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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 Version

with Confidential – Prosecution and Defence Only Annex A and Confidential *Ex Parte* – Prosecution Only Annexes 1-24

Prosecution's Request for Non-Disclosure of Information, Request for Lifting of a Rule 81(4) Redaction and Application of Protective Measures pursuant to 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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I. Background

1. As part of its ongoing review of relevant materials, in response to specific disclosure requests from the Defence and as part of its continuing disclosure obligations in respect of information acquired in the course of its investigations, the Prosecution has disclosed various documents to the Defence, some of which have been disclosed with redactions made pursuant to Rule 81(2) or 81(4) of the Rules of Procedure and Evidence (Rules).
2. Accordingly, the Prosecution hereby requests authorisation, pursuant to Articles 54(3)(f), 64, and 68 of the Rome Statute (Statute) and Rule 81(2) and (4), to redact certain information in these documents.
3. Additionally, in light of information revealed through in-court testimony, the Prosecution has realised that part of a Rule 81(4) redaction applied to one document, a witness related expense, is no longer justified, and the Prosecution hereby requests the Trial Chamber's authorisation to lift part of this redaction.
4. Finally, the Prosecution also notifies the Trial Chamber of the application of redactions to one document, pursuant to Regulation 42 of the Regulations of the Court (Regulations) following authorisation received from Trial Chamber II.

II. Prosecution's Submissions

5. 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 proposed redactions are attached hereto as Annexes 1 to 22 in a format that permits the Trial Chamber to view the information that the Prosecution proposes for redaction. The document which is the subject of the Rule 81(4) lifting request, and the document for which redactions are applied in accordance with

Regulation 42, are also included in the chart and attached as Annexes 23 and 24 for the Trial Chamber's convenience.

6. The Prosecution submits that the proposed redactions do not affect the value of or hinder the Defence's ability to assess the relevant information contained in the documents,¹ 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.
7. The information that the Prosecution proposes for redaction is as follows:

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

8. The Prosecution requests authorisation, pursuant to Rule 81(2), to redact references to two hotels [REDACTED]. The hotels have been and may continue to be used as witness accommodation and interview locations. [REDACTED]. To protect further and ongoing investigations, the Prosecution requests authorisation to redact the information concerned in these three documents.
9. These locations are not in any way connected to or otherwise associated with the Court or the Office of the Prosecutor (OTP) but merely provide services of an independent commercial nature in places where the OTP continues to carry out its investigations (in this and other situations and cases). The Prosecution submits that revealing the identity of the above locations could jeopardise the Prosecution's ability to operate effectively and discretely in the field, and that this information is immaterial to any issue in this case.
10. The Prosecution recalls that in its recent Decision on the Prosecution's Requests for Non-Disclosure of Information in Witness-Related Document (hereafter "27 October Decision"),² the Trial Chamber granted authorisation

¹ For all items it is clear (either from the document itself or the E-Court meta-data) to which witness the document relates.

² ICC-01/04-01/06-2597-Conf-Exp.

to redact interview locations and witness accommodation.³ The Prosecution submits that the same arguments should equally apply to [REDACTED].

Leads and Sources for the Conduct of Further Investigations – Rule 81(2) & Rule 81(4)

11. The Prosecution requests authorisation, pursuant to Rule 81(2) and (4), to redact references in two transcripts of an interview with trial witness DRC-OTP-WWWW-0213 ('witness 213') to information and the individual – [REDACTED] – who is the source of that information. The Prosecution submits that the redactions are necessary to ensure its further investigations are not prejudiced by disclosing the names of sources or leads, and to avoid compromising the security of the individual concerned.
12. "Further investigation" in this context refers to further investigations that may be undertaken by the Prosecution relevant to the Defence abuse of process application. The proposed redactions do not seek to redact substantive information in relation to the "the ongoing investigation against *Thomas Lubanga Dyilo* in relation to the current case against him as set out in the warrant of arrest issued for him on 10 February 2006"⁴ or information that could be disclosable under Article 67(2) or Rule 77.
13. Although the Prosecution has not hitherto requested redactions in respect of information (and/or the sources of that information) related to the Defence abuse of process application, the Prosecution has requested, and this Trial Chamber has previously authorised, short-term redactions to protect further and ongoing investigations (including the names of individuals at risk) provided the redactions do not affect information relevant to the current charges or otherwise subject to disclosure obligations.⁵

³ Ibid, see paras. 24-28.

⁴ ICC-01/04-01/06-234-Conf-Exp, "Decision on the Prosecution Amended Application pursuant to Rule 81(2)", 2 August 2006, page 5.

⁵ See for example ICC-01/04-01/06-1560-Conf-Exp, and oral decision delivered 13 February 2007; ICC-01/04-01/06-T-66-CONF-EXP-ENG ET.

14. Moreover, as the source of information to witness 213, the individual is at risk of being seen as having collaborated with the Court, and with the Prosecution in particular ([REDACTED]). Given that no lesser measures exist to safeguard his safety and well-being,⁶ and on the basis of the submissions set out above, the Prosecution requests authorisation to redact the information concerned.

Witnesses and their family members – Rule 81(4)

15. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact references in four documents to (i) the name of a non-trial witness, and (ii) the names and whereabouts of family members of trial and non-trial witnesses. The Prosecution requests these redactions to protect the safety of these persons.
16. In relation to sub-category (i), witness DRC-OTP-WWWW-0037 ('witness 37') is mentioned in an email as someone intermediary DRC-OTP-WWWW-0316 ('intermediary 316') was in contact with in or around June 2006. The connection between intermediary 316 and this witness is known to the Defence through the chart detailing contacts between witnesses and intermediaries.
17. The non-disclosure of the identity of witness 37 was previously authorised by the Trial Chamber,⁷ and while the Prosecution concedes that 'it is necessary for the Chamber to keep the changing and emerging issues in the trial under review',⁸ in this instance, there is no basis for concluding that the identity of this witness is now relevant to any issue in these proceedings.
18. Witness 37 was interviewed by the OTP in February 2005, and according to the OTP's records, the witness has not been contacted by the Office for any

⁶ [REDACTED].

⁷ ICC-01/04-01/06-1965-Conf-Exp, paras. 26-27.

⁸ ICC-01/04-01/06-2597 at para. 67.

discussions (substantive or otherwise) since that time.⁹ The OTP has no other record of contact between this intermediary and this witness, and there is no information to suggest that they knew or were in contact with each other before this time. In the circumstances, the Prosecution submits that there can therefore be no implication that information provided by witness 37 in an interview almost a year and a half earlier could have been encouraged or otherwise falsified by intermediary 316, and therefore the witness is not implicated in or otherwise relevant to the contentions advanced by the Defence as part of its abuse of process application.

19. The reason for the contact in 2006 by intermediary 316 was [REDACTED], and the Prosecution submits that without more, contacts of this nature between intermediaries and non-trial (and otherwise irrelevant) witnesses should not be cause to revisit a non-disclosure order.¹⁰
20. In relation to sub-category (ii), the persons concerned are:
 - (a) the wife of intermediary 316;
 - (b) the parents of intermediary DRC-OTP-WWWW-0321 ('intermediary 321');
 - (c) a family member of non-trial witness DRC-OTP-WWWW-0314; and
 - (d) the father of two potential witnesses whom the OTP did not meet.

The Prosecution recalls that in the 27 October Decision, the Trial Chamber granted authorisation to redact the names and whereabouts of witness's family members, including *inter alia* the wife of intermediary 316.¹¹

21. As for the father of the two prospective child witnesses, his name is contained in a document (a list of proposed witnesses to be screened) relevant to intermediary 321 and witness DRC-OTP-WWWW-0581, but to the OTP's knowledge, it did not meet the two children, and the children did

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ ICC-01/04-01/06-2597 at para. 75.

not [REDACTED]. In these circumstances, the Prosecution submits that the father's name is not relevant information for the Defence, and should remain redacted given that no lesser measures exist to protect this person's safety as an individual at risk on account of the activities of the court.¹²

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

22. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact [REDACTED] of trial witness 213, which is also the witness' current ICCPP location.
23. The Prosecution recalls that in the 27 October Decision, the Trial Chamber granted authorisation to redact the whereabouts of witnesses who are in the ICCPP on the basis that such information is irrelevant to the Defence, that the redactions are 'necessary and fair, given that disclosure will put the witnesses or others at risk' and that the information does not fall within Article 67(2) of the Statute or Rule 77 of the Rules.¹³ The Prosecution submits that these considerations continue to apply in respect of the information [REDACTED].

Whereabouts and Personal (including Contact) Information – Rule 81(4)

24. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact references to current and previous locations and personal (including contact) information of witnesses, intermediaries 316 and 321 and other persons at risk on account of the activities of the Court namely OSU field staff.
25. The redactions cover, *inter alia*, information such as residential addresses, current locations, phone numbers, email addresses and passport numbers. The Prosecution submits that such information is irrelevant to the known issues in the case and that although the identity of certain witnesses and

¹² [REDACTED].

¹³ Ibid, see paras. 29-33.

OSU field staff may have been disclosed, their personal information and/or contact details should not be unnecessarily disseminated without due cause.

26. The Prosecution recalls that in the 27 October Decision, the Trial Chamber granted authorisation to redact personal information of this kind.¹⁴

Request for Lifting of Rule 81(4) Redaction

27. In its 27 October Decision, the Trial Chamber granted the Prosecution's request for non-disclosure of the address of intermediary 321 in a witness related expense document.¹⁵ On 10 July 2010, the witness revealed part of this address while testifying.¹⁶ In those circumstances, the Prosecution considers that this part of the redaction is no longer justified, and requests the Trial Chamber's authorisation to remove it from the document in question.

Notification of application of Redactions pursuant to Regulation 42

28. Finally, the Prosecution notifies the Trial Chamber that it has disclosed the witness statement of DRC-OTP-WWWW-0183 with the same redactions authorised by Trial Chamber II on 8 June 2010 in accordance with Regulation 42.¹⁷

III. *Ex Parte* Filing

29. The Prosecution submits that the classification of the present filing and annexes as *Confidential - Ex Parte - Prosecution Only* is necessary.¹⁸

¹⁴ Ibid, see paras. 34-38.

¹⁵ The expense – DRC-OTP-0196-0534 – is attached as Annex 23 with the part of the redaction to be removed highlighted in red. The entire redaction was authorised in ICC-01/04-01/06-2597-Conf-Exp at paras. 36-38.

¹⁶ See the transcript of the hearing; ICC-01/04-01/06-T-310-CONF-ENG ET, page 27, lines 6-7.

¹⁷ The statement – DRC-OTP-2001-0732 – is attached as Annex 24 for the information of the Trial Chamber. For the decision of Trial Chamber II authorising non-disclosure, see transcript of the hearing on 8 June 2010; ICC-01/04-01/07-T-151-CONF-FRA.

¹⁸ 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).

30. 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.¹⁹ 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.
31. 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 confidential and public redacted versions of the present filing forthwith.
32. The documents have all been disclosed to the Defence, with the proposed redactions, in order to ensure that the Defence has access to these materials 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.

IV. Relief Requested

33. Based on the foregoing, the Prosecution requests that the Trial Chamber authorises:
 - a. the non-disclosure of information contained in the documents set out in the table at Annex A and attached as Annexes 1-22, in accordance with Articles 54(3)(f), 64 and 68 and Rules 81(2) and (4); and

¹⁹ 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.

- b. the lifting of part of the redaction highlighted in attached Annex 23.



Luis Moreno-Ocampo
Prosecutor

Dated this 23rd day of December 2010
At The Hague, The Netherlands