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No.: ICC-01/04-01/06
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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 Redacted
with Confidential *Ex Parte* - Prosecution Only Annex A and Confidential *Ex Parte* – Prosecution Only Annexes 1-82**

**Prosecution's Request for Non-Disclosure of Information
in Witness Related Expenses**

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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The Prosecution requests authorisation, pursuant to Articles 54(3)(f), 64, and 68 of the Rome Statute (Statute), Rule 81(2) and (4) of the Rules of Procedure and Evidence (Rules) and Regulation 42 of the Regulations of the Court (Regulations) to redact certain information in documents known as ICC Witness Related Expenses (“Expenses Documents”) and documents related to intermediary 0316. In addition, the Prosecution informs the Chamber of Rule 81(1) redactions that continue to apply to protect internal work product in a number of these documents.

I. Background

1. On 16 June 2009, the evidence of witness 0015 was adjourned by the Court for a new written statement to be taken.¹
2. During the course of the interview which then took place, [REDACTED]. The Defence was present during the interview and shortly thereafter requested the disclosure of any receipts and expenses related to witness 0015.
3. In addition, the Defence requested the disclosure of receipts and expenses for each of the Prosecution’s trial witnesses and for intermediary 0316. The Prosecution also disclosed a statement taken by a staff member in the Operational Support Unit (OSU) of the Office of the Prosecutor (OTP) in May 2008 (“May 2008 Statement”), related to intermediary 0316.
4. To date, the Prosecution has disclosed 988 Expenses Documents in respect of its trial witnesses and intermediary 0316.² 779 of these have been disclosed

¹ Transcript of hearing on 16 June 2009, ICC-01/04-01/06-T-192-ENG-WT, page 11, lines 8 – 13.

to the Defence in unredacted form. A further 128 were disclosed with redactions to internal work product made pursuant to Rule 81(1) only (that is, no other redaction categories were applied). These have not been included in this application.

5. The remaining 82 Expenses Documents, and the May 2008 Statement, were disclosed with redactions made pursuant to Rule 81(2) and/or (4), although for all items it is clear (either from the document itself or the E-Court meta-data) to which witness the expenses relate. With this filing, the Prosecution requests the authorisation of the Trial Chamber pursuant to Articles 54(3)(f), 64, and 68 and Rule 81(2) and (4) to apply those redactions to the 82 Expense Documents and to the May 2008 Statement. The Prosecution informs the Trial Chamber that it has made redactions in respect of one additional category, internal work product, that is not subject to disclosure in accordance with Rule 81(1).³

II. Prosecution's Submissions

6. The redactions for which the Prosecution requests authorisation pertain to seven categories of information as detailed below.
7. The proposed redactions do not affect the value, or hinder Defence's ability to assess the relevant information contained in the Expenses Documents, nor do they impact on issues that are relevant to the Defence case. Accordingly, the Prosecution submits that the redactions are not prejudicial to or inconsistent with the rights of the Accused.

² This figure accounts for ICC Witness Related Expenses registered and linked to trial witnesses and intermediary 143 in the Prosecution's evidence management system as at 20 December 2009. It also includes witness related expenses related to Defence witness D01-WWWW-0016 (formerly prosecution witness DRC-OTP-WWWW-0035) and to some non-trial witnesses, a small number of whose ICC Witness Related Expenses were also disclosed as part of this process.

³ The Prosecution has applied redactions to protect its internal work product pursuant to Rule 81(1) in 12 of the Expenses Documents which are the subject of this application.

8. The overview chart attached hereto as Confidential-Ex Parte Annex A indicates (i) the category of information to which the redaction pertains, and (ii) the proposed redaction. Each of the Expense Documents and the May 2008 Statement with the proposed redactions made pursuant to Rule 81(2) and (4) are attached hereto as Annexes 1 to 82 in a format that permits the Trial Chamber to view the information that the Prosecution proposes for redaction.⁴

9. The categories of information that the Prosecution proposes for redactions are the following:

1. Intermediaries and Prosecution Sources/Leads (Rule 81(2))

10. The Prosecution requests authorisation, pursuant to Rule 81(2), to redact references in five documents to intermediaries of the Office of the Prosecutor (OTP) and in two documents to a Prosecution source/lead.

11. 4 documents contain references to an intermediary named [REDACTED], DRC-OTP-WWWW-0143, and/or to the name of the [REDACTED] for which he works.⁵ [REDACTED] continues to provide services in the form of facilitating contact between witnesses and the OTP in other investigations in the Democratic Republic of the Congo (DRC).

12. The Prosecution recalls that in its decision of 19 November 2009, the Trial Chamber reiterated that “[f]or the purposes of the Lubanga trial it is not

⁴ For one item – DRC-OTP-0196-0658 – the only redaction applied was to the e-Court metadata field ‘source identity’ pursuant to Rule 81(2). The request for this redaction is included in the present application under category 4 and is included as the first entry in the chart attached as Confidential-Ex Parte Annex A. The document itself has not been attached in a separate annex as no redaction has been applied to its content.

⁵ In respect of two of these items, corresponding redactions were also made to the E-Court meta-data.

necessary to disclose [143's] identity at present"⁶ and authorised the continued non-disclosure of his identity.

13. One further document contains references to an intermediary named [REDACTED], DRC-OTP-WWWW-0183. The Prosecution recently contacted 0183 and has been informed that he has had to relocate [REDACTED] for security reasons. [REDACTED]. On 17 December 2009, Trial Chamber II authorized provisional redactions to DRC-OTP-WWWW-0183's identity.⁷
14. To protect further and ongoing investigations, and pursuant to Regulation 42(2) to maintain consistency with another Chamber, the Prosecution requests authorisation for temporary redactions to the name of this intermediary until protective measures can be implemented.
15. For two documents, the Prosecution requests authorisation to redact references to "[REDACTED]" and "[REDACTED]". The Prosecution believes that these references do not relate to trial witness DRC-OTP-WWWW-0298 in the present case but rather to a Prosecution source/lead in the *Katanga and Ngudjolo Chui* case, DRC-OTP-WWWW-0273.
16. WWW-0273 is [REDACTED] and it can be anticipated that he would be at risk if his identity were disclosed. In July 2009 he reported that he [REDACTED]. In October 2009, he reiterated to the OTP concerns about his security, and he was provided with general security advice. At this time, WWW-0273 was living in [REDACTED].
17. Although the Prosecution has not hitherto requested redactions to this source/lead in the present case, to protect further and ongoing investigations

⁶ ICC-01/04-01/06-2190-Conf-Exp, para. 31

⁷ ICC-01/04-01/07-1728-Conf-Exp, page 13.

and to maintain consistency with the other Chamber, it requests authorisation to redact the information concerned.

2. OSU Field Staff (Rule 81(2))

18. The Prosecution requests authorisation, pursuant to Rule 81(2), to redact the references in nine documents to two individuals employed in the OTP's Operational Support Unit (OSU), [REDACTED] and [REDACTED].⁸ Both individuals continue to work for, and are required to support the OTP operations from time to time, including by accompanying witnesses to and from interview locations. In order to protect further and ongoing investigations and preserve the Court's ability to operate on the field, the Prosecution requests that the name of these individuals remain undisclosed.
19. The Prosecution submits that the reasoning applied by the Trial Chamber in authorising redactions to the identity of 143 applies equally to these individuals employed by the OSU, namely the potential prejudice to ongoing and future investigations. Furthermore, the Prosecution submits that there is no basis to conclude that their identity is relevant to any issue in this case.⁹
20. Although the Prosecution has not hitherto requested redactions to the identity of OSU staff in the present case, to protect further and ongoing investigations, it requests authorisation to redact the information concerned.

3. Locations for witness interviews/accommodation (Rule 81(2))

21. The Prosecution requests authorisation, pursuant to Rule 81(2), to redact the reference to a private rental address and to a hotel in two Expenses Documents. These locations have been and may continue to be used as

⁸ In respect of eight of these items, corresponding redactions were also made to the E-Court meta-data.

⁹ ICC-01/04-01/06-2190-Conf-Exp, para. 12.

witness accommodation (often used, for example, in the case of interviews conducted over more than one day) and interview locations.

22. The Prosecution recalls that the Trial Chamber has previously granted authorisation to redact interview locations.¹⁰ The same arguments apply to premises used to accommodate witnesses. To protect further and ongoing investigations, the Prosecution requests authorisation to redact the information concerned.

4. Witnesses and their family members or guardians (Rule 81(4))

23. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact references in the Expenses Documents to (i) names and/or witness codes of three non-trial witnesses, and (ii) names and whereabouts of family members or guardians of five witnesses.¹¹ These redactions concern (i) witnesses “[REDACTED]”, [REDACTED] and [REDACTED], and (ii) family member or guardians of witnesses 0041, 0157, 0213 and 0287, and intermediary 0316. The Prosecution requests these redactions to protect the safety of these persons.
24. In relation to sub-category (i), the names and witness codes are those of non-trial witnesses included in six Expenses Documents related to intermediary 0316. These individuals are not witnesses in the present case and their names and codes are otherwise not relevant to the known issues in the present case. The redactions do not render the relevant documents unintelligible or unusable and do not affect the value of the information for the Defence.

¹⁰ ICC-01/04-01/06-2186-Conf-Exp, para. 23. The confidential and public versions of this decision were notified as ICC-01/04-01/06-2186-Conf-Red (para. 23) and ICC-01/04-01/06-2186-Red (para. 23) on 10 December 2009. The same arguments apply.

¹¹ In the case of witnesses 0041 and 0316, it concerns their family members. In the case of witnesses 0157 and 0213, it concerns their guardians – [REDACTED], the foster mother of 0157 and [REDACTED], the foster father of 0213. The Single Judge in the *Katanga and Ngudjolo Chui* case extended the protection to guardians; ICC-01/04-01/07-90, para. 30.

25. The Prosecution recalls that the Trial Chamber authorised redactions to witness [REDACTED], including witness code, in its oral decision of 18 January 2008.¹²
26. In relation to sub-category (ii), the majority of the persons concerned currently reside in the DRC, [REDACTED]. In respect of witness 0041, the persons concerned are children (his own and those of his wife from a previous relationship) whose names have not been disclosed to date. In respect of witnesses 0157 and 0213, the persons concerned are the foster parents who housed the witnesses during the time of their assessment for admission into the Court's protection program. Their names and locations have not been disclosed to date. In respect of 0287, a witness in the *Katanga and Ngudjolo Chui* case, the person concerned is their child, whose name has not been disclosed in either that or the present case.
27. The Prosecution submits, as was held by the Single Judge in the *Katanga and Ngudjolo Chui* case, that disclosing to the Defence the names and identifying information of family members or guardians of prosecution witnesses, including information that could lead to the disclosure of their current whereabouts (particularly those currently located [REDACTED]), could pose an additional risk to their safety and/or physical well-being.¹³
28. In respect of intermediary 0316, the Prosecution further submits that the protection afforded to the names and whereabouts of family members of witnesses should equally extend to members of his family. Although the role of 0316 and other intermediaries has been raised as an issue in both the present and the *Katanga and Ngudjolo Chui* cases, the members of 0316's

¹² Transcript, ICC-01/04-01/06-T-71-CONF-EXP-ENG ET, page 5, lines 9-17.

¹³ See ICC-01/04-01/07-90, paras. 31, 35, 36 and 38; ICC-01/04-01/07-160, paras. 43, 45, 47 and 48; ICC-01/04-01/07-249, paras. 18, 19, 21 and 23; ICC-01/04-01/07-361, paras. 13, 15, 18 and 21; ICC-01/04-01/07-427, paras. 30, 33, 39 and 41; ICC-01/04-01/07-425, paras. 11, 13, 15 and 18; and ICC-01/04-01/07-568, paras. 16, 19, 21 and 24. The redactions were authorised in Confidential Ex Parte annexes to the decisions.

family are irrelevant to this or any other known issue in the case. Non-disclosure of their names and whereabouts is necessary for their protection as persons at risk on account of the activities of the Court and no lesser measures exist to ensure their continued safety.

29. The Prosecution recalls that the Trial Chamber has previously authorised redactions to family members of witnesses and prosecution sources, applying the reasoning that information was irrelevant to the known issues in the case, so long as this course did not render the document in any way unintelligible or unusable.¹⁴

5. Whereabouts of witnesses who are in the International Criminal Court Protection Program (ICCPP) (Rule 81(4))

30. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact references in the Expenses Documents to the current whereabouts of witnesses 0012, 0015, 0041, and 0213, who are in the ICCPP. These whereabouts may be specific locations and addresses, but also include references to phone numbers, travel destinations and schools, which could provide possible links to their whereabouts.
31. In the *Katanga and Ngudjolo Chui* case, the Single Judge authorised the redactions of the current whereabouts of Prosecution witnesses who have

¹⁴ Decision on the "Prosecution's Request for Non-Disclosure of Information" of 19 December 2008, and the "Prosecution's Request for Non-Disclosure of Information" of 4 February 2009, ICC-01/04-01/06-2208-Conf-Exp, paras. 28, 39, 42, 58–59, 63, 69, 74, 77 and 80; Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" of 5 December 2008, 9 April 2009, ICC-01/04-01/06-1814-Conf, paras. 34–35. Corrected version: Annex 1 to the Decision issuing corrected and redacted versions of "Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" of 5 December 2008", 2 June 2009, ICC-01/04-01/06-1924-Conf-Anx 1, paras. 34–35. Public redacted version: Annex 2 to the Decision issuing corrected and redacted versions of "Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" of 5 December 2008", 2 June 2009, ICC-01/04-01/06-1924-Anx2, paras. 34–35.

been accepted in the ICC protection program as a necessary measure to minimize the risk posed by the disclosure of their identities to the Defence.¹⁵

32. The Prosecution recalls that the Trial Chamber authorised similar redactions in its decision of 10 December 2009.¹⁶

6. Unknown third parties (Rule 81(4))

33. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact references in the Expenses Documents to six unknown third parties. As the information concerned is not relevant to the present case, and in order to protect these persons whose safety may be at risk on account of the activities of the Court, their names and identifying information should remain undisclosed.
34. Although the Prosecution has not hitherto requested similar redactions in the present case, to protect the safety of these persons, it requests authorisation to redact the information concerned.
35. The Prosecution submits that the information is irrelevant to the known issues in the case, does not affect the content or value of the information in the document, and does not render the document in any way unintelligible or unusable. The Prosecution recalls that the Trial Chamber has previously authorised permanent redactions to the names of those who have been referred to as "third parties" on this basis.¹⁷

¹⁵ ICC-01/04-01/07-90, paras. 27–28. The redactions were authorised in a Confidential Ex Parte annex to the decision.

¹⁶ ICC-01/04-01/06-2208-Conf-Exp, paras. 34–35, 58–59.

¹⁷ ICC-01/04-01/06-2179-Conf-Exp, para. 18 (public redacted versions ICC-01/04-01/06-2179-Red and ICC-01/04-01/06-2179-Red2).

7. Personal information and contact details of witnesses and other persons at risk on account of the activities of the Court (Rule 81(4))

36. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact references in 15 Expenses Documents to the personal information and contact details of trial witnesses, intermediary 0316 and other persons at risk on account of the activities of the Court including OSU field staff.
37. The redactions include, *inter alia*, private telephone numbers, residential addresses and the details of identification documentation.¹⁸
38. The Prosecution submits that such information is irrelevant to the known issues in the case and that although the identity of certain witnesses and OSU field staff may have been disclosed, their personal information and/or contact details should not be unnecessarily disseminated without due cause.
39. The Prosecution recalls that the Trial Chamber has previously authorised redactions to the phone numbers of witnesses on the basis that the information is irrelevant to the known issues in the case, the redaction does not render the document unintelligible or unusable, and no lesser measures appear to be feasible to ensure the continued safety and security of the witness.¹⁹ The Prosecution submits that these arguments are equally applicable in these instances.

¹⁸ ICC-01/04-01/07-90, paras. 41 and 43. The redactions were authorised in a Confidential *Ex Parte* annex to the decision.

¹⁹ Transcript of the hearing of 7 May 2009, ICC-01/04-01/06-T-170-CONF-ENG ET, pages 30-31; ICC-01/04-01/06-2186-Conf-Exp, para. 20.

III. *Ex Parte* Filing

40. The Prosecution submits that the classification of the present filing and annexes as *Confidential - Ex Parte - Prosecution Only* is necessary.²⁰
41. The present filing seeks relief on the basis of provisions on protective measures. 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.²¹ Moreover, the Statute provides that the applications pursuant to Rule 81(2) "shall be heard on an *ex parte* basis". Since this application is made, in part, pursuant to Rule 81(2), an *ex parte* classification is justified.
42. 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 file a public redacted version of the present filing.
43. The Expense Documents and May 2008 Statement have all been disclosed to the Defence, with the proposed redactions, in order to ensure that the Defence has access to these documents in advance of the continuation of the trial. Should the Trial Chamber decline to authorise any of the proposed redactions, the Prosecution will re-disclose the relevant documents.

²⁰ 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).

²¹ 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

44. Based on the foregoing, the Prosecution requests that the Trial Chamber authorize the non-disclosure of information contained in the 82 Expenses Documents, and the May 2008 Statement, as set out in Annex A, in accordance with Articles 54(3)(f), 64 and 68, Rule 81(2) and (4) and Regulation 42.



Luis Moreno-Ocampo
Prosecutor

Dated this 10th day of February 2010
At The Hague, The Netherlands