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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 1-42**

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

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Counsel for the Defence

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Legal Representatives of Applicants

Mr Luc Walley

Mr Franck Mulenda

Ms Carine Bapita Buyangandu

Mr Joseph Keta Orwinyo

Mr Jean Chrysostome Mulamba

Nsokoloni

Mr Paul Kabongo Tshibangu

Mr Hervé Diakiese

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Ms Paolina Massidda

States Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Ms Silvana Arbia

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

The Prosecution requests authorisation, pursuant to Articles 54(3)(f), 64, and 68 of the Rome Statute (Statute) and Rule 81(2) and (4) of the Rules of Procedure and Evidence (Rules) to redact certain information in documents known as ICC Witness Related Expenses (“Expenses Documents”) and the transcripts of an interview with non-trial witness DRC-OTP-WWWW-0567.

I. Background

1. On 19 November 2009, the Chamber authorised the Prosecution to contact its own witnesses for the purpose of re-interviewing them in preparation for the Defence case.¹ Among the materials subsequently disclosed to the Defence, the transcripts of an interview with non-trial witness DRC-OTP-WWWW-0567 have been disclosed with redactions made pursuant to Rule 81(2) in combination with Rule 81(4).
2. On 26 January 2010 and 3 March 2010 the Prosecution filed requests for authorisation in respect of the non-disclosure of information contained in *inter alia* Expense Documents related to trial witnesses, defence witnesses and intermediaries DRC-OTP-WWWW-0316 and DRC-OTP-WWWW-0321.²
3. In its ongoing review of relevant Expense Documents, the Prosecution has subsequently disclosed a further 41 Expense Documents with redactions made pursuant to Rule 81(2) or 81(4).

¹ 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).”

² See the ‘Prosecution’s Request for Non-Disclosure of Information in Documents related to Defence Witnesses and Re-Interviews with Prosecution Witnesses’ ICC-01/04-01/06-2314-Conf-Exp-Corr (public redacted version ICC-01/04-01/06-2314-Red), and the ‘Prosecution’s Request for Non-Disclosure of Information in Witness Related Expenses’ ICC-01/04-01/06-2266-Conf-Exp (public redacted version ICC-01/04-01/06-2266-Red). Decisions on these requests are pending.

II. Prosecution's Submissions

4. The Prosecution requests the authorisation of the Trial Chamber pursuant to Articles 54(3)(f), 64, and 68 and Rules 81(2) and (4) to apply redactions to the interview transcripts.
5. The proposed redactions do not affect the value of or hinder the Defence's ability to assess the relevant information contained in the documents,³ 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. All of the documents with the proposed redactions are attached hereto as Annexes 1 to 42 in a format that permits the Trial Chamber to view the information that the Prosecution proposes for redaction.⁴
7. The information that the Prosecution proposes for redaction is as follows:

Intermediaries – Rule 81(2)

8. One Expense Document contains a reference to intermediary [REDACTED], DRC-OTP-WWWW-0143. This Trial Chamber has recently determined that the identity of intermediary 143 "is now evidence which is "[...] material to

³ For all items it is clear (either from the document itself or the E-Court meta-data) to which witness the expenses relate.

⁴ Except for Expense Document DRC-OTP-0196-0450 (the first entry in the chart attached as Annex A) as a redaction has been applied to the metadata and not the content of the document. The nature, category and legal basis for redaction is however included in the chart (*) and in the main filing (see paras. 10-12).

the preparation of the defence” and ordered the disclosure of his name (and other details) once necessary protective measures have been implemented.⁵

9. Pending a decision on the Prosecution’s leave to appeal the Decision on Intermediaries (and if granted, a decision by Appeals Chamber in respect of the disclosure of intermediary 143’s identity)⁶, or if not granted, the implementation of adequate protective measures, the Prosecution requests authorisation, pursuant to Rule 81(2), to redact the name of intermediary 143 in this Expense Document.

OSU Field Staff and Contact Persons – Rule 81(2)

10. The Prosecution requests authorisation, pursuant to Rule 81(2), to redact references in 10 documents to two individuals employed in the OTP’s Operational Support Unit (OSU), [REDACTED] and [REDACTED]. Both individuals continue to work for, and are required to support the OTP operations in the field from time to time, [REDACTED].
11. The Prosecution also requests authorisation, pursuant to Rule 81(2), to redact references in two Expense Documents to ‘[REDACTED]’ and ‘[REDACTED]’. These individuals support OTP operations from time to time, [REDACTED]. Their names have not been disclosed to date.
12. The Prosecution submits that there is no basis to conclude that the identities of any of these individuals are relevant to any issue in this case. In order to protect further and ongoing investigations and preserve the OTP’s ability to operate on the field, the Prosecution requests that the name of these four individuals remain undisclosed.

⁵ Decision on Intermediaries, ICC-01/04-01/06-2434-Conf-Exp (confidential redacted version ICC-01/04-01/06-2434-Conf-Red) at para.s 143 and 150(i).

⁶ Prosecution’s Application for Leave to Appeal the “Decision on Intermediaries, ICC-01/04-01/06-2453-Conf-Exp

Locations for witness accommodation/interviews – Rule 81(2)

13. The Prosecution requests authorisation, pursuant to Rule 81(2), to redact references to hotels and a private rental address in eight Expense Documents. These locations have been and may continue to be used as witness accommodation (often used, for example, in the case of interviews conducted over more than one day) and interview locations. To protect further and ongoing investigations, the Prosecution requests authorisation to redact the information concerned.
14. The Prosecution recalls that the Trial Chamber has previously granted authorisation to redact interview locations.⁷ The same arguments apply to premises used to accommodate witnesses. Authorisation for the non-disclosure of this category of information has been requested by the Prosecution in two earlier filings, which remain pending before this Trial Chamber.⁸

Witnesses and their family members [REDACTED] – Rule 81(4)

15. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact references in four Expense Documents to (i) the name of non-trial witness 158, (ii) the location of non-trial witness 110, and (iii) the names and identifying information of family members [REDACTED] of two witnesses, intermediary 316 and trial witness 297.⁹ The Prosecution requests these redactions to protect the safety of these persons.

⁷ 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.

⁸ See ICC-01/04-01/06-2314-Conf-Exp-Corr (public redacted version ICC-01/04-01/06-2314-Red), and ICC-01/04-01/06-2266-Conf-Exp (public redacted version ICC-01/04-01/06-2266-Red).

⁹ In the case of witness 316, it concerns the name and school details of his children. In the case of witness 297, it concerns [REDACTED]. The Single Judge in the *Katanga and Ngudjolo Chui* case extended the protection to guardians; ICC-01/04-01/07-90, para. 30.

16. In relation to sub-category (i), the name of non-trial witness 158 (“[REDACTED]”) is contained in an Expense Document relevant to intermediary 316. This individual is not a witness in the present case (neither his statement nor his identity have been disclosed). His name is 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.
17. In relation to sub-category (ii), as the identity and personal information of witness 110 is the subject of a non-disclosure order,¹⁰ the Prosecution has redacted a reference to his possible location (“[REDACTED]”) contained in an Expense Document relevant to intermediary 321.
18. In relation to sub-category (iii), the persons concerned are the children of intermediary 316 and [REDACTED] of witness 297. Their names have not been disclosed to date. Authorisation for the non-disclosure of this information has been requested by the Prosecution in two earlier filings, which remain pending before this Trial Chamber.¹¹ The same submissions apply here.

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

19. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact references in the Expense Documents to several mobile phone numbers,

¹⁰ Witness 110 was a potential Court witness. Redactions to his identity were ordered first ordered on a temporary basis on 24 April 2008, see ICC-O 1/04-01/06-1295-US-Exp (public redacted version, ICC-01/04-01/06-1311-Anx2). In its ‘Preliminary and Final Decisions on the group of potential court witnesses’, the Trial Chamber confirmed that the disclosure (with redactions) was sufficient, and that no further disclosure (including of identity) was required, ICC-01/04-01/06-1986-Conf-Exp at para. 75 (confidential and public redacted versions respectively ICC-01/04-01/06-2033-Conf-Anx1 and ICC-01/04-01/06-2033-Anx2).

¹¹ The Prosecution requested authorisation for non-disclosure of (a) the name and schooling details of intermediary 316’s children in ICC-01/04-01/06-2266-Conf-Exp (public redacted version ICC-01/04-01/06-2266-Red), and (b) the name ([REDACTED]) of witness 297’s [REDACTED] in ICC-01/04-01/06-2314-Conf-Exp-Corr (public redacted version ICC-01/04-01/06-2314-Red).

which could provide possible links to the current whereabouts of trial witness 297, who is in the ICCPP.¹²

20. 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.¹³
21. The Prosecution recalls that the Trial Chamber authorised similar redactions in its decision of 10 December 2009.¹⁴ Authorisation for the non-disclosure of this type of information has been requested by the Prosecution in two earlier filings, which remain pending before this Trial Chamber.¹⁵

Unknown third parties – Rule 81(4)

22. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact references in four Expense Documents to two unknown third parties. 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.
23. 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.¹⁶ Authorisation for the non-

¹² [REDACTED].

¹³ ICC-01/04-01/07-90, paras. 27–28. The redactions were authorised in a Confidential Ex Parte annex to the decision.

¹⁴ ICC-01/04-01/06-2208-Conf-Exp, paras. 34–35, 58–59.

¹⁵ See ICC-01/04-01/06-2314-Conf-Exp-Corr (public redacted version ICC-01/04-01/06-2314-Red), and ICC-01/04-01/06-2266-Conf-Exp (public redacted version ICC-01/04-01/06-2266-Red).

¹⁶ 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).

disclosure of similar information has been requested by the Prosecution in two earlier filings, which remain pending before this Trial Chamber.¹⁷

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

24. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact references in the Expense Documents to the personal information and contact details of intermediary 321 and other persons at risk on account of the activities of the Court namely OSU field staff.
25. The redactions include, *inter alia*, private telephone numbers, residential addresses, bank account numbers and the details of identification documentation.
26. 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.
27. Authorisation for the non-disclosure of information of this nature has been requested by the Prosecution in its two earlier filings, which remain pending before this Trial Chamber.¹⁸ The Prosecution submits that the arguments made in those filings are applicable here.

III. *Ex Parte* Filing

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

¹⁷ See ICC-01/04-01/06-2314-Conf-Exp-Corr (public redacted version ICC-01/04-01/06-2314-Red) and ICC-01/04-01/06-2266-Conf-Exp (public redacted version ICC-01/04-01/06-2266-Red).

¹⁸ *Ibid.*

¹⁹ 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).

29. 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.²⁰ 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.
30. 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.
31. The Expense Documents and transcripts of interview 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 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

32. Based on the foregoing, the Prosecution requests that the Trial Chamber authorize the non-disclosure of information contained in the 41 Expense Documents, and two transcripts of interview, as set out in the chart attached as Annex A, in accordance with Articles 54(3)(f), 64 and 68 and Rules 81(2) and (4).



Luis Moreno-Ocampo
Prosecutor

Dated this 31st day of May 2010
At The Hague, The Netherlands