

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER I

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

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

Public

Redacted Decision on the "Prosecution's Request for Lifting of Redactions to the Identity of One Individual providing Rule 77 Information and Request for Redactions further to Article 54(3)(f) and Rules 81(2) and 81(4)" and "Prosecution's application for variation in the protective measures concerning witness 44 and witness 101" of 24 July 2009

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Detention Section

**Victims Participation and Reparations
Section**

**Other
Trial Chamber II**

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, delivers the following Decision on the “Prosecution’s Request for Lifting of Redactions to the Identity of One Individual providing Rule 77 Information and Request for Redactions further to Article 54(3)(f) and Rules 81(2) and 81(4)” and on the “Prosecution’s application for variation in the protective measures concerning witness 44 and witness 101”, and on part of the “Prosecution’s Application for Non-Disclosure of Sources contained in the meta-data in compliance with the Consolidated E-Court Protocol”:¹

I. Background and submissions

1. On 12 June 2009, the Trial Chamber authorised redactions to the identity of eight individuals pursuant to Article 68 of the Rome Statute (“Statute”) and Rule 81(4) of the Rules of Procedure and Evidence (“Rules”) that had been sought by the Office of the Prosecutor (“prosecution”).² In exercising its protective obligations, the Chamber authorised the non-disclosure of witness DRC-OTP-WWWW-0101’s (“Witness 101”) identity and ordered the service of his statement on the defence with substantial redactions.³ In the same Decision, the Chamber authorised the non-disclosure of the identity of witness DRC-OTP-WWWW-0044 (“Witness 44”), as well as the service of a

¹ Prosecution’s Request for Lifting of Redactions to the Identity of One Individual providing Rule 77 Information and Request for Redactions further to Article 54(3)(f) and Rules 81(2) and 81(4), 24 July 2009, ICC-01/04-01/06-2066-Conf; Prosecution’s application for variation in the protective measures concerning witness 44 and witness 101, 24 July 2009, ICC-01/04-01/06-2067; Prosecution’s Application for Non-Disclosure of Sources contained in the meta-data in compliance with the Consolidated E-Court Protocol, 16 April 2009, ICC-01/04-01/06-1820-Conf-Exp; A public version was filed on 14 May 2009, ICC-01/04-01/06-1871.

² Decision on the “Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information” of 5 December 2008 and “Prosecution’s Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information” of 12 March 2009, 12 June 2009, ICC-01/04-01/06-1965-Conf-Exp; The confidential and public redacted versions were issued on 24 June 2009, ICC-01/04-01/06-1980-Conf-Anx1 and ICC-01/04-01/06-1980-Anx2.

³ ICC-01/04-01/06-1965-Conf-Exp, paragraphs 86 – 92 and 98. To prevent any prejudice to the accused, the Chamber had also approved five admissions of fact and had ordered the disclosure of several items of alternative evidence.

summary [REDACTED] on the defence.⁴

2. On the request of Trial Chamber II,⁵ the prosecution successfully contacted these two witnesses in the context of the case against Germain Katanga and Mathieu Ngudjolo Chui ("Katanga and Ngudjolo case"), in order to obtain their observations regarding the disclosure of their statements and identities to the defence in that trial.⁶ Witness 101 conditionally consented to disclosure of his identity in the Katanga and Ngudjolo case and in the case against Thomas Lubanga ("Lubanga case"),⁷ whereas Witness 44 consented to disclosure [REDACTED] to the Chamber and the parties in the Katanga and Ngudjolo case, but objected to disclosure in the Lubanga case.⁸
3. On 17 July 2009, the prosecution resubmitted the statements of Witnesses 101 and 44 to Trial Chamber II in order to seek authorisation for certain redactions before disclosing the statements to the defence teams in the Katanga and Ngudjolo case.⁹
4. On 22 July 2009, Trial Chamber II ordered the prosecution to submit its request to implement redactions in relation to Witnesses 101 and 44 to Trial Chamber I on the basis of Regulation 42(1) of the Regulations of the Court.¹⁰ It made available to Trial Chamber I the relevant transcript of the *ex parte* hearing (8 July 2009), along with the entirety of the submissions advanced by parties in the Katanga and Ngudjolo case on the issue of the protection of

⁴ ICC-01/04-01/06-1965-Conf-Exp, paragraphs 65 – 72 and 98. To prevent any prejudice to the accused, the Chamber had also approved two admissions of fact and had ordered the disclosure of several items of alternative evidence.

⁵ Transcript of hearing on 8 July 2009, ICC-01/04-01/07-T-68-CONF-EXP-ENG-ET.

⁶ ICC-01/04-01/06-2067, paragraphs 5 and 6.

⁷ ICC-01/04-01/06-2067, paragraph 6.

⁸ *Ibid.*

⁹ Prosecution's Resubmission of the Statements of Witnesses 101 and 44, 17 July 2009, ICC-01/04-01/07-1315.

¹⁰ Décision sur la protection de 21 témoins relevant de l'article 67-2 du Statut et/ou de la règle 77 du Règlement de procédure et de preuve, 22 July 2009, ICC-01/04-01/07-1329-Conf-Exp, paragraph 55 and page 31; the public redacted version was issued on 24 July 2009, ICC-01/04-01/07-1332, page 28.

individuals before Trial Chamber II.¹¹

5. [REDACTED].¹²

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6. On 24 July 2009, the prosecution filed a request before this Chamber to disclose the identity of Witness 101, and to authorise redactions to the names of two family members of the witness and to the name and identifying features of an individual who had provided information and documents to him.¹³

7. The prosecution indicated that the witness agreed to disclosure of his identity in both the Katanga and Ngudjolo case and the Lubanga case, but that in the latter case, his consent was given only on the condition that his identity and statement are not disseminated or made known to third parties.¹⁴ [REDACTED].¹⁵

8. The prosecution further submitted that the requested redactions protect others who reside in areas of risk and who are not in a protection programme.¹⁶ Information in this regard is said not to be material to the defence and withholding it will not restrict the defence's ability to comprehend and assess the relevant information in the statement.¹⁷ The prosecution maintains that other than redacting the names of two family

¹¹ ICC-01/04-01/07-1332, page 27.

¹² [REDACTED].

¹³ ICC-01/04-01/06-2066-Conf. The information relating to the family members and the source for which redactions are sought had been part of the sections of the statement for which redactions were authorised by the Chamber in order to protect the witness's identity on 12 June 2009.

¹⁴ ICC-01/04-01/06-2066-Conf, paragraph 3.

¹⁵ ICC-01/04-01/06-2066-Conf, paragraph 4.

¹⁶ ICC-01/04-01/06-2066-Conf, paragraph 7.

¹⁷ ICC-01/04-01/06-2066-Conf, paragraph 8.

members, it has no means of protecting them.¹⁸ The redactions relevant to the individual who provided information to Witness 101 are sought in order to protect the ongoing investigations and to protect him from the risk of harm arising on account of information he provided.¹⁹ The prosecution cites previous Decisions of Trial Chamber II in which it authorised redactions to protect family members and prosecution sources.²⁰

9. [REDACTED].²¹

10. The prosecution referred to the earlier "Prosecution's Application for Non-Disclosure of Sources contained in the meta-data in compliance with the Consolidated E-Court Protocol" in which it requested authorisation to redact the identity of Witness 101 in two e-court meta-data fields.²² The prosecution indicated that if the Trial Chamber grants the requests in the present filing, then it will withdraw the pending application.²³

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11. Also on 24 July 2009, the prosecution filed the "Prosecution's application for variation in the protective measures concerning witness 44 and witness 101".²⁴ The prosecution seeks a variation of the existing protective measures for these individuals so that it is able to comply with its disclosure obligations in the Katanga and Ngudjolo case.²⁵

12. The prosecution intends to disclose the statement of Witness 101 to the

¹⁸ Annex 3 to Prosecution's Request for Lifting of Redactions to the Identity of One Individual providing Rule 77 Information and Request for Redactions further to Article 54(3)(f) and Rules 81(2) and 81(4), 24 July 2009, ICC-01/04-01/06-2066-Conf-Exp-Anx3.

¹⁹ ICC-01/04-01/06-2066-Conf-Exp-Anx3.

²⁰ ICC-01/04-01/06-2066-Conf-Exp-Anx3.

²¹ ICC-01/04-01/06-2066-Conf, paragraphs 5, 6 and 10.

²² ICC-01/04-01/06-2066-Conf, paragraphs 2 and 9, referring to ICC-01/04-01/06-1820-Conf-Exp (public version: 14 May 2009, ICC-01/04-01/06-1871).

²³ ICC-01/04-01/06-2066-Conf, paragraph 9.

²⁴ ICC-01/04-01/06-2067.

²⁵ ICC-01/04-01/06-2067, paragraph 11.

accused in both cases, and thus it seeks authorisation to lift the existing redactions protecting his identity, whilst simultaneously seeking leave to redact the names of two family members and one prosecution source.²⁶

13. As Witness 44 explicitly objected to disclosure [REDACTED] in the Lubanga case, but consented *vis-à-vis* the Katanga case, the prosecution seeks authorisation to lift the redactions to the witness's identity in order to disclose it to the accused in the Katanga and Ngudjolo case alone (however, see the development of the prosecution's position on this issue set out below).²⁷ The prosecution also requests authorisation to redact information that reveals the identity of certain family members of Witness 44, as well as that of someone who assisted at the interviews.²⁸

Responses

14. On 12 August 2009, the defence,²⁹ and on 13 August 2009, the Office of Public Counsel for Victims ("OPCV")³⁰ and the legal representatives,³¹ informed the Chamber that they did not intend to respond to the filings of the prosecution.

ICC-01/04-01/06-2083-Conf-Exp-AnxA

15. On 17 August 2009, in response to an order by the Chamber concerning a different application for variation of protective measures,³² the prosecution submitted a filing containing information about various individuals for which

²⁶ ICC-01/04-01/06-2067, paragraph 12.

²⁷ ICC-01/04-01/06-2067, paragraph 13.

²⁸ ICC-01/04-01/06-2067, paragraph 8.

²⁹ Email communication from the defence to the Trial Chamber through the Legal Advisor to the Trial Division on 12 August 2009.

³⁰ Email communication from the OPCV to the Trial Chamber through the Legal Advisor to the Trial Division on 13 August 2009.

³¹ Email communication from Luc Walley to the Trial Chamber through the Legal Advisor to the Trial Division on 13 August 2009; Email communication from Carine Bapita to the Trial Chamber through the Legal Advisor to the Trial Division on 13 August 2009.

³² Order on the prosecution's application to vary protective measures under Regulation 42, 27 July 2009, ICC-01/04-01/06-2068.

it seeks a variation of certain protective measures.³³ This filing includes information on Witness 101 and Witness 44.³⁴

ICC-01/04-01/06-2087-Conf

16. Given that the two applications relating to Witness 101 and Witness 44 from the prosecution, *inter alia*, relate to the disclosure of information provided by Witnesses 44 and 101 in the Katanga and Ngudjolo case, on 20 August 2009, the Chamber issued an order instructing the Registry to notify the defence teams of the Katanga and Ngudjolo case of the filings and invited their submissions thereon.³⁵ It also requested further information from the prosecution and the Registry.³⁶

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17. On 31 August 2009, the defence of Germain Katanga ("Katanga defence") filed its "Defence Observations on the Prosecution's Requests relative to witness 44 and witness 101 (ICC-01/04-01/06-2066-Conf and 2067)".³⁷ Referring to its response to the prosecution's previous application submitted to Trial Chamber II,³⁸ it indicates to the Chamber that it does not object to temporary redactions to the statements of Witness 44 and Witness 101, provided that the accused receives disclosure at the latest thirty days prior to the commencement of the trial (which is in line with Trial Chamber II's prior rulings on redactions).³⁹

³³ Prosecution's Submission further to the Trial Chamber's 'Order on the prosecution's applications to vary protective measures under Regulation 42', 17 August 2009, ICC-01/04-01/06-2083.

³⁴ Annex A to the Prosecution's Submission further to the Trial Chamber's 'Order on the prosecution's applications to vary protective measures under Regulation 42', 17 August 2009, ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraphs 45 – 49.

³⁵ Order on the prosecution's applications for the variation of protective measures concerning Witness 44 and Witness 101, 20 August 2009, ICC-01/04-01/06-2087-Conf.

³⁶ *Ibid.*

³⁷ Defence Observations on the Prosecution's Request relative to witness 44 and witness 101 (ICC-01/04-01/06-2066-Conf and 2067), 31 August 2009, ICC-01/04-01/06-2096-Conf.

³⁸ Defence Response to the "Prosecution's Resubmission of the Statement of Witnesses 101 and 44", 27 July 2009, ICC-01/04-01/07-1339.

³⁹ ICC-01/04-01/06-2096-Conf, paragraph 5.

18. With a view to protecting the rights of the accused, the Katanga defence objects in principle to permanent redactions, suggesting this is the most intrusive protective measure a Chamber is able to authorise, and submitting that this step should only be taken in exceptional circumstances.⁴⁰ In support of these arguments, it draws on jurisprudence from the Appeals Chamber and the current practice of Trial Chamber II.⁴¹

19. Finally, the Katanga defence submits that while it may be possible in the future for the defence successfully to seek a review of redactions ordered by a Chamber, the time and effort involved will inevitably affect the defence's ability to investigate and prepare the case, particularly given that the start of the trial is imminent.⁴²

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20. On 31 August 2009, the Victims and Witnesses Unit ("VWU") filed its "Victims and Witnesses Unit's observations on the security situation of Witness 44 and regarding inconsistent disclosure regime between different cases."⁴³ [REDACTED].⁴⁴

21. [REDACTED].⁴⁵

22. [REDACTED].⁴⁶

23. On 17 September 2009, the defence filed a response to the VWU's

⁴⁰ ICC-01/04-01/06-2096-Conf, paragraph 5.

⁴¹ ICC-01/04-01/06-2096-Conf, paragraph 5.

⁴² ICC-01/04-01/06-2096-Conf, paragraph 6. The trial in the Katanga and Ngudjolo case started on 24 November 2009.

⁴³ Victims and Witnesses Unit's observations on the security situation of Witness 44 and regarding inconsistent disclosure regime between different cases, 31 August 2009, ICC-01/04-01/06-2099-Conf.

⁴⁴ ICC-01/04-01/06-2099-Conf, paragraph 2.

⁴⁵ ICC-01/04-01/06-2099-Conf, paragraph 3.

⁴⁶ ICC-01/04-01/06-2099-Conf, paragraphs 4 and 5.

observations.⁴⁷ It submits that redactions to documents that are to be disclosed to the defence should be treated as an exceptional measure.⁴⁸ The defence submits that the mere fact that one Trial Chamber has authorised the non-disclosure of a witness's identity cannot justify the non-disclosure of that identity in another case.⁴⁹ Moreover, it rehearses that the defence is bound by an obligation of confidentiality that meets the concerns of the prosecution.⁵⁰

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24. On 31 August 2009, the prosecution also submitted its "Prosecution's Submission on the Variation of Protective Measures for Witness 44 further to the Trial Chamber's Order of 20 August 2009".⁵¹ It referred to its submissions in the Katanga and Ngudjolo case and set out the security risks to Witness 44 in Annex A.⁵² The prosecution submits that the statement contains Rule 77 information [REDACTED].⁵³ It refers the Chamber to its submissions on the interpretation of Regulation 42 of the Regulations of the Court before Trial Chamber II.⁵⁴

25. [REDACTED].⁵⁵ [REDACTED].⁵⁶ [REDACTED].⁵⁷ [REDACTED].⁵⁸

26. The prosecution underlines that although Witness 44 consents to disclosure [REDACTED] in the Katanga and Ngudjolo case, [REDACTED] opposes

⁴⁷ Réponse de la Défense aux "Victims and Witnesses Unit's observations on the security situation of Witness 44 and regarding inconsistent disclosure regime between different cases", déposées le 31 août 2009, 17 September 2009, ICC-01/04-01/06-2130.

⁴⁸ ICC-01/04-01/06-2130, paragraph 3.

⁴⁹ ICC-01/04-01/06-2130, paragraph 4.

⁵⁰ ICC-01/04-01/06-2130, paragraph 5.

⁵¹ Prosecution's Submission on the Variation of Protective Measures for Witness 44 further to the Trial Chamber's Order of 20 August 2009, 31 August 2009, ICC-01/04-01/06-2101-Conf.

⁵² ICC-01/04-01/06-2101-Conf, paragraphs 10 and 11; Annex A to Prosecution's Submission on the Variation of Protective Measures for Witness 44 further to the Trial Chamber's Order of 20 August 2009, 31 August 2009, ICC-01/04-01/06-2101-Conf-Exp-AnxA.

⁵³ ICC-01/04-01/06-2101-Conf, paragraph 12.

⁵⁴ ICC-01/04-01/06-2101-Conf, paragraph 13, referring to ICC-01/04-01/07-1244 (public redacted version of ICC-01/04-01/07-1231-Conf-Exp).

⁵⁵ ICC-01/04-01/06-2101-Conf, paragraph 14.

⁵⁶ ICC-01/04-01/06-2101-Conf, paragraph 14.

⁵⁷ ICC-01/04-01/06-2101-Conf, paragraph 15.

⁵⁸ ICC-01/04-01/06-2101-Conf, paragraph 15.

disclosure in the Lubanga case.⁵⁹ The prosecution submits that the witness's identity should remain protected in the Lubanga case.⁶⁰ On the basis of the enhanced risk to Witness 44 [REDACTED], the prosecution's submission is that it should not be disclosed in either case.⁶¹ The prosecution is to make a similar application for protective measures for Witness 44 before Trial Chamber II.⁶²

27. The prosecution submits that whilst the information contained in Witness 44's statement is relevant to the accused in the Katanga and Ngudjolo case pursuant to Rule 77 of the Rules, this does not justify the severe risks that will arise [REDACTED], following disclosure of this information in the Katanga and Ngudjolo case.⁶³ The prosecution submits that this will not cause material prejudice to the accused in the Katanga and Ngudjolo case, as there are measures available in lieu of disclosure of Witness 44's identity, such as alternative evidence and admissions.⁶⁴

28. [REDACTED].⁶⁵ It requests authorisation, additionally, to redact the name of an NGO staff member in paragraph 10 of Witness 44's statement, in order to protect that individual's security pursuant to Rule 81(4) of the Rules.⁶⁶ The prosecution notes that the Chamber has previously authorised similar redactions in relation to this individual.⁶⁷

29. By way of conclusion, the prosecution seeks leave to vary the protective measures in relation to Witness 44, by disclosure of a version of the witness's statement in which the identity and location of the witness, [REDACTED]

⁵⁹ ICC-01/04-01/06-2101-Conf, paragraph 16.

⁶⁰ ICC-01/04-01/06-2101-Conf, paragraph 17.

⁶¹ ICC-01/04-01/06-2101-Conf, paragraph 18.

⁶² ICC-01/04-01/06-2101-Conf, paragraph 18.

⁶³ ICC-01/04-01/06-2101-Conf, paragraph 19.

⁶⁴ ICC-01/04-01/06-2101-Conf, paragraph 20.

⁶⁵ ICC-01/04-01/06-2101-Conf, paragraph 21.

⁶⁶ ICC-01/04-01/06-2101-Conf, paragraph 22.

⁶⁷ ICC-01/04-01/06-2101-Conf, paragraph 22.

family members and individuals who were present during the interview [REDACTED] are redacted, as well as the identity of an NGO and a staff member.⁶⁸

30. The defence informed the Chamber on 15 September 2009 that it does not intend to submit observations on the "Prosecution's Submission on the Variation of Protective Measures for Witness 44 further to the Trial Chamber's Order of 20 August 2009".⁶⁹

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31. On request of the Chamber,⁷⁰ on 10 September 2009 the prosecution provided further information relating to some of the redactions requested in relation to Witness 44.⁷¹

II. Applicable Law and relevant decisions

32. The following provisions of the Statute and Rules are relevant to this Application:

Article 54

Duties and powers of the Prosecutor with respect to investigations

[...]

3. The Prosecutor may:

[...]

(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 64

Functions and powers of the Trial Chamber

⁶⁸ ICC-01/04-01/06-2101-Conf, paragraph 23.

⁶⁹ Email communication from the Defence to the Trial Chamber through the Legal Advisor to the Trial Division on 15 September 2009.

⁷⁰ Email communication from the Trial Chamber to the Prosecution through the Legal Advisor to the Trial Division on 7 and 8 September 2009.

⁷¹ Addendum to the Prosecution's Submission on the Variation of Protective Measures for Witness 44 further to the Trial Chamber's Order of 20 August 2009, 10 September 2009, ICC-01/04-01/06-2114-Conf.

[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

[...]

(e) Provide for the protection of the accused, witnesses and victims.

(f) Rule on any other relevant matters.

[...]

Article 68

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[...]

Rule 81

Restrictions on disclosure

[...]

2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an ex parte basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

[...]

4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.

[...]

Regulation 42

Application and variation of protective measures

1. Protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court and shall continue after proceedings have been concluded, subject to revision by a Chamber.

2. When the Prosecutor discharges disclosure obligations in subsequent proceedings, he or she shall respect the protective measures as previously ordered by a Chamber

and shall inform the defence to whom the disclosure is being made of the nature of these protective measures.

3. Any application to vary a protective measure shall first be made to the Chamber which issued the order. If that Chamber is no longer seized of the proceedings in which the protective measure was ordered, application may be made to the Chamber before which a variation of the protective measure is being requested. That Chamber shall obtain all relevant information from the proceedings in which the protective measure was first ordered.

4. Before making a determination under sub-regulation 3, the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made.

33. In the present case, the Appeals Chamber held that "... three of the most important considerations for an authorisation of non-disclosure of the identity of a witness pursuant to rule 81 (4) of the Rules of Procedure and Evidence [are]: the endangerment of the witness or of members of his or her family that the disclosure of the identity of the witness may cause; the necessity of the protective measure; and why [...] the measure would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."⁷² The Appeals Chamber emphasised that this should include an examination of whether less restrictive protective measures are sufficient and feasible.⁷³

34. In the Katanga and Ngudjolo case the Appeals Chamber held that "persons other than witnesses, victims and members of their families, may, at this stage of the proceedings, be protected through the non-disclosure of their identities by analogy with other provisions of the Statute and the Rules. The aim is to secure protection of individuals at risk. Thus, by necessary implication, Rule 81(4) should be read to include the words 'persons at risk on account of the activities of the Court' so as to reflect the intention of the States that adopted the Statute and the Rules of Procedure and Evidence, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect

⁷² 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", 14 December 2006, ICC-01/04-01/06-773, paragraph 21; see also, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, paragraph 67.

⁷³ ICC-01/04-01/06-773, paragraph 33.

people at risk.”⁷⁴ The Appeals Chamber emphasised that non-disclosure of information for the protection of persons at risk on account of the activities of the Court requires “a careful assessment [...] on a case by case basis, with specific regard to the rights of the [accused].”⁷⁵

35. In the Chamber’s assessment, this approach of the Appeals Chamber extending protection for the groups expressly provided for in Rule 81(4) of the Rules – i.e. witnesses, victims and members of their families – to “*other persons at risk on account of the activities of the Court*” is to be applied during trial proceedings. Therefore, the Trial Chamber’s responsibility under Article 64(6)(e) of the Statute to “[p]rovide for the protection of the accused, witnesses and victims” includes providing for the protection of others who are at risk on account of the activities of the Court.⁷⁶

36. Further, the Trial Chamber has previously authorised the permanent redaction of the names of individuals referred to as third parties, intermediaries and NGOs (together with their field staff) when, *inter alia*, the information was irrelevant to the known issues in the case, so long as this course did not render the relevant documents in any way unintelligible or unusable.⁷⁷ Applying the same reasoning, it also authorised redactions

⁷⁴ ICC-01/04-01/07-475, paragraph 56.

⁷⁵ ICC-01/04-01/07-475, paragraph 2.

⁷⁶ Decision on the “Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” of 5 December 2008, 9 April 2009, ICC-01/04-01/06-1814-Conf, paragraph 34; corrected version: Annex 1 to the Decision issuing corrected and redacted versions of “Decision on the ‘Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information’ of 5 December 2008”, 2 June 2009, ICC-01/04-01/06-1924-Conf-Anx1, paragraph 34; public redacted version: Annex 2 to the Decision issuing corrected and redacted versions of “Decision on the ‘Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information’ of 5 December 2008”, 2 June 2009, ICC-01/04-01/06-1924-Anx2, paragraph 34.

⁷⁷ Transcript of hearing on 13 December 2007, ICC-01/04-01/06-T-65-ENG-ET, page 3, lines 3 – 17; Order granting prosecution’s application for non-disclosure of information provided by a witness, 31 January 2008, ICC-01/04-01/06-1146-Conf-Exp; confidential redacted version: Annex 1 to the Decision issuing a redacted version of “Order granting prosecution’s application for non-disclosure of information provided by a witness” filed on 31 January 2008 and of “Order on prosecution’s further application for non-disclosure of information provided by a witness” filed on 7 February 2008, 11 March 2008, ICC-01/04-01/06-1221-Conf-Anx1, paragraph 8.

relating to family members of witnesses and prosecution sources.⁷⁸

III. Analysis

General Matters

37. The approach established by the Chamber to applications under Regulation 42 of the Regulations of the Court is as follows:

The procedure, therefore, that should be followed [...] is that on an application to vary protective measures ordered by another Chamber, the matter should be referred "first" for consideration by the original Chamber. Thereafter, the application may be considered by the second Chamber, who will have the benefit of the Decision of the Chamber which was first seized of these issues. The second Chamber will then make its own independent decision, reflecting the needs of the case before it and it will no doubt focus on any security concerns that are indicated. Finally, if the second Chamber reaches a different conclusion to the first Chamber, then the latter may need to review its own orders in order to make such consequential amendments as are necessary (e.g. to ensure that in implementing the second Chamber's decision the prosecution is not put in a position in which it will necessarily breach an order of the first Chamber).⁷⁹

The Chamber has followed this approach for the purposes of this Decision.

Witness 101

38. The Chamber notes that the two filings ICC-01/04-01/06-2066-Conf and ICC-01/04-01/06-2067 overlap. While the wording is slightly different, the substance of the requests is essentially the same. They will be treated as one application.

39. The Chamber notes the prosecution's submissions that the statement contains information that is relevant to the Lubanga and Katanga and Ngudjolo cases,

⁷⁸ ICC-01/04-01/06-1814-Conf, paragraphs 34 and 35; corrected version: ICC-01/04-01/06-1924-Conf-Anx1, paragraphs 34 and 35; public redacted version: ICC-01/04-01/06-1924-Anx2, paragraphs 34 and 35.

⁷⁹ Decision on the application to disclose the identity of intermediary 143, 18 November 2009, ICC-01/04-01/06-2190-Conf-Exp, paragraph 30.

under Rule 77 of the Rules [REDACTED].⁸⁰

40. As the witness has consented to the disclosure of his identity within the context of the Katanga and Ngudjolo case before Trial Chamber II and the Lubanga case before this Chamber, the protective measures can be varied for the purposes of Trial Chamber I. [REDACTED],⁸¹ and this provides the witness with the means to seek effective protection should the need arise in the future.

41. The Chamber notes that the consent given by Witness 101 is conditional and the prosecution has requested that the accused and the defence teams do not disclose the statement or make it known that the individual provided a statement to the prosecution, outside of the strict context of the relevant trial proceedings.

42. In all the circumstances, the Chamber concludes that lifting redactions to the identity of Witness 101 in the Lubanga trial is appropriate. Bearing in mind its obligation to protect victims and witnesses under Article 64(6)(e) and 68(1) of the Statute, and considering that the identity of the witness and the contents of the statement will be made available to the defence, to ensure that the witness is not unnecessarily put at risk due to his cooperation with the Court, the Chamber orders the defence team in the Lubanga case and the accused not to disclose the statement or to make it known that Witness 101 provided a statement to the prosecution, outside of the strict context of these particular trial proceedings, in accordance with Articles 64(6)(e) and 68(1) of the Statute, Rule 81(4) of the Rules and Regulation 42 of the Regulations of the Court.

43. The Chamber has considered the proposed redactions to 'third parties' and

⁸⁰ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 48.

⁸¹ ICC-01/04-01/06-2066-Conf, paragraph 4; ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 48.

since these are very limited in their scope, they do not render the document in any way unintelligible or unusable.⁸²[REDACTED].⁸³ [REDACTED].⁸⁴ Bearing in mind [REDACTED], that the Court's obligation to protect pursuant to Article 68(1) of the Statute also includes the duty to protect the psychological well-being and privacy of individual witnesses, and that Rule 81(4) of the Rules explicitly refers to the protection of family members of witnesses, the Chamber authorises redactions to the names of the two family members named in the prosecution's filing, for the purposes of the Lubanga case. Other, less restrictive, protective measures do not appear feasible. This will not cause any material prejudice to the accused.

44. Addressing the position of the individual who provided information to the witness, the Chamber notes the submission of the prosecution concerning threats that may be faced by those who cooperate with the prosecution.⁸⁵ It is suggested that if this individual's name is redacted, the Court will protect not only the prosecution's ongoing investigations, but also the security of other witnesses who provided documents to the prosecution, which had been given to them by this individual.⁸⁶ In all the circumstances, the Chamber is persuaded that he falls within the protective scope of Rule 81(2) of the Rules (as a prosecution source), as well as Rule 81(4) of the Rules (as a person at risk on account of the activities of the Court and whose disclosure may put other persons at risk). Although this individual is the original source of the documents, the defence is aware of the identity of Witness 101, who subsequently provided all the relevant information to the prosecution, and the defence has access to the substantive details of the witness's statement, including any Rule 77 information. Bearing this in mind, the Chamber finds

⁸² See Annex 2 to Prosecution's Request for Lifting of Redactions to the Identity of One Individual providing Rule 77 Information and Request for Redactions further to Article 54(3)(f) and Rules 81(2) and 81(4), 24 July 2009, ICC-01/04-01/06-2066-Conf-Anx2.

⁸³ ICC-01/04-01/06-1965-Conf-Exp, paragraphs 28 – 29.

⁸⁴ Annex B to the Prosecution's application for variation of protective measures concerning witness 44 and witness 101, 24 July 2009, ICC-01/04-01/06-2067-Conf-Exp-AnxB, see the table on pages 11 and 12.

⁸⁵ ICC-01/04-01/06-2067-Conf-Exp-AnxB, see the table on pages 12 and 13.

⁸⁶ ICC-01/04-01/06-2067-Conf-Exp-AnxB, see the table on pages 12 and 13.

that non-disclosure of this individual's identity will not prejudice the rights of the accused. The Chamber thus authorises the redaction of his name and details for the purposes of the Lubanga trial, in accordance with Article 64(6)(e) of the Statute and Rules 81(2) and 81(4) of the Rules. However, the Chamber will revisit this issue if an application is made for disclosure of particular items of additional information.

45. In light of this decision, the Chamber notes that the prosecution will withdraw its pending application to redact the witness's identity in various meta-data fields.

Witness 44

46. The Chamber notes that Witness 44 has only consented to the disclosure [REDACTED] within the context of the Katanga and Ngudjolo case before Trial Chamber II and not in the Lubanga case before this Chamber. It has taken into account the prosecution's submissions that the statement contains Rule 77 information.

47. The Chamber has borne in mind the circumstances that necessitated the original protective measures, as set out in its earlier decision.⁸⁷ It takes note of the prosecution's submissions [REDACTED].⁸⁸ [REDACTED].⁸⁹ [REDACTED].⁹⁰ [REDACTED].⁹¹ [REDACTED].⁹² [REDACTED].⁹³ [REDACTED].⁹⁴ In view of these circumstances and the explicit fears of the witness, the Chamber is persuaded that the protective measures it has imposed need to be retained in the Lubanga case.

⁸⁷ ICC-01/04-01/06-1965-Conf-Exp, paragraph 23.

⁸⁸ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 45.

⁸⁹ ICC-01/04-01/06-2101-Conf-Exp-AnxA, paragraph 12.

⁹⁰ ICC-01/04-01/06-2101-Conf-Exp-AnxA, paragraph 12.

⁹¹ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 45; ICC-01/04-01/06-2101-Conf-Exp-AnxA, paragraph 12.

⁹² ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 45.

⁹³ ICC-01/04-01/06-2101-Conf-Exp-AnxA, paragraph 12.

⁹⁴ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 45; ICC-01/04-01/06-2101-Conf-Exp-AnxA, paragraph 12.

48. [REDACTED].⁹⁵ [REDACTED].⁹⁶

49. [REDACTED]. In those circumstances, approving lesser protective measures in one of the two trials could seriously undermine the protective measures imposed in the other case, thereby creating a serious risk to the safety of protected witnesses. Given the personal circumstances of Witness 44 outlined above, the Chamber is persuaded that for the purposes of the Lubanga trial, non-disclosure of Witness 44's identity must be upheld. Furthermore, it draws the attention of Trial Chamber II to the risks that may exist if [REDACTED] revealed within the context of the Katanga and Ngudjolo case. In particular the Chamber underlines the numerous, apparently credible, threats the witness has received. The Chamber therefore concludes that disclosure [REDACTED] in the Lubanga trial would be incompatible with its obligations to protect witnesses under Articles 64(6)(e) and 68(1) of the Statute and Rule 81(4) of the Rules.

50. In all the circumstances, the Chamber maintains the present disclosure regime as regards witness 44 for the purposes of the Lubanga trial (and accordingly the disclosed summary remains appropriate).

IV. Conclusion

51. For the purposes of the Lubanga trial, the Chamber:

- (i) Grants the prosecution's application to lift the redactions relating to Witness 101, as requested by the prosecution;
- (ii) Grants the application for redactions relating to two family members and to an individual who provided information

⁹⁵ Annex A to the Prosecution's application for variation in the protective measures concerning witness 44 and witness 101, 24 July 2009, ICC-01/04-01/06-2067-Conf-Exp-AnxA, see the table on page 27 of the annex.

⁹⁶ ICC-01/04-01/06-2067-Conf-Exp-AnxA, see the table on page 27 of the annex.

included in Witness 101's statement, as requested by the prosecution, subject to any further application by the defence;

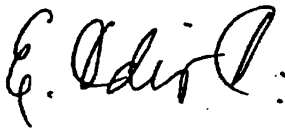
(iii) [REDACTED]; and

(iv) Upholds the existing protective measures for Witness 44 (in particular, non-disclosure of the witness's identity) and otherwise maintains the present disclosure regime as regards Witness 44 for the purposes of the Lubanga trial (and accordingly the disclosed summary remains appropriate).

Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 14 December 2009

At The Hague, The Netherlands