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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 Version
with Confidential *Ex Parte* – Prosecution Only Annex A and
Confidential *Ex Parte* – Prosecution Only Annexes Annexes 1-5**

**Prosecution's Request for Non-Disclosure of Information
in the transcripts of Witness 157 and for Lifting of Redactions to the identity of
Witness 169**

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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Other

The Prosecution requests authorisation, pursuant to Articles 54(3)(f), 64, and 68 of the Rome Statute (Statute) and Rule 81(4) of the Rules of Procedure and Evidence (Rules) to redact certain information in the transcripts of the Prosecution's interview with witness DRC-OTP-WWWW-0157 conducted in January 2010; and authorisation to lift the Article 68 and Rule 81(4) redactions to the identity of witness DRC-OTP-WWWW-0169 in the Investigator's Note.

I. Background

1. On 2 October 2009, the Prosecution filed an application seeking leave of the Trial Chamber to "contact trial witnesses called by the Prosecution, when necessary to conduct further inquiries regarding the Defence case, specifically to assess the veracity of facts and allegations that may be raised by Defence witnesses and obtain contact information for persons who may be potential leads for the Prosecution investigation into the Defence case".¹
2. On 19 November 2009, the Chamber authorised the Prosecution to contact its own witnesses with the purpose of re-interviewing them.²
3. On 11 January 2010, investigators of the Office of the Prosecutor (OTP) met witness DRC-OTP-WWWW-0157 for the purpose of inquiring into the veracity of information provided by the *Lubanga* Defence.

¹ ICC-01/04-01/06-2144-Red, p. 4, at (iii). See also para. 34.

² ICC-01/04-01/06-2192-Red, para. 66: the "Chamber is persuaded that it is appropriate for the prosecution to meet again with witnesses [...] for the purposes identified in the application. These meetings should be recorded by audio or video equipment, and the prosecution must apply its disclosure obligations following any re-interview. If it becomes necessary to use this procedure with other witnesses, the same approach is to be followed (once the Court and the defence have been given adequate notice)."

II. Prosecution's Submissions

Transcripts of Witness 157

4. With this filing, the Prosecution requests the authorisation of the Trial Chamber pursuant to Articles 54(3)(f), 64, and 68 and Rule 81(4) to apply redactions to the transcripts of the OTP's interview with witness DRC-OTP-WWWW-0157. The redactions concern the current location of witness DRC-OTP-WWWW-0157 who is in the Court's protection program (ICCPP), and the names and whereabouts of family members of Prosecution witnesses.³
5. The Prosecution submits that the proposed redactions do not affect the value, or hinder Defence's ability to assess the relevant information contained in the transcripts, 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.
6. 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. The three transcripts with the proposed redactions made pursuant to Rule 81(4) are attached hereto as Annexes 1 to 3 in a format that permits the Trial Chamber to view the information that the Prosecution proposes for redaction.

³ An application has also been submitted to Trial Chamber II for the same redactions; ICC-01/04-01/07-1883-Conf-Exp "Prosecution's Application to disclose the redacted transcripts of an interview with Witness 157 pursuant to Rule 77 and Regulation 35".

7. The information that the Prosecution proposes for redaction is as follows:

Whereabouts of witnesses who are in the ICCPP – Rule 81(4)

8. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact the location of the interview in all three transcripts. This is also where witness DRC-OTP-WWWW-0157 has been relocated as part of the Court's protection program.
9. In the *Katanga and Ngudjolo Chui* case, the Single Judge authorised the redactions of the current whereabouts of Prosecution witnesses who have 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.⁴
10. The Prosecution recalls that Trial Chamber I authorised similar redactions in its decision of 10 December 2009.⁵

Names and whereabouts of family members of witnesses

11. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact the following information contained in the recent interview of DRC-OTP-WWWW-0157:

- (i) the surname and identifying information of [REDACTED] of DRC-OTP-WWWW-0157;
- (ii) the places of residence of [REDACTED] and his family; and
- (iii) the name of [REDACTED]'s mother,

in order to protect the safety of these persons.

⁴ ICC-01/04-01/07-90, paras. 27–28. The redactions were authorised in a Confidential Ex Parte annex to the decision.

⁵ ICC-01/04-01/06-2208-Conf-Exp, paras. 34–35, 58–59.

12. This information concerns individuals who are not witnesses in the present case. Their names and whereabouts are otherwise not relevant to the known issues in the case.
13. 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 of prosecution witnesses, including information that could lead to the disclosure of their current whereabouts (particularly those currently located in the Ituri district or the Kinshasa area), could pose an additional risk to their safety and/or physical well-being.⁶
14. 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.⁷
15. The three transcripts have all been disclosed to the Defence, with the proposed redactions, in order to ensure that the Defence has access to these documents at the earliest opportunity. Should the Trial Chamber decline to authorise any of the proposed redactions, the Prosecution will re-disclose the relevant documents.

⁶ 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.

⁷ 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.

Investigator's Note of Witness 169

16. The Prosecution draws the Trial Chamber's attention to the fact that in the re-interview transcript bearing the ERN DRC-OTP-0222-0478 at 0495, line 591, witness DRC-OTP-WWWW-0157 mentions that a certain "[REDACTED]" was also known as "[REDACTED]". The Chamber has previously authorised redactions to the Investigator's Note of a person named [REDACTED], who is Prosecution witness DRC-OTP-WWWW-0169, including redactions to his identity.⁸

17. The Prosecution is unable to confirm or refute whether the [REDACTED] mentioned in the transcripts of the interview of witness DRC-OTP-WWWW-0157 and witness DRC-OTP-WWWW-0169 ([REDACTED]) are the same person. Nevertheless, in light of the information contained in the transcripts of the interview of witness DRC-OTP-WWWW-0157, the Prosecution is seeking authorisation to lift the redactions to the identity of witness DRC-OTP-WWWW-0169 in the Investigator's Notes because if the persons are the same, the screening may be relevant to the Defence. The Prosecution is no longer in contact with this witness and cannot advise him of the proposed disclosure of his identity. Whilst the Prosecution is seeking to lift the redactions to his identity, it seeks to maintain other redactions including to his place of residence and the names of his family members, which are currently authorised in the Investigator's Note.⁹

18. Should the Trial Chamber grant the Prosecution's request for lifting of redactions to the identity of witness DRC-OTP-WWWW-0169, the Prosecution

⁸ The Investigator's Note of W-0169 bears the ERN DRC-OTP-0150-0150. The Trial Chamber authorised the Prosecution's proposed redactions in its "Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing Tu Quoque Information" of 5 December 2008", ICC-01/04-01/06-1814-Conf, para. 55(b). A copy of the Investigator's note is attached hereto as Annex 4 in a format that permits the Trial Chamber to view the original redactions authorised by the Trial Chamber.

⁹ A second version of the Investigator's note is attached hereto as Annex 5 in a format that permits the Trial Chamber to view only the redactions that the Prosecution intends to maintain (the redactions which the Prosecution is seeking authorisation to lift have been removed).

will remove the redactions and re-disclose the Investigator's Note to the Defence.

III. *Ex Parte* Filing

19. The Prosecution submits that the classification of the present filing and annexes as *Confidential - Ex Parte - Prosecution Only* is necessary.¹⁰
20. 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.¹¹
21. 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.

IV. Relief Requested

22. Based on the foregoing, the Prosecution requests that the Trial Chamber:
 - (i) authorise the non-disclosure of information contained in the three transcripts of interview with witness DRC-OTP-WWWW-0157 as set out in Annexes 1-3, in accordance with Articles 54(3)(f), 64 and 68 and Rule 81(4); and
 - (ii) authorize the lifting of redactions to the identity and identifying information for witness DRC-OTP-WWWW-0169, while

¹⁰ 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).

¹¹ 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.

maintaining other redactions already authorised, as set out in Annex 5.



Luis Moreno-Ocampo
Prosecutor

Dated this 12th day of March 2010
At The Hague, The Netherlands