

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-02/04-01/05

Date: 22 March 2007

PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Single Judge

Registrar: Mr Bruno Cathala

SITUATION IN UGANDA

IN THE CASE OF

THE PROSECUTOR

***vs. JOSEPH KONY, VINCENT OTTI, RASKA LUKWIYA, OKOT ODHIAMBO and
DOMINIC ONGWEN***

Public Document

**Prosecution's Application under Regulation 42(3) to Vary Protective Measures by
Lifting Redactions from Applications for Victims' Participation Provided to the OTP,
and To Submit a Further Reply under Rule 89(1) in the Case and Situation**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Ms Christine Chung, Senior Trial Lawyer
Mr Eric MacDonald, Trial Lawyer

***Ad Hoc* Defence Counsel**

Ms Michelyn C. St-Laurent

Preliminary Statement

The Office of the Prosecutor (“OTP”) respectfully applies under Regulation 42(3) to vary the protective measure imposed by the Single Judge’s decision of 1 February 2007, by lifting the redactions in the applications for victims’ participation provided to the OTP.

Procedural Background

1. On 1 February 2007, the Single Judge issued a decision entitled, “Decision on legal representation, appointment of counsel for the Defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and 1/0111/06 to a/0127/06.”¹ This decision (hereinafter “1 February 2007 Decision”), notified the public and the OTP that the Registry had received, on a confidential basis, 49 applications for victims’ participation in these proceedings.² The Decision ordered the transmission of these applications, in conformity with Rule 89(1), on or before 12 February 2007, to the OTP and also to *ad hoc* Defence counsel appointed in the decision.³ The OTP and *ad hoc* Defence counsel were ordered to submit observations in reply to the applications, under Rule 89(1).⁴
2. On 6 February 2007, the Prosecution filed an “Application to Lift Redactions From Applications for Victims’ Participation to be Provided to the OTP.”⁵ The application (hereinafter “6 February 2007 OTP Application to Lift Redactions”) stated, in

¹ ICC-02/04-01/05-134 (public document), 1 February 2007.

² *See id.*, para. 1.

³ *See id.*, p. 19.

⁴ *See id.*

⁵ ICC-02/04-01/05-150 (public document), 6 February 2007.

footnote 10, that the OTP was not seeking leave to appeal the 1 February 2007 Decision.⁶

3. From 13 to 15 February 2007, the Registry furnished redacted versions of the victims' applications.⁷ On 15 February 2007, the Prosecution filed further submissions supplementing the Application to Lift Redactions, based on a preliminary reading of the redacted applications (hereinafter, "15 February 2007 Further Submissions").⁸
4. On 20 February 2007, the Single Judge issued his "Decision on the Prosecutor's 'Application to Lift Redactions From Applications for Victims' Participation to be Provided to the OTP' and on the Prosecution's further submissions supplementing such Application, and request for extension of time."⁹ That decision (hereinafter "20 February 2007 Decision") determined that "a request to the Chamber for leave to appeal under Article 82 paragraph 1(d) of the Statute is the only remedy of a general nature whereby participants can voice their concerns regarding a Chamber's decision."¹⁰ The Decision thus found that "the Prosecutor's Application is deprived of procedural basis" and on that basis declined to "consider the merits of the submissions."¹¹
5. On 23 February 2007, by decision entitled "Decision on "Requête de la Défense en extension de délai afin de répondre aux 'Observations de la Défense sur les

⁶ See *id.*, note 10.

⁷ In the situation, the Prosecution received 47 applications on 13 February 2007 and 2 applications on 14 February 2007. In the case, the Prosecution received 9 applications on 13 February 2007, 39 applications on 14 February 2007, and one application on 15 February 2007.

⁸ Prosecution's further submissions supplementing its 'Application to Lift Redactions From Applications for Victims' Participation to be Provided to the OTP', dated 6 February 2007, and request for extension of time' (public document), ICC- 02/04-01/05-208, 15 February 2007.

⁹ ICC-02/04-01/05-209 (public document), 20 February 2007.

¹⁰ See *id.*, p. 5.

¹¹ See *id.*, p. 6.

demandes de participation à la procédure a/0010/06, a/0064/06 à a/0070/06, a/0070/06, a/0081/06 à a/0104/06 et a/0111/06 à a/0127/06,”¹² the Single Judge granted *ad hoc* Defence counsel an extension of time until 6 March 2007 to reply to the Applications, and the OTP an extension of time until 28 February 2007 to file its reply.¹³

6. On 26 February 2007, the Prosecution filed its “Request for Leave to Appeal the Decision Denying the ‘Application to Lift Redactions From Applications for Victims’ Participation to be Provided to the OTP.”¹⁴ Among other things, the Prosecution argued that the 20 February 2007 Decision erred in failing to reach the merits of the 6 February 2007 OTP Application to Lift Redactions, because Regulation 42(3) of the Regulations of the Court expressly directs that “[a]ny application to vary a protective measure shall first be made to the Chamber which issued the order.”¹⁵
7. On 28 February 2007, based on its review of the redacted applications for victims’ participation, the OTP filed replies under Rule 89(1). In the situation, the OTP filed the “Prosecution’s Reply under Rule 89(1) to the Applications for Participation of Applicants a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to 1/0104/06 and a/0111/06 to a/0127/06 in the Uganda Situation.”¹⁶ In the case, the OTP filed the “Prosecution’s Reply under Rule 89(1) to Applications for participation of Applicants a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to 1/0104/06 and a/0111/06 to a/0127/06 in the Case of the Prosecutor vs. JOSEPH KONY, VINCENT OTTI, RASKA LUKWIYA, OKOT

¹² ICC-02/04-01/05-211 (public document), 23 February 2007.

¹³ *See id.*, p. 8.

¹⁴ ICC-02/04-01/05-212 (public document), 26 February 2007.

¹⁵ *See id.*, para 7.

¹⁶ ICC-02/04-85 (public document), 28 February 2007.

ODHIAMBO and DOMINIC ONGWEN” (hereinafter, “OTP’s Reply to Applications in the Case”).¹⁷

8. On 9 March 2007, the Single Judge issued his “Decision on the “Prosecution's Request for Leave to Appeal the Decision Denying the 'Application to Lift Redactions From Applications for Victims' Participation to be Provided to the OTP”” (hereinafter “9 March 2007 Decision Denying Leave to Appeal”).¹⁸ In this Decision, the Single Judge denied leave to appeal. The Decision noted that “nowhere, either in his Application to Lift Redactions or in his Further Submissions, did the Prosecutor argue that he was bringing a motion under regulation 42, sub-regulation 3, of the Regulations”¹⁹ and that consequently “neither the issue of the scope and purpose of regulation 42, sub-regulation 3, of the Regulations, nor its relationship to article 82, paragraph 1(d), of the Statute, were addressed by the Decision on the Prosecutor's Application to Lift Redactions.”²⁰

Application under Regulation 42(3) to Vary Protective Measures by Lifting Redactions from Applications for Victims’ Participation Furnished to the Prosecution

A. This Application and the Impugned Determination

9. The Prosecution respectfully applies under Regulation 42(3) for lifting of the redactions in the applications for victims’ participation which are the subject of the 1 February 2007 Decision, insofar as those applications have been provided to the OTP. The 1 February 2007 Decision expressly justified redactions of information from the versions of the applications provided to the OTP and to *ad hoc* Defence

¹⁷ ICC-02/04-01/05-214 (public document), 28 February 2007.

¹⁸ ICC-02/04-01/05-219 (public document), 9 March 2007.

¹⁹ *See id.*, p. 4.

²⁰ *See id.*

counsel on the ground that the redactions constituted a necessary “protective measure.”²¹ The OTP notes that Regulation 42(3), which directs the making of an application to vary protective measures to “the Chamber which issued the order,” imposes no time limit for the submission of the application. Nor logically should there be a time-limit, as long as the protective measure in question remains in effect and, as is set forth below, continues to affect the ability of a party or participant to claim entitlements granted by the Statute or to fulfil obligations imposed by the Statute.²²

10. The 9 March 2007 Decision also expressly disclaimed any determination on the core issue of whether it is appropriate to lift the redactions at issue.²³ This application seeks an adjudication of the merits of that legal claim, based on additional facts which came to light after the redacted versions of the applications were furnished to the OTP and *ad hoc* Defence counsel. These facts, critically, include the circumstance that the redacted applications themselves furnish no rationale for redaction of information from the OTP. This application seeks, by means of an avenue identified in the 9 March 2007 Decision Denying Leave to Appeal,²⁴ a determination on the merits, which is distinct from the procedural issue determined by the 20 February

²¹ This is apparent from the title of the Decision as well as the subheading “Whether there is a need to adopt any protective measures and, in the affirmative, of which nature,” *see* 1 February 2007 Decision, p. 12, and the discussion at paras. 16-25 of the Decision.

²² *See Prosecutor v. Milan Lukic & Sredoje Lukic*, “Decision on Prosecutor’s Motion for Order on Protective Measures,” Case no. IT-98-32/1, 2 November 2005, para. 10 (denying Prosecution’s application for variation of protective measures under ICTY Rule 75(F)(G) because of continued effectiveness of measures ordered in a different case, but noting that “...the Prosecution may file a motion at any time in the present proceedings requesting additional protective measures, or the rescission, variation or augmentation of existing protective measures...”); *Prosecutor v. Jean de Dieu Kamuhanda*, “Decision on Jean de Dieu Kamuhanda’s Motion for Protective Measures for Defense Witnesses,” Case no. ICTR-99-54, 22 March 2001, para. 24. (“Defense is obviously at liberty, pursuant to Rule 75 of the Rules to request a Judge or Trial Chamber, at any time, to amend the protective measures or to seek additional measures for its witnesses, if necessary”).

²³ *See* ICC-02/04-01/05-219 (public document), 9 March 2007, p. 4.

²⁴ *See id.*

2007 Decision or the 9 March 2007 Decision. Also, the OTP submits that the prior decisions of the Single Judge establish that this application to vary protective measures under Regulation 42(3) has already been deemed by the Single Judge to be legally distinct from the 6 February 2007 Application to Lift Redactions; if the two applications had been considered to be the same, there would have been no reason for the prior Decisions not to have addressed the merits of the question of the propriety of lifting the redactions vis-à-vis the OTP.

11. The protective measure announced by the 1 February 2007 Decision, and which the OTP seeks to vary, directed that both the OTP and *ad hoc* Defence counsel be provided with versions of the applications for participation redacted of information including, but not limited to, information relating to the applicant's identity, location where victimization occurred, "commanders" who carried out the incident resulting in the victimization, and the specific features of the injury, loss or harm allegedly suffered.²⁵ The Decision identified two grounds for viewing this protective measure to be warranted, vis-à-vis the Prosecution:

(1) because "serious security concerns arising from the situation in the field . . . require[] a particularly restrictive approach."²⁶

(2) because "fundamental considerations of fairness (namely, the need to preserve equality of arms), . . . require that both parties be placed on an equal footing in respect of the exercise of a right which is bestowed on them by both the statutory texts."²⁷

Under the terms of the Decision, the Office of Public Counsel for Victims received unredacted versions of the applications.²⁸

²⁵ See *id.*, paras. 19, 21, 22, 25.

²⁶ See *id.*, para. 25.

²⁷ See *id.*

²⁸ See *id.*, p. 19.

B. The Decision that the Applications Furnished to the OTP Should Be Redacted Creates Inconsistent Jurisprudence Between the Pre-Trial Chambers of the ICC, and Between ICC Jurisprudence and that of Other International Criminal Tribunals

12. It is notable that the determination in the 1 February 2007 Decision that the OTP should be furnished with redacted applications for victims' participation creates a significant divergence in the rulings of Pre-Trial Chamber I and the Single Judge of this Chamber. On each of the numerous occasions in which Pre-Trial Chamber I or any Single Judge of that Chamber has ordered, pursuant to Rule 89(1), the transmission of applications for victims' participation to the parties, in either the DRC situation or the *Lubanga* case, it has ordered the OTP to receive unredacted versions.²⁹

13. The OTP also has been unable to find any precedent, in the *ad hoc* or hybrid tribunals, for victim or witness-related information of a type routinely handled by the OTP to be withheld from the OTP: (1) either on the grounds of general security

²⁹ See in the DRC situation, Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp (public redacted version), ICC-01/04-73, 21 July 2005, p. 5; Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0072/06 à a/0080/06 et a/0105/06 (document public), ICC-01/04-241, 29 septembre 2006, p. 4; Decision Appointing Ad Hoc Counsel and Establishing a Deadline for the Prosecution and the Ad Hoc Counsel to Submit Observations on the Applications of Applicants a/0001/06 to a/0003/06 (public document), ICC-01/04-147, 18 May 2006, p. 4; Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06 (document public), ICC-01/04-228, 22 septembre 2006, p. 5; see in the *Lubanga* case, Decision Establishing a Deadline for the Prosecution and the Defence to submit Observations on the Applications of Applicants a/0001/06 to a/0003/06 (document public), ICC-01/04-01/06-107, 18 May 2006, p.4; Décision autorisant le Procureur et la Défense à déposer des observations sur les demandes des requérants a/0004/06 à a/0009/06, a/0016/06 à a/0046/06 et a/0047/06 à a/0052/06 dans le cadre de l'affaire le Procureur c. Thomas Lubanga Dyilo (document public), ICC-01/04-01/06-270, 4 août 2006, p. 5; Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06 (document publique), ICC-01/04-01/06-463, 22 septembre 2006, p.5; Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0072/06 à a/0080/06 et a/0105/06 (document publique), ICC-01/04-01/06-494, 29 septembre 2006, p. 4; Décision sur la demande d'autorisation d'appel de la Défense relative à la transmission des Demandes de participation des victimes (document public), ICC-01/04-01/06-672, 6 novembre 2006, p. 7.

concerns without findings specific to a risk linked specifically to the OTP; or (2) on the grounds of equality of arms.

C. The Legal Reasoning of Pre-Trial Chamber I Is Fully Applicable Here

14. It is respectfully submitted that the reasoning of Pre-Trial Chamber I is fully applicable with respect to the applications which were the subject of the 1 February 2007 Decision. On 21 July 2005, Pre-Trial Chamber I first determined to furnish the OTP with unredacted versions of applications for victims' participation.³⁰ This decision was entered in the DRC situation and entitled "Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp."³¹ In its decision, Pre-Trial Chamber I observed initially that "...the scope of redactions cannot exceed what is strictly necessary in light of the applicant's security situation"³² It then made the following findings:

(1) "...that according to rule 5, paragraph 1(b) and rule 6, paragraphs 1 and 2 of the Rules, the Prosecutor, Deputy Prosecutor and all staff members of the Office of the Prosecutor are bound by principle of confidentiality; that to date the Pre-Trial Chamber has no indication of any breach of such confidentiality obligations; and that according to article 68, paragraph 1 of the Statute, the Prosecutor is also under an obligation to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses;"³³

³⁰ See Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp (public redacted version), ICC-01/04-73, 21 July 2005.

³¹ See *id.*

³² See *id.*, p. 4.

³³ See *id.*, p. 5. The Pre-Trial Chamber logically did not deem Defence confidentiality duties to be of similar force. For defence counsel, the matter of confidentiality is an ethical prohibition, see Code of Professional Conduct for Counsel, Art. 8(1), but not Rule-based.

(2) "...further that the Prosecutor is already aware of the situation of many victims, including in particular that of the Applicants, and that there are no indications that the transmission of unredacted copies of the Applications to the Prosecutor will increase the security risks that they currently face."³⁴

15. In August 2006, after commencement of the case, counsel for the Defence in the *Lubanga* case twice challenged the practice of Pre-Trial Chamber I of ordering that only the Defence should receive redacted versions of the applications for victims' participation.³⁵ The Defence specifically raised a claim of "procedural inequality" between the Prosecution and the Defence, in light of the Prosecution's receipt of unredacted applications for participation.³⁶ The Single Judge³⁷ and subsequently Pre-Trial Chamber I³⁸ rejected the respective Defence challenges, and the Chamber continued to furnish unredacted versions of the applications to the OTP only.³⁹

³⁴ See *id.*

³⁵ See Request for Leave to Appeal the 'Decision sur les demandes de participation a la procedure a/0001/06, a/0002/06, et a/0003/06 dans le cadre de l'affaire Le Procureur v. Thomas Lubanga et de l'enquête en République démocratique du Congo' (public document), ICC-01/04-01/06-272, 7 August 2006 and Request for Access to the Unredacted Versions of the Applications of Applicants a/0004/06 to 1/0009/06, 1/0016/06 to 1/0046/06, and a/0047/06 to a/0052/06, and for an Extension of Time (public document), ICC-01/04-01/06-328, 14 August 2006.

³⁶ See Request for Leave to Appeal the 'Décision sur les demandes de participation a la procédure a/0001/06, a/0002/06, et a/0003/06 dans le cadre de l'affaire Le Procureur v. Thomas Lubanga et de l'enquête en République démocratique du Congo' (public document), ICC-01/04-01/06-272, 7 August 2006, section 2.1.2.1, specifically paras. 38-39; see also Request for Access to the Unredacted Versions of the Applications of Applicants a/0004/06 to 1/0009/06, 1/0016/06 to 1/0046/06, and a/0047/06 to a/0052/06, and for an Extension of Time (public document), ICC-01/04-01/06-328, 14 August 2006, para. 25 and Section 3.1.

³⁷ See *Décision relative aux requêtes de la Défense et de l'Accusation concernant la prorogation de délai* (document public), ICC-01/04-01/06-334, 16 August 2006, p.4.

³⁸ See *Decision on Defence Motion for Leave to Appeal* (public document), ICC-01/04-01/06-338, 18 August 2006, pp. 7-8.

³⁹ See authorities cited *supra* at note 29.

16. The reasons which have consistently been stated and relied upon by Pre-Trial Chamber I in the DRC situation and case demonstrate that it is appropriate to lift all of the redactions ordered in this proceeding, in the copies which have been furnished to the OTP. The 1 February 2007 Decision in this proceeding first based the need for non-disclosure to the OTP upon the seriousness of the security situation in Northern Uganda. The Decision, however, does not explain why disclosure to the OTP, in particular, of information relating to the applicants should be considered to pose a risk of exposing the applicants to endangerment in Northern Uganda. As such, the Decision of the Single Judge fails to demonstrate why redaction of the copies to be furnished to the OTP is “strictly necessary.”⁴⁰ In the context of determining the permissible extent of protective measures imposed under authority of Rule 81(4), the Appeals Chamber of this Court has endorsed the standard that protective measures should restrict the rights of participants “only as far as is necessary.”⁴¹ In addition, the Appeals Chamber more recently has stressed, in two decisions reversing judgments of Pre-Trial Chamber I, the need for the Chambers to “indicate with sufficient clarity the basis of the[ir] decision.”⁴² One of the decisions – the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’ ” – discusses the fundamental obligation of

⁴⁰ See Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp (public redacted version), ICC-01/04-73, 21 July 2005, p. 4.

⁴¹ See Judgment on the Prosecutor’s Appeal against the decision of Pre-Trial Chamber I entitled “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, para. 37 (affirming that non-disclosure is “the exceptionality,” see *id.*, para. 38, and that non-disclosure ordered on the ground of protecting witnesses should restrict the rights of the accused only as far as necessary).

⁴² See Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81,” ICC-01/04-01/06-773 (OA 5), 14 December 2006, para. 20; Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81,” ICC-01/04-01/06-774 (OA 6), 14 December 2006, para 30.

the Chambers to provide sufficient reasoning, based on the facts presented, to justify any redaction of a document to which a party would otherwise be entitled, when redaction is imposed as a protective measure.⁴³ It is respectfully submitted that the 1 February 2007 Decision fails to provide a legally sufficient explanation of the reasons that disclosure *to the OTP* of unredacted applications for participation posed a risk to the applicants. As such, the protective measure of non-disclosure to the OTP should be varied.

17. Nor is equality of arms a consideration which justifies the non-disclosure to the OTP of redacted applications for participation. As Pre-Trial Chamber I found, the Prosecution and Defence are not on equal footing on the issues of confidentiality and victim protection. Unlike the Defence, the Prosecution has obligations of confidentiality based in the Rules of Procedure and Evidence, as well as duties of victim and witness protection under Art. 68(1) of the Statute. Withholding from the OTP the identities and full circumstances of victimization and harm is therefore unwarranted, particularly absent prior breaches of the OTP's confidentiality obligations. Non-disclosure additionally undermines the OTP's ability to execute its own statutory duties, at a minimum by frustrating the OTP's capacity to identify victims or witnesses to whom it may owe (or indeed may already be providing) protective measures.⁴⁴

⁴³ See Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81," ICC-01/04-01/06-773 (OA 5), 14 December 2006, paras. 20-21 (fundamental fairness requires that non-disclosure on grounds of protection be supported by sufficient reasoning based on the facts, and when Chamber authorizes non-disclosure of identity of a witness on ground of "endangerment of the witnesses or members of their families," it must indicate "why the Pre-Trial Chamber expected that the security of witnesses or their families may be endangered if the witnesses' identities were disclosed to the [party].")

⁴⁴ Notably, Pre-Trial Chamber I, which has invoked the principle of equality of arms in other pre-trial contexts, *see* *Décision relative à la requête du procureur sollicitant l'autorisation d'interjeter appel de la décision de la chambre du 17 janvier 2006 sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 ET VPRS 6* (document public), ICC-01/04-135, 20 April 2006, paras. 38,

D. The Redacted Applications Further Support that There Are No Security Concerns Which Justify the Withholding of Victim-Related Information from the OTP

18. The redacted applications themselves, which were made available for the first time to the OTP and *ad hoc* Defence counsel on 13 February 2007 to 15 February 2007, further demonstrate the lack of any security concern which could justify the withholding of victim-related information from the OTP. Only five of the 49 applicants have requested that the OTP not be informed of their identity and/or of other information in their applications.⁴⁵ In all five of these cases, in addition, the request was not specific to the OTP; rather, the five applicants requests that the information be withheld from the OTP and at least one of the following: Defence counsel, the public, or the State.⁴⁶ Finally, while three of the five applicants who requested confidentiality in some form provided general security reasons to withhold their identities and/or information, none of these five gave any specific justification as to how or why their concerns related to the OTP.⁴⁷ The applications, in sum, furnished no reason to believe that any information contained in those applications was in any way different from the type of victim-related information which is received and handled by the OTP every day.

E. The Redactions Have Prevented the OTP from Exercising Rights Granted by Rule 89(1), from Adequately Fulfilling its Protection Obligations under Article 68(1), and from Determining Whether There Are Witnesses Who Have Already Been Interviewed by the OTP among the Applicants

54 (the PTC I did not apply that principle when deciding the propriety of releasing unredacted applications for victims' participation to the OTP). See Decision on Defence Motion for Leave to Appeal (public document), ICC-01/04-01/06-338, 18 August 2006, pp. 7-8.

⁴⁵ See Prosecution's further submissions supplementing its 'Application to Lift Redactions From Applications for Victims' Participation to be Provided to the OTP', dated 6 February 2007, and request for extension of time' (public document), ICC- 02/04-01/05-208, 15 February 2007, para. 10 (*see* applications a/0065/06, a/0066/06 a/0067/06 a/0100/06 a/0115/06).

⁴⁶ *See id.*

⁴⁷ *See id.*, para. 11.

19. After receiving the redacted applications, the OTP also identified, by means of the 15 February 2007 Further Submissions, and the OTP's Reply to Applications in the Case, the ways in which the redactions, upon review of their scope and nature, indeed have impaired the exercise of the OTP's entitlements and duties. *First*, the redaction of dates and factual information relating to the harm which is reported to have been inflicted, including information identifying the purported perpetrator or perpetrators, has prevented the OTP from meaningfully replying under Rule 89(1), because the redactions most often have made it impossible to determine if the harm suffered by the applicant was a result of any of the crimes which form the basis of the charges in the Arrest Warrants.⁴⁸ In the case of four of the 49 applications, the redactions make it impossible to establish the basic fact of whether the harm alleged was inflicted within the temporal jurisdiction of the Court.⁴⁹ *Second*, the redactions prevent the OTP from fulfilling its own protection obligations under Art. 68(1), because the OTP has been barred from access to information which: (1) might establish or confirm that witnesses previously interviewed by the OTP are among the applicants and in need of protective measures or a variation in existing protective measures; or (2) might affect the OTP's assessment of the adequacy of existing protection measures relating to victims or OTP witnesses.⁵⁰ *Third*, the OTP is prevented by virtue of the redactions from establishing that it might be appropriate for the application to be denied at this stage in the proceedings because of the applicant's pre-existing status as a person interviewed by the OTP and already subject to protective measures. Pre-Trial Chamber I found it "inappropriate at this particular stage in the proceedings" to grant victim status to applicants who had previously been interviewed by the Prosecution and were already subject to

⁴⁸ See OTP's Reply to Applications in the Case, para. 21, note 54 (applications a/0064/06; a/0067/06; a/0068/06; a/0069/06; a/0088/06; a/0089/06; a/0092/06; a/0097/06; a/0101/06; a/0102/06; a/0114/06; a/0126/06).

⁴⁹ See *id.*, note 57 (applications a/0067/06, a/0068/06; a/0069/06; a/0089/06).

⁵⁰ See 15 February 2007 Further Submissions, para. 6.

protection measures, because of the risks which were likely to be created if such applicants were granted the status of victims and thus were compelled to engage in repeated contacts with their legal representatives.⁵¹ The redactions imposed by the 1 February 2007 Decision make it impossible for the OTP to identify witnesses it has previously interviewed, as it did in the *Lubanga* proceeding, and therefore prevent consideration of the potential impact of the applicant's dual status as both victim and witness upon the witness or upon future proceedings.

F. An Unwarranted Distinction among the Sections of the Court Underlies the Protective Measure of Limiting the OTP's Access to Unredacted Versions of the Applications

20. This application has thus far noted: (1) the unprecedented nature of the 1 February 2007 Decision, in this Court and in other tribunals; (2) the lack of any reason based in the record or the applications themselves to believe that it is "strictly necessary"⁵² to provide redacted applications to the OTP; and (3) the lack of an adequate explanation of the reasons underlying the determination to furnish the OTP with only redacted material.

21. In this Court, as in other international criminal tribunals, the rules of the Court – specifically, Rules 5 and 6 of the ICC Rules of Evidence and Procedure – impose confidentiality obligations upon officers and staff within the Organs of the Court equally. In light of these confidentiality obligations, the OTP respectfully submits that Pre-Trial Chamber I was correct to apply the rule that victim-related information should not redacted or withheld from the OTP so long as (1) if the information is not

⁵¹ See *id.*, para. 9 (citing « Décision sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 dans le cadre de l'affaire le Procureur c. Thomas Lubanga Dyilo » (public), ICC-01/04-01/06-601, 20 octobre 2006, pp. 5, 10-11, 13).

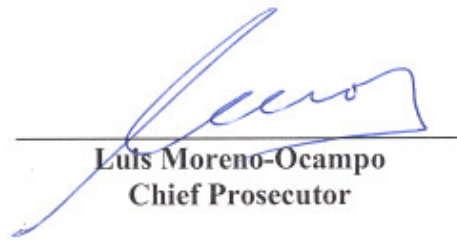
⁵² See Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp (public redacted version), ICC-01/04-73, 21 July 2005, p. 4.

different in kind to the type of victim and witness-related information that the OTP routinely receives and manages; and (2) absent any specific indications from the record that disclosing the information to the OTP will create a risk to victims or witnesses. It is a matter which could reflect on the institution as a whole for the Chambers of this Court to order the withholding of information which a section of the Court is ordinarily entitled by Statute to receive and possess, because the information enables the performance of statutory duties, when there is no reason in the record for expecting that the section of the Court would violate its confidentiality obligations. Also, in this proceeding, the Single Judge and Pre-Trial Chamber II are aware that in addition to receiving and managing victim and witness-related information on a routine basis, the OTP also has regularly provided security-related information to the VWU, and also has provided such information to the Chamber, to help ensure the efficacy of all efforts to protect victims and witnesses. A determination which prevents the OTP from gaining access to victim- and witness-related information of a type which it routinely handles thus also has the potential broader effect of arbitrarily impairing the OTP's provision of protection-related information to the Chamber and its capacity to aid VWU in fulfilling its role of advising both the OTP and the Court on appropriate protective measures, *see* Art. 68(4).

Conclusion

For the foregoing reasons, the OTP respectfully applies under Regulation 42(3) to vary protective measures by lifting the redactions in the applications for victims' participation provided to the OTP pursuant to the 1 February 2007 Decision. The OTP has set forth in this submission the reasons that the lifting of the redactions is warranted to enable the OTP to exercise entitlements granted by the Rules and to perform ongoing obligations under the Statute and the Rules. Among the

entitlements is the opportunity to submit a meaningful reply under Rule 89(1). For this reason, the OTP also respectfully requests that in the event that the relief sought in this application is granted, it be permitted to supplement its prior replies, in the situation and case, under Rule 89(1).



Luis Moreno-Ocampo
Chief Prosecutor

Dated this 22nd day of March 2007
At The Hague, The Netherlands

List of Cited Authorities

I. JURISPRUDENCE

ICTY

1. *Prosecutor v. Milan Lukic & Sredoje Lukic*, Case no. IT-98-32/1, “Decision on Prosecutor’s Motion for Order on Protective Measures,” 2 November 2005, <http://www.un.org/icty/lukic/trialc/decision-e/051102.htm> (Last visited 22 March 2007).

ICTR

2. *The Prosecutor v. Jean De Dieu Kamuhanda*, Case no. ICTR-99-54, “Decision on Jean De Dieu Kamuhanda’s Motion for Protective Measures for Defence Witnesses” 22 March 2001, <http://69.94.11.53/ENGLISH/cases/Kamuhanda/decisions/220301.htm> (Last visited 22 March 2007).