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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

Confidential - *Ex Parte* - Prosecution Only Attachment A

Confidential - *Ex Parte* - Prosecution Only Annexes 1-4

Prosecution's Submission further to the Trial Chamber's 'Order on the prosecution's applications to vary protective measures under Regulation 42'

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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Introduction

1. On 14 July 2009, the Prosecution in the case against Germain KATANGA and Mathieu NGUDJOLO CHUI (Katanga case) requested that Trial Chamber I (Chamber) vary protective measures under Regulation 42 of the Regulations of the Court (Regulations) to the statements of 8 witnesses and informed the Chamber that it seeks to apply the same redactions as in the Lubanga case for 2 additional witnesses.¹ The statements of these witnesses are relevant to the Katanga case as they contain information that should be disclosed under Article 67(2) of the Rome Statute (Statute) and/or Rule 77 of the Rules of Procedure and Evidence (Rules). There are distinct issues in each case that warrant certain differences in the redactions necessary for disclosure.
2. On 27 July 2009,² the Chamber ordered the Prosecution to provide information on 17 witnesses who had been referred directly by Trial Chamber II,³ because the statements are relevant in the Katanga case either under Article 67(2) or Rule 77 and because this Chamber authorized protective measures to the statements of most of these witnesses.⁴

Information on Security Risks

3. To assist the Chamber, the Prosecution refers the Chamber to its two submissions that detail the security risks posed to these witnesses in the Katanga case.⁵

¹ ICC-01/04-01/06-2047. The 10 witnesses are: DRC-OTP-WWWW-0033, DRC-OTP-WWWW-0175, DRC-OTP-WWWW-0178/0253, DRC-OTP-WWWW-0179, DRC-OTP-WWWW-0243, DRC-OTP-WWWW-0271, DRC-OTP-WWWW-0282, DRC-OTP-WWWW-0288 and DRC-OTP-WWWW-0169 and DRC-OTP-WWWW-0090.

² ICC-01/04-01/06-2068, 27 July 2009.

³ 'Décision sur la protection de 21 témoins relevant de l'article 67(2) du Statut et/ ou de la règle 77 du Règlement de procédure et de preuve', 22 July 2009, iCC-01/04-01/07-1332-Conf-Exp (public redacted version issued on 24 July 2009). The Prosecution notes that there is overlap between the 10 witnesses referred to by the Prosecution and the 17 witnesses referred to the Chamber by Trial Chamber II.

⁴ For witness 0090, the request for authorization of redactions is pending before this Chamber. For witnesses 0047, 0052, 0068, 0113 no request has yet been made to the Chamber for protective measures.

⁵ ICC-01/04-01/07-985-Conf-Exp-Corr, 25 March 2009 and ICC-01/04-01/07-986-Conf-Exp, 23 March 2009.

Specific Information for each Witness

4. The Prosecution sets out the detailed review of each witness' proposed set of redactions or lifting of redactions and security risks in Confidential, *ex parte* – Prosecution Only Attachment A.
5. The Prosecution notes that it is requesting additional redactions to those requested in its 14 July 2009 filing to the name of one individual and one organisation under Article 54(3)(f). The Prosecution notes that this Chamber has authorized the same redactions in other statements.⁶

Ex Parte Filing

6. The Prosecution submits that the classification of Attachment A and four annexes as *Confidential-Ex Parte – Prosecution Only* is necessary as⁷ it seeks relief on the basis of protective measures. The information discussed must be treated confidentially, Prosecution only.⁸
7. The Prosecution submits that no alternative procedures exist to deal with this request. The rights of the Accused are maintained as the main submission is public.

Feasibility of Inconsistent Disclosure and Interpretation of Regulation 42

8. The Prosecution acknowledges that there are risks to a disclosure regime that differs between two cases. The risks may be lower with certain witnesses and greater with others and must be considered on a case by case basis. Certain safeguards will need to be imposed to ensure to the extent possible that the

⁶ See Oral Decision T-66-CONF-EXP ENG ET, dated 13 December 2007, Page 1, lines 15-24 and Page 5, lines 16-24; Decision ICC-01/04-01/06-1561-CONF-EXP, dated 17 December 2008, Pages 8-9, paras 14-16 and page 39, paras 39-41; Decision ICC-01/04-01/06-1295-US-EXP, dated 24 April 2008, Annex D Page 2, para 5.

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

⁸ 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.

Accused persons in the Katanga and the Lubanga cases do not share such information. The Prosecution in the Katanga case will bring a motion seeking an order prohibiting the Defence teams and the Accused persons from communicating to any third party in order to minimize the risk of disclosure between the Accused persons in both cases. Second, a confidentiality order in the Lubanga case prohibits disclosure of the statements beyond the Lubanga defence team other than for legitimate investigation purposes.

9. The Prosecution refers the Chamber to its submission on the interpretation of Regulation 42.⁹

Requested Relief

10. The Prosecution requests the Chamber's authorization for redactions or lifting of redactions under Regulation 42, Articles 54(3)(f), 64(6)(e) and (f), 67(2), 68(1) and Rule 77 as set out herein.



Luis Moreno-Ocampo
Prosecutor

Dated this 17 day of August 2009
At The Hague, The Netherlands

⁹ ICC-01/04-01/07-1231-Conf-Exp.