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

Date: **4 January 2008**

**TRIAL CHAMBER I**

**Before:** Judge Adrian Fulford, Presiding Judge  
Judge Elizabeth Odio Benito  
Judge René Blattmann

**Registrar:** Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF  
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

**Public Document**

**Defence Response to “Prosecution’s Application for Lifting of Redactions, Non-Disclosure of Information and Disclosure of Summary Evidence”, “Prosecution’s Application for Non-Disclosure of Information on the Basis of Article 54(3)(f)” and “Prosecution’s Application for Lifting of Redactions and Non-disclosure of Information”**

**Office of the Prosecutor**

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**a/00001/06 to a/0003/06 and a/0105/06**

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**BACKGROUND:**

1. On 12 and 13 December 2007, the Prosecutor filed "Prosecution's Application for Lifting of Redactions, Non-Disclosure of Information and Disclosure of Summary Evidence"<sup>1</sup> and "Prosecution's Application for Non-Disclosure of Information on the Basis of Article 54(3)(f)".<sup>2</sup>
2. On 14 December 2007, the Prosecutor filed a third application, entitled "Prosecution's Application for Lifting of Redactions and Non-disclosure of Information".<sup>3</sup>
3. On 18 December 2007, the Chamber issued an order informing the Parties that the three applications filed by the Prosecutor would be discussed during the Status Conference to be held on 9, 10 and 11 January 2008.
4. The Chamber gave the Defence until 4 January 2008 to file a response to these applications.<sup>4</sup>

**OBSERVATIONS:***Introductory remarks*

5. On 11 December 2007, the Prosecutor provided the Defence with a list of 44 witnesses. To date, only 16 of these witnesses, i.e. a third of them, have been the subject of a disclosure made in compliance with the Chamber's decision of 9 November 2007.<sup>5</sup> As far as the other witnesses are concerned, the Defence has been kept in the dark concerning their identity and has only summaries of their supposed testimonies<sup>6</sup> drafted by the Prosecutor or statements that have been redacted so heavily that they are impossible to understand.<sup>7</sup>

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<sup>1</sup> ICC-01/04-01/06-1081.

<sup>2</sup> ICC-01/04-01/06-1085.

<sup>3</sup> ICC-01/04-01/06-1087.

<sup>4</sup> ICC-01/04-01/06-1097.

<sup>5</sup> ICC-01/04-01/06-1019.

<sup>6</sup> Witnesses AA, AC, AF, AH, AI, AO, AQ, AR, AX, BB, BK, BO, AU, BG, BI, BP, BQ and BV.

<sup>7</sup> Witnesses AE, AG, AW, BC, BD, BE, BR, BS and BT.

6. The applications for non-disclosure to the Defence filed by the Prosecutor on 12, 13 and 14 December 2007 pertain to a total of 17 witnesses,<sup>8</sup> 4 videos<sup>9</sup> and 73 documents.<sup>10</sup>

7. The essentially *ex parte* nature of these applications denies the Defence the possibility of fully exercising its rights on essential issues. This is all the more worrying in view of the fact that the judges have stated that they rely on the Prosecutor as far as the form and extent of redactions is concerned, given their “lack of information about the detailed circumstances of each of the potentially relevant individuals”.<sup>11</sup>

8. However, the Defence opposes these applications for the following reasons.

**(1) Non-disclosure applications under article 68 and rule 81(4)**

9. The Prosecutor calls on the Chamber to authorise certain redactions aimed at concealing from the Defence the identity of Prosecution witnesses on the grounds that revealing their identity might place them in danger.

10. These applications, which are inconsistent with the rights of the Accused and the rules of a fair trial, are unacceptable.

11. Under article 67, “[the accused must] be informed promptly and in detail of the nature, cause and content of the charge[s]” against him or her and “have adequate time [...] for the preparation of the defence”. As the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) asked, “How can one conceive of the accused being afforded an equitable trial, adequate time for

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<sup>8</sup> ICC-01/04-01/06-1081.

<sup>9</sup> ICC-01/04-01/06-1085.

<sup>10</sup> ICC-01/04-01/06-1087.

<sup>11</sup> ICC-01/04-01/06-T-65-FRA, 13 December 2007, page 11, lines 7-8; ICC-01/04-01/06-T-65-ENG, 13 December 2007, page 12, lines 8-10.

preparation of his defence, and intelligent cross-examination of the Prosecution witnesses if he does not know from where and by whom he is accused?”<sup>12</sup>

12. The fundamental right of the accused to be informed of the identity of Prosecution witnesses and the content of their statements may not be restricted, even temporarily, for their protection unless disclosing their identity “may lead to the grave endangerment of the security of a witness or his or her family” and on the condition that such restriction “is not prejudicial to or inconsistent with the rights of the accused”.<sup>13</sup>

13. Neither of these conditions is met in the instant case.

- **The Prosecutor has not demonstrated the existence of a grave danger for each witness concerned that would justify non-disclosure of their identity**

14. The protective measures affecting the exercise of the rights of the Defence, in particular non-disclosure of identity, can be contemplated only in exceptional circumstances and can be ordered only after a case-by-case assessment of each witness’s situation.<sup>14</sup> The Chamber must ensure that the temporary non-disclosure of witnesses remains an exceptional measure ordered only in the absence of other means of protection.

15. On this point, the Defence recalls the principles and concerns formulated by the Trial Chamber of the ICTY in *Milošević*:

What the Trial Chamber must specifically address is whether the Prosecution has satisfied the requirements of Rule 69. Paragraph (A) of that Rules requires the Prosecution to make a showing of “exceptional circumstances” before it will be permitted to redact identifying information from witness statements. The Trial Chamber believes that such a showing can only be made on an individual basis. As the Trial Chamber in the Brđanin Decision explained, exceptional circumstances must be established with respect to every witness the Prosecution seeks to protect through redaction of identifying information, and that this be done *at the time* service of the supporting material is required. “Rule 69 (A) does *not* provide [a] blanket protection”. It must be right that the

<sup>12</sup> *Prosecutor v. Blaskić*, Case No. IT-95-14-T, *Decision on the Application of the Prosecutor dated 17 October 1996 requesting protective measures for victims and witnesses*, 5 November 1996, para. 25.

<sup>13</sup> Article 68(5).

<sup>14</sup> *Prosecutor v. Brđanin and Talić*, IT-99-36-T, *Decision on motion by prosecution for protective measures*, 3 July 2000, paras. 10, 11 and 19; *Prosecutor v. Milošević*, Case No. IT-02-54-T, *Decision on Prosecution motion for provisional protective measures pursuant to rule 69*, 19 February 2002, para. 17.

Prosecution, to be allowed to redact information it is required to disclose within a strict time frame under the Rules, be required to make a showing of exceptional circumstances with respect to each witness for whom - or each document for which - it seeks redaction. It is, after all, something only to be granted in “exceptional circumstances”, and the reason for this is that it goes to the heart of an accused’s right to a fair trial by enabling him to investigate the case against him.

[...]

The Trial Chamber notes with regret that the granting of such protective measures, which started out as an exceptional practice, has become almost the norm in proceedings before the Tribunal. Nonetheless, this practice has followed individual applications for protective measures, not for blanket orders suppressing the identity of witnesses from the accused. Whilst it is extremely important to provide adequately for the protection of victims and witnesses, the requirement that the accused be given a fair trial dictates that Trial Chambers only grant protective measures where it is properly shown in the circumstances of each such witness that the protective measures sought meet the standards set out in the Statute and Rules of the Tribunal, and expanded in its jurisprudence. The Prosecution is under an obligation at this early stage of the proceedings to justify redaction of a witness’s identifying information from statements disclosed pursuant to Rule 66 (A)(i) with respect to each such witness.<sup>15</sup>

[Underlining added]

16. Moreover, the alleged danger must be borne out by objective evidence corroborating the fears of the witness concerned.<sup>16</sup>

17. In its decisions the Appeals Chamber of the International Criminal Court has not called these principles into question. In its decision of 14 December 2006, the Appeals Chamber laid explicit emphasis on the need to specify the facts leading to the conclusion that danger would ensue from the disclosure of a witness’s identity;<sup>17</sup> a reference to a general situation of insecurity is not enough on its own to establish the grave and specific danger required under article 68(5).<sup>18</sup>

<sup>15</sup> *Prosecutor v. Milošević*, Case No. IT-02-54-T, *Decision on Prosecution motion for provisional protective measures pursuant to rule 69*, 19 February 2002, para. 17.

<sup>16</sup> *Prosecutor v. Brđanin and Talić*, IT-99-36-T, *Decision on motion by prosecution for protective measures*, 3 July 2000, para. 26:

It is, however, important to recall the terms of the rule under which the prosecution seeks a non-disclosure order. Rule 69(A) applies only to “the non-disclosure of the identity of a victim or witness who may be in danger or at risk”. Any fears expressed by potential witnesses themselves that they may be in danger or at risk are *not in themselves* sufficient to establish any real likelihood that they may be in danger or at risk. Something more than that must be demonstrated to warrant an interference with the rights of the accused which these redactions represent. [Underlining added]

<sup>17</sup> ICC-01/04-01/06-773, paras. 21 to 23.

<sup>18</sup> *Prosecutor v. Blaskić*, Case No. IT-95-14-T, *Decision of Trial Chamber I on the Applications of the Prosecutor Dated 24 June and 30 August 1996 in Respect of the Protection of Witnesses*, 2 October 1996. See also: *Prosecutor v. Brđanin and Talić*, IT-99-36-T, *Decision on Motion by Prosecution for Protective Measures*, 3 July 2000, para. 11 *et seq.*

18. Moreover, it is incumbent upon the Prosecutor to show that measures prohibiting disclosure to the public or media specified in rule 87(3) would not be sufficient to ensure the protection sought. In other words, the Prosecutor must demonstrate that it is the accused him or herself, or his or her defenders, who would imperil the witness.

19. However, the Chamber will note that, on the one hand, the Prosecutor merely cites the general insecurity in Ituri and, on the other, that the Registry, having performed the necessary checks, has confirmed that no communication from the Accused has to date caused concern.<sup>19</sup>

20. The existence of grave danger ensuing from the disclosure to the Defence of the identity of Prosecution witnesses has hence not been established in this case.

- **Non-disclosure of the identity of Prosecution witnesses to the point that they are “properly protected” is, at the current stage of proceedings, prejudicial to and inconsistent with the rights of the defence**

21. At the current stage of proceedings, i.e. three months before the commencement of the trial, scheduled for 31 March 2008, the Defence urgently needs to carry out investigations, in particular pertaining to Prosecution witnesses due to appear soon.

22. However, non-disclosure of the identity of Prosecution witnesses stands in the way of the Defence’s being able properly to investigate their credibility since not only does it conceal their identity itself but it also removes any information from their statements which might enable them to be identified directly or indirectly.<sup>20</sup>

23. The need to have the exact identity of the Prosecution witnesses in order to investigate exonerating circumstances effectively is universally recognised;<sup>21</sup> the

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<sup>19</sup> ICC-01/04-01/06-1090.

<sup>20</sup> ICC-01/04-01/06-T-65-FRA, page 10, lines 15-18.

<sup>21</sup> *Prosecutor v. Brđanin and Talić*, IT-99-36-T, *Decision on motion by prosecution for protective measures*, 3 July 2000, para. 36:

The prosecution asked rhetorically: [E]ven if [the defence] have the name of a witness, how would this assist them preparing the defence of either of the two accused? These

ICTY went as far as to note the right of the defence to disclose their identity to third parties, despite a measure prohibiting public disclosure, where disclosure is necessary for effectively investigating the witnesses concerned.<sup>22</sup>

24. The submission of “summaries” concealing the identity of witnesses by no means compensates for the non-disclosure of complete witness statements. This stopgap has been authorised by the Appeals Chamber only during pre-trial proceedings, on a case by case basis, and “bearing in mind the character of the confirmation hearing”.<sup>23</sup> This procedure is no longer permitted at the current stage of proceedings. The communication of redacted statements rendered partially incomprehensible by heavy redacting is equally unacceptable.

25. Owing to difficulties relating in particular to distance and the complexity of travel, in order to carry out its investigations the Defence needs a period that the Chamber has correctly assessed of 12 weeks between complete disclosure of the Prosecutor’s evidence – initially scheduled for 14 December 2007 – and the commencement of the trial.<sup>24</sup> As it stands, the timetable fixed by the Chamber requires the Prosecutor immediately to disclose, without redactions, all Prosecution

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statements are quite unrealistic when applied to those witnesses who fall within the category of giving evidence which directly implicates the accused. There can be no assumption by counsel for the accused that these witnesses will be telling the truth. There are well documented cases where, upon a careful investigation, witnesses called by the prosecution have turned out not to have been where they say they were, or have subsequently retracted their evidence. The Appeals Chamber has placed a firm obligation upon those representing an accused person to make proper inquiries as to what evidence is available in that person’s defence. Some of the prosecution witnesses are likely to be of such importance that it will be necessary for at least the final stage of the investigation into those witnesses to be done by counsel who is to appear for the accused at the trial. That is obvious to anyone with experience of criminal trials. The earlier stages can be conducted by the investigator(s) retained for the accused in the field. Many more than one person may well need to be spoken to before appropriate information becomes available.

<sup>22</sup> For example: *Prosecutor v. Blaškić*, Case No. IT-95-14-T, *Decision on the application of the Prosecutor dated 17 October 1996 requesting protective measures for victims and witnesses*, 5 November 1996, p.13; *Prosecutor v. Brđanin and Talić*, IT-99-36-T, *Decision on motion by prosecution for protective measures*, 3 July 2000; *Prosecutor v. Milošević*, Case No. IT-02-54-T, *Decision on Prosecution motion for provisional protective measures pursuant to Rule 69*, 19 February 2002.

<sup>23</sup> ICC-01/04-01/06-773, paras. 40 to 51.

<sup>24</sup> ICC-01/04-01/06-1019, para. 29.

evidence. Any fresh delay in the performance of this obligation would be clearly prejudicial to and inconsistent with the rights of the Defence.<sup>25</sup>

**(2) Applications for non-disclosure under article 54(3)(f)**

26. The Prosecutor seeks leave not to disclose certain sequences from incriminating video materials on the grounds that such disclosure would reveal the identity of persons who are not on the list of Prosecution witnesses and might place them in danger.

27. The Chamber will note that the sequences concerned consist of interviews with persons that comprise testimonies against the Accused. It follows that, even when the persons concerned have not been called to testify before the Court as witnesses, they must nevertheless be treated as witnesses from the point of view of disclosure of evidence. Their identity must be disclosed to the Defence in the same manner and for the same reasons as that of Prosecution witnesses. The Defence hence refers to its previous observations on this point.

**(3) Non-disclosure applications under rule 81(2)**

28. The Prosecutor seeks leave not to disclose certain information contained in statements and documents on the grounds that its communication could be prejudicial to its investigations into crimes allegedly committed by the Accused other than those prosecuted in the instant case.<sup>26</sup>

29. The Defence recalls that the Pre-Trial Chamber has fully and finally established the charges against the Accused. The Prosecutor has publicly confirmed that he does not intend to add new offences.<sup>27</sup> An investigation into the alleged

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<sup>25</sup> For a discussion of the Defence's rights to full disclosure, see, *inter alia*, the separate opinion of Judge Georgio M. Pikis, ICC-01/04-01/06-774, p. 24 *et seq.*, para. 11.

<sup>26</sup> ICC-01/04-01/06-1081, paras. 26 to 28.

<sup>27</sup> ICC-01/04-01/06-T-65-FRA, page 33.

actions of the Accused cannot therefore justify a refusal to disclose information pursuant to rule 81(2).

30. The principle of fair prosecution does not allow rule 81(2) to be used to conceal incriminating evidence from the accused, whether or not that evidence relates to the charges confirmed by the Pre-Trial Chamber. It may be applied only to investigations into other suspects.

**FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I TO:**

TAKE into account the observations of the Defence set out herein.

[signed]

**Ms Catherine Mabilie, Lead Counsel**

Dated this 4 January 2008, at The Hague