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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 Redacted Version Annex A &
Confidential *Ex Parte* – Prosecution Only Annexes 1-31**

**Prosecution's Request for Non-Disclosure of Information and Notification of
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 these documents have been disclosed with redactions made pursuant to Rule 81(2) and/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), (3) and 81(4), for those redactions.
3. Additionally, 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

4. 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 25 in a format that permits the Trial Chamber to view the information that the Prosecution proposes for redaction.¹ The documents for which redactions are applied in accordance with Regulation 42 are also included in the chart and attached as Annexes 26 to 31 for the Trial Chamber's convenience.

¹ Except for Expense Document DRC-OTP-0210-0296 (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 this redaction is however included in the chart (*) and in the main filing (see paras. 11, 12, 16, 17).

5. 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, 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 information that the Prosecution proposes for redaction is as follows:

Locations for witness interviews – Rule 81(2)

7. The Prosecution requests authorisation, pursuant to Rule 81(2), to redact references to two locations (a hotel and [REDACTED]) in two documents that have been and may continue to be used as witness interview locations. To protect further and ongoing investigations, the Prosecution requests authorisation to redact the information concerned.
8. 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.
9. The Prosecution recalls that in its recent 'Decision on the Prosecution's Requests for Non-Disclosure of Information in Witness-Related Documents'² (Decision 2597), the Trial Chamber granted authorisation to redact interview locations including one of the locations that is the subject of the present request.³

² ICC-01/04-01/06-2597-Red.

³ Decision 2597, at paras. 24-28.

Witnesses and their family members – Rule 81(4)

10. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact references in seven documents to (i) the names of five non-trial witnesses, (ii) the names and whereabouts of family members of trial and non-trial witnesses, and in one instance (iii) the name and identifying details of one person whose identity could lead to the identification of a witness' family members. The Prosecution requests these redactions to protect the safety of these persons.
 - (i) *Names of five non-trial witnesses*
11. Witnesses DRC-OTP-WWWW-0064 (witness 64) and DRC-OTP-WWWW-0604 (witness 604) are mentioned in three documents related to DRC-OTP-WWWW-0598 (witness 598). Witnesses DRC-OTP-WWWW-0177 (witness 177) and DRC-OTP-WWWW-0179 (witness 179) are mentioned in a witness related expense document relevant to intermediary DRC-OTP-WWWW-0143 (intermediary 143). Witness DRC-OTP-WWWW-0243 (witness 243) is linked to a witness related expense document relevant to intermediary DRC-OTP-WWWW-0316 (intermediary 316).
12. The non-disclosure of witnesses 64, 177, 179 and 243 was previously authorised by the Trial Chamber,⁴ and while the Prosecution concedes that 'it is necessary for the Chamber to keep the changing and emerging issues in the trial under review',⁵ in this instance, there is no basis for concluding that the identity of these witnesses is now relevant to any issue in these proceedings.
13. Witness 64 was screened by the OTP in March-April 2006. The witness has not provided any further information or otherwise been contacted by the

⁴ ICC-01/04-01/06-1814-Conf (see Conf-Exp-Annex, witnesses 1, 8, 10 and 16); in respect of witness 179 this was confirmed in ICC-01/04-01/06-2206, para. 64.

⁵ Decision 2597, at para. 67.

Office since that time.⁶ Witness 64 is associated with [REDACTED] witness 598 and was mentioned by the latter during his interviews with the Office in March and November 2010. The OTP has no record of any contact or link between this witness and any of the impugned intermediaries, and is not seeking to rely on the information he's provided either in the substantive case, or its response to the Defence abuse of process application.

14. Witness 604, also associated with witness 598 [REDACTED], is the author of an email provided to the OTP by witness 598. The OTP had a brief conversation with witness 604 [REDACTED] in order to obtain some further clarifications around the information contained in this email. At the time, and as submitted by the Prosecution during the deposition of witness 598,⁷ witness 604 voiced concerns about his security if it was known that he was speaking to the OTP. The OTP has since contacted the witness and he has reiterated these concerns and does not consent to disclosure.⁸ [REDACTED]. The nature of the information contained in the email – if witness 604's identity was known – could place him at risk, and the value of the information contained in the document is not affected by the non-disclosure of his identity. In these circumstances, the Prosecution requests the Trial Chamber to authorise the non-disclosure of the identity of witness 604 in order to protect his safety.
15. Witnesses 177 and 179 were screened by the OTP on 14 and 15 December 2005 respectively. Their 'connection' with intermediary 143 is known to the Defence through the investigator's notes disclosed (with redactions) for each witness. According to the OTP's records, neither witness has provided any

⁶ [REDACTED].

⁷ See transcript of the deposition on 1 December 2010, ICC-01/04-01/06-Rule68Deposition-CONF-ENG ET at pages 59-60.

⁸ [REDACTED]

further information or otherwise been contacted by the Office for any substantive discussions since that time.⁹

16. The expense in question relates to contact by intermediary 143 for a security assessment in December 2005-January 2006. This is clear from the document itself. The OTP has no other record of any other contact between this intermediary and the witnesses.
17. In respect of witness 243, although the witness is linked to an expense document relevant to intermediary 316, the OTP has no record of any contact between this witness and this intermediary. On the basis of the information available to it, the Prosecution believes that the witness related expense in question relates to a transfer of money to intermediary 316 for a task related to witness 243, but that the task itself was undertaken by another individual, unconnected with intermediary 316.
18. In the circumstances, there can be no suggestion that any of these witnesses are now implicated in or otherwise relevant to the contentions advanced by the Defence as part of its abuse of process application. Furthermore, they are not relevant to any issues in the substantive case. Without more, the Prosecution submits that contacts or links of this nature between non-trial (and otherwise irrelevant) witnesses and trial witnesses/intermediaries should not be cause to revisit a non-disclosure order. Accordingly, the Prosecution requests the continued non-disclosure of the identities of witnesses 64, 177 and 179, 243 and authorisation for the redactions currently applied to the relevant documents.

(ii) *Names and whereabouts of family members of trial and non-trial witnesses*

19. The family members concerned are:

- (a) the [REDACTED] of non-trial witness DRC-OTP-WWWW-0286;

⁹ [REDACTED].

(b) the [REDACTED] of intermediary 316;

(c) the [REDACTED] of '[REDACTED]'.

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 [REDACTED] of intermediary 316.¹⁰

(iii) *Name and identifying details of one person whose identity could lead to the identification of a witness' family members*

20. The persons concerned are the family members of intermediary 316. In a statement from intermediary 316 he refers to having been warned by [REDACTED] to be careful, because of news relayed to him by a friend "[REDACTED]". This friend is then described quite particularly. The Prosecution submits that the identity of this person, if known, could lead to the identification of various members of intermediary 316's family. In order to protect these persons, the Prosecution requests the non-disclosure of the name "[REDACTED]". Moreover, the Prosecution submits that the information is not relevant for the Defence: despite being in possession of this document at the time of intermediary 316's testimony, the Defence chose not to present this statement to or in any way question the witness about the information contained therein.

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

21. 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 and other persons at risk on account of the activities of the Court. This includes a request to redact information contained in a report [REDACTED] related to trial witness

¹⁰ Decision 2597, at para. 75.

DRC-OTP-WWWW-0038. This information could lead to an identification of the witness' current location.¹¹

22. The redactions cover, *inter alia*, information such as residential addresses, current locations, phone numbers and email addresses. The Prosecution submits that such information is irrelevant to the known issues in the case and that although the identity of certain witnesses and intermediaries may have been disclosed, their personal information and/or contact details should not be unnecessarily disseminated without due cause.
23. The Prosecution recalls that in the 27 October Decision, the Trial Chamber granted authorisation to redact personal information of this kind.¹²

Innocent third parties – Rule 81(4)

24. The Prosecution requests authorisation, pursuant to Rule 81(4), to redact references in eight documents to innocent 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.
25. The persons are:
 - (a) [REDACTED] is referred to in a receipt and investigator's note as having provided \$200USD to intermediary 143 to cover costs incurred by the latter in December 2005-January 2006 in contacting a number of former child soldiers interviewed by the OTP to ascertain their security situation. This person was the [REDACTED] at the relevant time. This is quite clear from the two documents in which her name is mentioned. The Prosecution submits that in this context, the name itself is irrelevant information to the Defence, and should be redacted

¹¹ [REDACTED].

¹² Decision 2597, at paras. 34-38.

to ensure the confidentiality of the information and protect the safety of this person;

- (b) [REDACTED], who put witness DRC-OTP-WWWW-0555 (witness 555) in touch with [REDACTED]; [REDACTED], a member of the [REDACTED] who interviewed witness 555 in early 2005; [REDACTED] and [REDACTED], and [REDACTED] ([REDACTED]), the [REDACTED] for which these latter two person worked and who assisted in financing witness 555's studies. The Prosecution submits that the names of these persons, and the [REDACTED], are not relevant information for the Defence. These discrete redactions do not in any way affect the value of, or the ability of the Defence to assess, the relevant information contained in the statement. The Prosecution submits therefore that the names should be redacted to ensure the confidentiality of the information and to protect the safety of these persons and their ability to continue working in the field;
- (c) [REDACTED, [REDACTED] and [REDACTED] (3 references), and [REDACTED] (supervisor [REDACTED]), all persons mentioned in intermediary 143's ICC Personal History Form.¹³ Whilst the Prosecution concedes that certain information about intermediary 143's professional background and employment with the Court is relevant information for the Defence, it submits that the names of individual supervisors and personal referees constitute confidential

¹³ The Prosecution notes that following initial disclosure on 11-Oct-2010, the Defence requested, and the Prosecution agreed to and effected, the lifting of the names of W-0143's other more recent supervisors from this document on 21-Oct-2010. The Prosecution also notes that these persons have and may continue to be involved in work in the DRC. The Prosecution notes particularly for [REDACTED] that his capacity to continue his current work in [REDACTED] relies to a large extent on discretion and the non-disclosure of information on his possible relation with ICC cases.

information that should not be unnecessarily disseminated without due cause;

- (d) [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED] are all individuals mentioned in a statement taken from intermediary 316 on 2 June 2008. They are mentioned by intermediary 316 in the context of being persons aware of his relocation following alleged security threats. Although the identities of a number of persons connected with intermediary 316 are now relevant to the Defence as part of the abuse of process application, the Prosecution submits that these persons are not. In light of the context in which they are mentioned, and their lack of proximity to the allegations against intermediary 316 (eg. witness interference, misuse of finances), the Prosecution requests authorisation to redact their names in order to protect their safety;
- (e) Intermediary 316's [REDACTED] is mentioned in a statement from intermediary 316 on 7 June 2008 as someone who witnessed and informed him of the intimidating visits to his house that led to him deciding to relocate. As above, the Prosecutions submits that in this context, the person's name is irrelevant to the Defence, and that a redaction is necessary ([REDACTED]) to ensure the confidentiality of the information and to protect her safety; and
- (f) A field worker, [REDACTED], and [REDACTED] are mentioned in the investigator's notes of an interview with witness 598. Both the individual and [REDACTED] are active in the field and disclosure of their identities could jeopardize their ability to continue to perform this work. Accordingly, in order to protect their safety and allow

them the confidentiality and security required to operate in the field, the Prosecution requests the Trial Chamber to authorise the redactions to the document in question.

26. There is no basis for concluding that the identity of these individuals is relevant to any live issue in these proceedings, the redactions do not affect the intelligibility or usability of the relevant documents, and no lesser measures are feasible to protect these persons. As such, the redactions do not adversely affect the rights of the accused. The Prosecution recalls that the Trial Chamber has previously authorised similar redactions to the identities of irrelevant individuals.¹⁴

Notification of application of Redactions pursuant to Regulation 42

27. Finally, the Prosecution notifies the Trial Chamber that it has disclosed a number of materials recording the results of interviews conducted with DRC2 witnesses concerning intermediary 316 with the same redactions authorised by Trial Chamber II on 8 June 2010 in accordance with Regulation 42.¹⁵

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.¹⁶
29. The present filing seeks relief on the basis of provisions of protective measures. The Prosecution submits that the information discussed must be

¹⁴ ICC-01/04-01/06-1924-Anx2, paras. 34-35 and ICC-01/04-01/06-2597-Red, para. 81.

¹⁵ The materials are attached for the Trial Chamber's information as annexes 26-31. Trial Chamber II authorised the non-disclosure of this information in decisions ICC-01/04-01/07-1551-Conf-Exp and ICC-01/04-01/07-1591-Conf-Exp.

¹⁶ 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).

treated confidentially and cannot be disclosed to the Defence in advance of a determination as to whether disclosure is necessary.¹⁷ 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 confidential and public redacted versions of the present filing forthwith.
31. 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.

¹⁷ 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 authorises the non-disclosure of information contained in the documents set out in the table at Annex A and attached as Annexes 1-25, in accordance with Articles 54(3)(f), 64 and 68 and Rules 81(2) and (4).



Luis Moreno-Ocampo
Prosecutor

Dated this 10th day of February 2011
At The Hague, The Netherlands