnesses REDACTED in the ambit of ongoing investigations. The Prosecution submits that his identity should therefore not be revealed.

8. Third, under Rules 81(2) and (4) the Prosecution requests authorisation to redact the name of non-trial witness REDACTED (DRC-OTP-WWWW-0120) in the meta-data fields for three photographs: DRC-OTP-0077-0293, DRC-OTP-0077-0294, and DRC-OTP-0077-0295. The photographs depict images of dead bodies following the Kobu massacre of February 2003 and have been disclosed under Rule 77. The source of these photographs, REDACTED is REDACTED. Although the fact that REDACTED is REDACTED has been revealed through REDACTED, due to the fact that REDACTED witness REDACTED may face enhanced security risks if he himself becomes known as a source to the OTP. In accordance with Rule 81 (4) the Prosecution therefore seeks to redact his identity as the source of the above mentioned photographs.

9. Fourth, under Rules 81 (2) and 81(4) the Prosecution requests authorisation to redact the name of OTP source, REDACTED (no assigned Court Code), in the meta-data fields for document DRC-OTP-0126-0411 (a report). REDACTED . Although he currently lives in REDACTED. Revealing his identity could not only expose him as a source for the OTP, but could also expose his known sources, and this could prejudice future investigations of the OTP as well as his security.

Ex Parte Filing

10. The Prosecution submits that the classification of the present filing as *Confidential- Ex Parte – Prosecution Only* is necessary.⁶ First, the Statute provides that applications pursuant to Rule 81(2) “shall be heard on an *ex parte* basis”.
11. Second, 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 names of witnesses, their current location and their security situation, must be treated confidentially and cannot be disclosed to the Defence in advance of the implementation of protective measures.⁷ To do so would run afoul of the Court’s obligation under Article 68(1) to protect these individuals and their families.
12. 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

⁶ 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.

⁷ 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.

addressed. The Prosecution submits that no alternative procedures exist to deal with this request.

Relief Requested

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

- (i) The non-disclosure of the identity of four individuals in two meta-data fields, in accordance with Rules 81(2) and 81(4), as set out above⁸;
- (ii) The non-disclosure of the identity of one individual in two meta-data fields, for whom an application for redactions to his/her identity is currently pending before the Chamber.⁹



Luis Moreno-Ocampo

Prosecutor

Dated this 14th day of May 2009
At The Hague, The Netherlands

⁸ DRC-OTP-WWWW-0154, DRC-OTP-WWWW-0138, DRC-OTP-WWWW-0120 and REDACTED.

⁹ DRC-OTP-WWWW-0101.