

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-01/04-01/06

Date: 26 April 2011

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 1, and Confidential -
Ex Parte, Prosecution Only Annexes 2-5**

Prosecution's Request for Non-Disclosure of Information in Six Documents

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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**Victims Participation and Reparations
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Other

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. In recent disclosures, six documents have been disclosed with redactions made pursuant to Article 54(3)(e) and 54(3)(f) of the Rome Statute (Statute) and Rule 81(4) of the Rules of Procedure and Evidence (Rules).
2. Accordingly, the Prosecution hereby requests authorisation for those redactions pursuant to Articles 54(3)(e), 54(3)(f), 64, and 68 of the Statute and Rule 81(3) and 81(4).

II. Prosecution's Submissions

3. The overview chart attached hereto as Annex 1 indicates (i) the category of information to which the redactions relate, and (ii) the proposed redactions. Four of the six documents are attached hereto as Annexes 2 to 5 in a format that permits the Trial Chamber to view the information that the Prosecution proposes for redaction.¹
4. 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.
5. The information that the Prosecution proposes for redaction is as follows:

¹ The Prosecution has not attached two documents for which redactions are not to the document content but only to the source of the documents and the chain of custody metadata fields. The details of the requested redactions are, however, included in the chart at Annex 1 (see the first two entries).

Information contained in a non-ICC Statement of Non-Trial Witness W-0064

6. Pursuant to Rule 81(4), the Prosecution requests authorisation to redact the following information contained in a document provided by trial witness DRC-OTP-WWWW-0598 (W-0598): (i) the name and identifying information of non-trial witness DRC-OTP-WWWW-0064 (W-0064), and (ii) the names and identifying details of innocent third parties.
7. The document provided by W-0598 is an unsigned, undated, non-ICC statement related to W-0064, [REDACTED]. The Prosecution first received information about W-0064 from W-0598, and W-0064 was thereafter screened by the Prosecution in March-April 2006.² W-0064 has not provided any further information or otherwise been contacted by the Prosecution since that time.³ The document provided by W-0598 is a separate and independent document relevant to W-0064, unrelated to the Prosecution's screening of him.
8. The non-disclosure of the identity of W-0064 was previously authorised by the Trial Chamber,⁴ and while the Prosecution agrees 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 this witness is now relevant to any issue in these proceedings. Neither the Prosecution nor the Defence relied on this redacted document, or the nature of the information contained therein, when questioning W-0598 during his testimony on 1 December 2010.⁶ Moreover, the Prosecution has no record of

² The investigator's note of this screening was disclosed to the Defence with redactions to the witness's identity.

³ [REDACTED]W-0064 indicated [REDACTED] that he was willing to participate in a fuller interview with the Prosecution but expressed significant security concerns. This interview never eventuated. [REDACTED].

⁴ ICC-01/04-01/06-1814-Conf (see Conf-Exp-Annex, witness 1) and ICC-01/04-01/06-2720-Conf.

⁵ ICC-01/04-01/06-2597-Red, at para. 67.

⁶ The Prosecution also notes that the Defence has not requested lifting of the redactions in the interim or subsequently.

any contact or link between this witness and any of the impugned intermediaries. Lastly, the Prosecution submits that no lesser measures are available to protect this witness, and notes that the Defence did not oppose the proposed redactions to W-0064 in its response to the Prosecution's most recent request for non-disclosure.⁷

9. Additionally, the document refers to a number of innocent third parties in the context of the information relevant to W-0064. In order to protect these persons whose safety may be at risk on account of the activities of the Court and/or whose details may also reveal the identity of W-0064, the Prosecution submits that their names and identifying information should remain undisclosed. Additionally, the Prosecution submits that revealing the identity of these persons could lead to the identification of W-0064.
10. The persons are:
 - (a) [REDACTED] who interviewed W-0064 in late 2004. The Prosecution notes that this individual was referred to in relation to W-0064 in a different document (but similar context) and the redaction to this person in that document was not opposed by the Defence, and was approved by the Trial Chamber;⁸
 - (b) [REDACTED], who pressured W-0064 into participating in a proposed assignment (which included providing false information to [REDACTED] and the assassination of W-0598); and
 - (c) [REDACTED] who housed W-0064 for a period in order to protect his safety.

⁷ Réponse de la Défense à la "Prosecution's Request for Non-Disclosure of Information and Notification of Application of Protective Measures pursuant to Regulation 42", ICC-1/04-01/06-2697-Conf, para. 8.

⁸ ICC-1/04-01/06-2697-Conf, para. 21 and ICC-01/04-01/06-2720-Conf, para. 52.

11. As with W-0064, there is no basis for concluding that the identity of these individuals is relevant to any live issue in these proceedings. The discrete redactions do not affect the intelligibility or usability of the document, and no lesser measures are feasible to protect these persons, or W-0064. As such, the Prosecution submits that 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.⁹
12. In light of the foregoing, in order to ensure the safety of this vulnerable non-trial witness and the other persons mentioned therein, the Prosecution requests the continued non-disclosure of the identity of W-0064 and authorisation for the redactions currently applied to the relevant document.

Information contained in Statement of Non-Trial Witness W-0227

13. Pursuant to Rule 81(4), the Prosecution requests authorisation to redact the ICCPP location and whereabouts of family members from a statement taken from non-trial witness DRC-OTP-WWWW-0227 (W-0227).
14. A telephone interview was conducted with W-0227, whose identity is known to the Defence, in November 2010. Redactions are sought to his ICCPP location, as well as to information that could reveal the whereabouts of his family, [REDACTED]. The Prosecution requests these redactions to protect the integrity of measures adopted in the ICCPP and to protect his family members.
15. W-0227 is not implicated in or otherwise relevant to the contentions advanced by the Defence as part of its abuse of process application and is not relevant to any issues in the substantive case.

⁹ ICC-01/04-01/06-1924-Anx2, paras. 34-35, ICC-01/04-01/06-2597-Red, para. 81 and ICC-01/04-01/06-2720-Conf, for example at paras. 52 and 60.

Source of Four documents received from Non-Governmental Organisations (NGOs)

16. Four documents have recently been disclosed to the Defence as being relevant to defence witnesses and/or 'material to the Defence' pursuant to Rule 77. These documents were provided to the Prosecution by NGOs who have previously agreed to disclosure of materials to the Defence on condition that any reference to the NGO, including and particularly as the source of the document, is removed and protected from disclosure to the Defence. For two of these documents, the only redactions are redactions to the name of the NGO (and its employee) in the source and chain of custody metadata fields. The documents themselves have been provided to the Defence in fully unredacted form. For the other two documents, limited discrete redactions have also been applied to the content where the disclosure of that information may reveal the identity of the information provider (or, in one case, another NGO) as the source of the document. The Prosecution submits that the redactions are necessary to protect the confidentiality of the information provider, and do not affect the value of the information contained therein, or otherwise prejudice the rights of the accused.
17. The Trial Chamber has previously agreed with disclosure on this basis and held that removing the name of the NGO does not affect the quality of the relevant information.¹⁰ The Prosecution requests the Trial Chamber to authorise disclosure on this basis for the relevant documents in this instance.

¹⁰ See ICC-01/04-01/06-T-95-CONF-EXP-ENG ET at page 45, line 20 to page 51, line 23 (with respect to [REDACTED]) and page 51, line 24 to page 53, line 7 (with respect to [REDACTED]).

III. *Ex Parte* Filing

18. The present filing seeks relief on the basis of provisions of 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 The Prosecution submits therefore that the classification of the present filing and annexes as *Confidential - Ex Parte - Prosecution Only* is necessary.¹²
19. 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 forthwith.
20. The documents have all been disclosed to the Defence, with the proposed redactions, in order to ensure that the Defence had access to these materials before the trial resumed on 23 March 2011. Should the Trial Chamber decline to authorise any of the proposed redactions, the Prosecution will re-disclose the relevant documents.

IV. Relief Requested

21. Based on the foregoing, the Prosecution requests that the Trial Chamber authorises the non-disclosure of information contained in the documents set

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.

¹² 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).

out in the table at Annex 1 and attached as Annexes 2-5 in accordance with Articles 54(3)(e), 54(3)(f), 64 and 68 and Rule 81(3) and (4).



Luis Moreno-Ocampo
Prosecutor

Dated this 26th day of April 2011
At The Hague, The Netherlands