

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 16 March 2010

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 variation of protective measures under Regulation 42 on
referral from Trial Chamber II on 22 July 2009**

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

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**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* (“Lubanga case”), delivers the following decision (“Decision”) on issues matter referred to it by Trial Chamber II in its “*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*”¹, and the “Prosecution’s Submission further to the Trial Chamber’s ‘Order on the prosecution’s applications to vary protective measures under Regulation 42’”:²

I. Background and submissions

1. On 22 July 2009, Trial Chamber II issued the “*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*” that deals with protective measures for witnesses who are relevant for both the Lubanga case and the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (“Katanga and Ngudjolo case”).³ A public redacted version of the decision was issued on 24 July 2009.⁴ *Inter alia*, on the basis of Regulation 42(3) of the Regulations of the Court (“Regulations”), Trial Chamber II referred to Trial Chamber I the situation of witnesses 90, 169, 175, 178 (alias 152) and 179; it seized Trial Chamber I *proprio motu* of the situation of witness 37; and it sought the views of Trial Chamber I as regards disclosure of the identities of witnesses 23, 47, 52, 68 and 113.⁵ It

¹ *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. The public redacted version was issued on 24 July 2009, ICC-01/04-01/07-1332. Some of the witnesses addressed in this decision have been dealt separately by the Chamber following an application from the prosecution addressing some of the same witnesses: *Decision on the prosecution’s applications to vary protective measures under Regulation 42* of 14 July and 17 August 2009, 10 December 2009, ICC-01/04-01/06-2206-Conf-Exp.

² *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.

³ *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. The public redacted version was issued on 24 July 2009, ICC-01/04-01/07-1332. The procedural history leading up to this decision by Trial Chamber II is described therein.

⁴ *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*, 24 July 2009, ICC-01/04-01/07-1332.

⁵ ICC-01/04-01/07-1329-Conf-Exp, pages 30 and 31; ICC-01/04-01/07-1332, pages 27 and 29. Witnesses 90, 169, 175, 178/253 and 179 were also the subject of an application of the prosecution and are dealt with in a separate decision.

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 individuals referred by Trial Chamber II.⁶

2. [REDACTED].⁷
3. On 27 July 2009, Trial Chamber I issued an “Order on the prosecution’s application to vary protective measures under Regulation 42”, which, *inter alia*, instructed the prosecution to file a single, comprehensive document addressing (1) the security situation of the affected witnesses, (2) the relevance of the redacted information to the defence in the Lubanga and the Katanga and Ngudjolo cases, (3) the proposed variations (in greater detail), and (4) the feasibility of implementing inconsistent disclosure regimes between the two cases. It also invited the parties and participants in the Lubanga case to file written submissions on the interpretation and application of Regulation 42 of the Regulations.⁸ The order also addressed a separate application by the prosecution concerning the variation of protective measures that has been dealt with separately.⁹
4. On 12 August 2009, the Lubanga defence informed the Chamber that it did not intend to respond to the order of the Chamber.¹⁰
5. On 17 August 2009, Germain Katanga’s defence (“Katanga defence”) submitted observations on the prosecution’s request for variation of

⁶ ICC-01/04-01/07-1329-Conf-Exp, paragraph 55 and page 29; ICC-01/04-01/07-1332, page 27.

⁷ [REDACTED].

⁸ Order on the prosecution’s applications to vary protective measures under Regulation 42, 27 July 2009, ICC-01/04-01/06-2068.

⁹ Prosecution’s Request Pursuant to Regulation 42 in Relation to Protective Measures Sought Before Trial Chamber II (Witnesses 33, 169, 175, 178/253, 179, 243, 271, 282, 288), 14 July 2009, ICC-01/04-01/06-2047. Some of the witnesses addressed in the application by the prosecution overlap with witnesses dealt with by Trial Chamber II in its decision of 22 July 2009.

¹⁰ Email communication from the defence to the Trial Chamber through the Legal Advisor to the Trial Division on 12 August 2009.

protective measures, which is not analysed in this decision, and it referred to its filing on the general interpretation of Regulation 42 of the Regulations.¹¹

6. On 17 August 2009, Mathieu Ngudjolo Chui's defence ("Ngudjolo defence") submitted observations on the request of the prosecution, to which it annexed earlier submissions by the parties and participants in the Katanga and Ngudjolo proceedings on the general interpretation of Regulation 42 of the Regulations.¹²
7. On 17 August 2009, in response to the Chamber's order, the prosecution submitted its "Prosecution's Submission further to the Trial Chamber's 'Order on the prosecution's applications to vary protective measures under Regulation 42'".¹³ The prosecution provided detailed information on the witnesses for which it seeks a variation of protective measures, and for those referred to the Chamber by Trial Chamber II in its decision of 22 July 2009. Furthermore, the prosecution refers the Chamber to its two submissions that detail the security risks posed to these witnesses in the Katanga and Ngudjolo case.¹⁴ [REDACTED].¹⁵ The prosecution acknowledges the risks inherent in a disclosure regime that differs between two cases; it notes that certain safeguards will need to be imposed; and it informs the Chamber that it will seek a confidentiality order in the Katanga and the Ngudjolo case to minimize the risk of disclosure between the accused persons in the two trials.¹⁶ Last, the prosecution refers the Chamber to its submission on the interpretation of

¹¹ Defence Observations on the Prosecution's Request Pursuant to Regulation 42 in Relation to Protective Measures Sought Before Trial Chamber II (Witnesses 33, 169, 175, 178/253, 179, 243, 271, 282, 288) (ICC-01/04-01/06-2047), 17 August 2009, ICC-01/04-01/06-2081. A Corrigendum was issued the next day, 18 August 2009, ICC-01/04-01/06-2081-Corr.

¹² Observations de la Défense de Mathieu Ngudjolo sur la requête ICC-01/04-01/06-2047 du Procureur, 17 August 2009, ICC-01/04-01/06-2078.

¹³ 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.

¹⁴ ICC-01/04-01/06-2083, paragraph 3, referring to decisions ICC-01/04-01/07-985-Conf-Exp-Corr, 25 March 2009 and ICC-01/04-01/07-986-Conf-Exp, 23 March 2009.

¹⁵ ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 1.

¹⁶ ICC-01/04-01/06-2083, paragraph 8.

Regulation 42 in the Katanga and Ngudjolo case.¹⁷

II. Applicable Law and relevant decisions

8. The following provisions of the Statute and Rules are relevant in considering 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

[...]

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

[...]

¹⁷ ICC-01/04-01/06-2083, paragraph 9.

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.

9. The Appeals Chamber has established criteria which are to be applied when a Chamber is considering authorizing, in exceptional circumstances, non-disclosure of the identities of witnesses to the defence. It held that three of the most important considerations are (1) the danger to the witness or his or her family members that disclosure may entail, (2) the necessity for the protective measures and (3) an assessment of whether the measures will be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹⁸

The Appeals Chamber additionally required an investigation into the

¹⁸ 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 23.

sufficiency and feasibility of less restrictive protective measures.¹⁹ Although these criteria were established in the course of pre-trial proceedings, in the assessment of the Chamber, they are equally applicable to the trial stage of the case.

10. In the Katanga and Ngudjolo case the Appeals Chamber has 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 people at risk.”²⁰ The Appeals Chamber emphasised that non-disclosure of information for the protection of those 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].”²¹

11. 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 the “*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,

¹⁹ 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 33.

²⁰ 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 56.

²¹ 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 2.

witnesses and victims" includes providing for the protection of other persons at risk on account of the activities of the Court.²²

12. Further, the Trial Chamber has previously authorised the permanent redaction of the names of persons 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 document in any way unintelligible or unusable.²³ Applying the same reasoning, it has also authorized redactions to family members of witnesses and prosecution sources.²⁴

III. Analysis

General comments

13. The Chamber has already considered the operation of Regulation 42(1) of the Regulations of the Court in the context of an application to disclose the identity of an intermediary in the Katanga and Ngudjolo trial which had been withheld by Trial Chamber I in the Lubanga case.²⁵ The Chamber, faced with those facts, observed:

²² 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.

²³ Transcript of hearing on 13 December 2007, ICC-01/04-01/06-T-65-ENG, page 3; 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, and (confidential redacted version) ICC-01/04-01/06-1221-Conf-Anx1, paragraph 8.

²⁴ 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, paragraphs 34 and 35. 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, paragraphs 34 and 35. 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, paragraphs 34 and 35.

²⁵ Decision on the application to disclose the identity of intermediary 143, 18 November 2009, ICC-01/04-01/06-2190-Conf-Exp.

26. Although Trial Chamber I is clearly able to make a decision on the protective measures necessary for 143, and the need or otherwise to disclose his identity, in the context of the Lubanga trial (conducting the judgment required under Rule 81(2)), it is realistically unable to undertake the same exercise of judgment for Trial Chamber II. For instance, do the matters described by Trial Chamber II (summarised in the preceding paragraph) result in the conclusion that the identity must be disclosed to the defence (under Rule 81(2)), or are there other, lesser measures which would secure fairness for the accused? This requires a detailed understanding of the facts and issues in the Katanga trial, leading to a nuanced decision, which Trial Chamber I is ill-equipped to make. And does a decision on disclosure need to be made at this stage, or can it be delayed to see how the evidence and issues evolve? Only the judges of Trial Chamber II can sensibly answer these questions, and in those circumstances the words of Regulation 42(3) take on real significance: "Any application to vary a protective measure shall first be made to the Chamber which issued the order." Certainly in cases such as the present, in order for this provision to operate in a way which ensures that justice will be done in both cases, the two Chambers must arrive at their own separate conclusions as to whether the protective measures shall be varied, depending on the issues which need to be balanced in the different cases.

27. In these circumstances, the Chamber which originally issued the non-disclosure order, logically, should first deal with the issue, providing an analysis to assist the second Chamber, and the latter Chamber will undoubtedly take into account any security concerns that are indicated.

14. Although there are differences in the circumstances of the present Decision and those of 18 November 2009, there are no sustainable reasons for diverting from the approach the Chamber adopted in the latter case.

15. The Chamber will address Witness DRC-OTP-WWWW-37, who was referred by Trial Chamber II, and Witnesses DRC-OTP-WWWW-23, DRC-OTP-WWWW-47, DRC-OTP-WWWW-52, DRC-OTP-WWWW-68 and DRC-OTP-WWWW-113, for whom Trial Chamber II seeks the view of Trial Chamber I. For all witnesses, the Chamber has conducted a case-by-case assessment of the risks posed to them if their identities are disclosed to any of the accused, and it has taken into consideration that the risk to the witnesses and the relevance of the information may differ greatly between the Lubanga case and the Katanga and Ngudjolo case.

16. [REDACTED].²⁶ [REDACTED].²⁷ [REDACTED].²⁸ [REDACTED].²⁹
[REDACTED].³⁰ [REDACTED].

17. [REDACTED].³¹ [REDACTED].³² [REDACTED].³³ [REDACTED].³⁴
[REDACTED].

Witness DRC-OTP-WWWW-0037

18. Witness 37, who was interviewed under Article 55(2) of the Statute and Rule 112 of the Rules, was forcibly recruited by the UPC/FPLC in 2000 and remained a member during the period relevant to the charges against Thomas Lubanga.³⁵ [REDACTED].³⁶ [REDACTED].³⁷ Recent efforts to contact the witness regarding disclosure and to provide contact details were unsuccessful.³⁸

19. The prosecution submits that the witness provides information on the provision of weapons at Mandro, military training by Uganda in 2000, the presence of a Rwandan liaison officer at Mandro, and two UPC attacks.³⁹ It submits that the interview contains information on the voluntary enlistment of child soldiers that is relevant in the Lubanga case under Article 67(2) of the Statute, as well as Rule 77 information on the role of foreign powers that is

²⁶ Décision sur la requête de la Défense de Thomas Lubanga aux fins de se voir communiquer la décision rendue par la Chambre le 24 juillet 2009, 17 September 2009, ICC-01/04-01/07-1476-Conf-Exp.

²⁷ Transcript of hearing on 1 October 2009, ICC-01/04-01/06-T-213-CONF-EXP-ENG-ET, page 4, lines 19 – 21.

²⁸ ICC-01/04-01/06-T-213-CONF-EXP-ENG-ET, page 4, line 21 to page 5, line 2. The defence refers to ICC-01/04-01/07-1476-Conf-Exp.

²⁹ ICC-01/04-01/06-T-213-CONF-EXP-ENG-ET, page 5, lines 20 – 24.

³⁰ ICC-01/04-01/06-T-213-CONF-EXP-ENG-ET, page 5, line 24 to page 6, line 10.

³¹ Submission of a New Report on Alleged Conduct of the Resource Person of Thomas Lubanga Dyilo's Defence Team, 26 August 2009, ICC-01/04-01/06-2091-Conf-Exp.

³² ICC-01/04-01/06-2091-Conf-Exp, page 4.

³³ Annex to Submission of a New Report on Alleged Conduct of the Resource Person of Thomas Lubanga Dyilo's Defence Team, 26 August 2009, ICC-01/04-01/06-2091-Conf-Exp-Anx.

³⁴ ICC-01/04-01/06-2091-Conf-Exp, page 5.

³⁵ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 43.

³⁶ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 44.

³⁷ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 44.

³⁸ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 44.

³⁹ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 43.

relevant in both the Lubanga and the Katanga and Ngudjolo proceedings.⁴⁰

20. In a decision of 12 June 2009, the Chamber authorized redactions to the witness's identity and the disclosure of a 6-page summary with alternative evidence and an admission of fact in the Lubanga case, in lieu of the disclosure of a redacted version of the interview transcript.⁴¹ The prosecution had similarly sought to disclose alternative evidence and an admission of act rather than the witness interview in the Katanga and Ngudjolo case.⁴²

21. [REDACTED].⁴³ [REDACTED].⁴⁴ [REDACTED].⁴⁵ [REDACTED].⁴⁶

22. The Chamber originally granted protective measures for this witness for the following reasons:⁴⁷

27. This witness was interviewed by the prosecution under Article 55(2) of the Statute. He was a combatant of the UPC/FPLC and provides information about its structure, and its recruitment and training strategies, as well as the provision of arms and training by Uganda and Rwanda. This includes incriminatory information, namely Thomas Lubanga allegedly addressing approximately 700 recruits before they left for training in Uganda, among whom were children between 12 and 15 years of age, and the presence of 90 – 100 recruits of 12 and 15 years of age at the Mandro training camp. The prosecution has sought to protect this witness's identity on the grounds that he is an 'insider', particularly since he is a member of the UPC/FPLC who provided a lengthy interview on many topics. The prosecution is no longer in contact with him and cannot, therefore, alert him to the availability of the IRS, or provide the relevant emergency contact details and advice on closely monitoring his security situation in advance of disclosure of his identity.

[...]

84. Save for one possible issue, the Chamber is satisfied that the proposed items of alternative evidence, when viewed in their entirety along with the admission, sufficiently cover the

⁴⁰ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 43.

⁴¹ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 43, referring to 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, 12 June 2009, ICC-01/04-01/06-1965-Conf-Exp, paragraphs 78-85; Confidential and public redacted versions were issued on 24 June 2009, ICC-01/04-01/06-1980.

⁴² ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 43, referring to Requête aux fins d'admission de faits et de non communication de l'identité de neuf témoins (W-023, W-033, W-037, W-044, W-047, W-052, W-068, W-101, W-113) ayant fourni des éléments de preuve relevant de la Règle 77, 23 March 2009, ICC-01/04-01/07-986-Conf-Exp ; The public redacted version was issued on 26 March 2009, ICC-01/04-01/07-991.

⁴³ ICC-01/04-01/07-1329-Conf-Exp, paragraph 56; ICC-01/04-01/07-1332, paragraph 56.

⁴⁴ ICC-01/04-01/07-1329-Conf-Exp, paragraph 56; ICC-01/04-01/07-1332, paragraph 56.

⁴⁵ ICC-01/04-01/07-1329-Conf-Exp, paragraph 57; ICC-01/04-01/07-1332, paragraph 57.

⁴⁶ ICC-01/04-01/07-1329-Conf-Exp, paragraph 57; ICC-01/04-01/07-1332, paragraph 57

⁴⁷ ICC-01/04-01/06-1980-Anx2, paragraphs 27, 84 and 85 (footnotes omitted).

information provided by this witness. As above, in order to best protect the rights of the accused, the summary and the alternative evidence must each be made available to the defence. The caveat just expressed is the prosecution should consider including in the summary that on occasion parents came to the training camp to reclaim their children, and that some were successful and others were refused access to them.

85. Therefore, the Chamber approves the proposals of the prosecution, which are an appropriate means of protecting the witness who is exposed to risk of harm on account of the activities of the Court, whilst simultaneously disclosing to the defence the relevant material contained in the witness's statement. As with witness DRC-OTP-WWWW-0044, the protective measures are appropriate despite the fact that the prosecution can no longer contact the witness and a final determination of the potential risk is therefore not possible. In these circumstances the least necessary protective measures will be implemented whilst ensuring there is no unfairness to the accused through the provision of the summary, the alternative evidence and most importantly, the admission of fact. The Chamber therefore approves the admission of fact, authorizes the nondisclosure of the witness's identity and the provision of the summary of the witness's interview transcript, together with the alternative evidence, in accordance with Articles 54(3)(f), 64(6)(e) and (f), 68(1) of the Statute and Rule 81(4) of the Rules.

23. When dealing with Witness DRC-OTP-WWWW-0044, the Chamber addressed the impact if the prosecution was unable to contact the witness as regards the risk evaluation:⁴⁸

71. [...] Although the witness is said to live [REDACTED], the Chamber notes that the prosecution has been unable to make contact [REDACTED] identity may be disclosed. In light of these circumstances, no alternative measure that will ensure the witness's safety is available. Whilst this lack of contact makes a final determination of the potential dangers impossible, the Chamber emphasizes that an inability to reach a firm conclusion on this issue is not the equivalent of establishing that the witness is not at risk. Given the volatile and not infrequently dangerous situation in the DRC, the Chamber's wide-ranging obligations require it to take all necessary steps in order to "provide for the protection" of individuals in these circumstances, so long as they do not undermine the fairness of the proceedings and they do not prejudice the defence if this information is withheld.

24. For the purposes of the Lubanga trial, Trial Chamber I accepts the proposals for non-disclosure of the witness's identity advanced by the prosecution (given the quantity and nature of the information provided by this witness and the existing protection for the rights of the accused), and observes that there is no basis for ordering more extensive disclosure in the present case. It is for Trial Chamber II to assess the risks to the witness if his identity is disclosed in the Katanga and Ngudjolo case (including the fact that he is arguably only indirectly linked to that case), and to determine whether disclosure is necessary, and, if so, its extent. [REDACTED].

⁴⁸ ICC-01/04-01/06-1980-Anx2, paragraph 71 (footnotes omitted).

Witnesses for whom Trial Chamber II seeks Trial Chamber I's view

25. Trial Chamber II seeks Trial Chamber I's view on the disclosure of the identities of Witnesses 23, 47, 52, 68 and 113 in the Katanga and Ngudjolo case.⁴⁹ Trial Chamber II has been informed by the prosecution that save for Witness 23, protective measures have not been ordered for any of these witnesses and their statements have not been provided to the defence in the Lubanga case.⁵⁰ Given that the information provided by at least four of these witnesses mainly concerns the Lubanga proceedings, Trial Chamber II suggests it is surprising that the prosecution categorises these statements as Rule 77 material in the Katanga and Ngudjolo case, but not in the Lubanga case.⁵¹ Before authorizing the prosecution to disclose the non-redacted statements to the defence teams in the Katanga and Ngudjolo case, as a precautionary measure, Trial Chamber II enquires of Trial Chamber I whether disclosure of the identities of these witnesses may be prejudicial to the Lubanga proceedings.⁵²

26. The Chamber notes that the prosecution maintains that all documents in question contain Rule 77 information relevant for the Lubanga proceedings. To date, the Chamber has only been provided with the material from Witness 23 and the prosecution has failed to disclose any of the documents relating to the other witnesses to the defence, and it has not made requests for non-disclosure. Given that the information falls within the scope of Rule 77, the prosecution has clearly breached its disclosure obligations by not addressing these documents earlier. Disclosure to the accused is to be made immediately, and any applications for redactions should be made in writing within 48 hours of notification of this Decision, in which case the redacted material is be

⁴⁹ ICC-01/04-01/07-1332, paragraph 65 and page 29.

⁵⁰ ICC-01/04-01/07-1332, paragraph 64.

⁵¹ ICC-01/04-01/07-1332, paragraph 64.

⁵² ICC-01/04-01/07-1332, paragraph 65.

disclosed pending the Chamber's decision on the issue.

Witness DRC-OTP-WWWW-0023⁵³

27. Witness 0023 ([REDACTED]) provides a 41-page signed statement that in the prosecution's submission is relevant under Rule 77 of the Rules in both cases, including, *inter alia*, information on the role of Thomas Lubanga.⁵⁴ As the witness was [REDACTED], he faces a high risk of harm and the Chamber previously authorized an admission of fact in lieu of the disclosure of a redacted version of his statement.⁵⁵ The prosecution seeks the same approach in the Katanga and Ngudjolo case.⁵⁶ The prosecution submits that it last had contact with the witness in March 2006, [REDACTED].⁵⁷ [REDACTED].⁵⁸

28. Trial Chamber II notes that the prosecution's numerous attempts to contact the witness in March 2009 were unsuccessful.⁵⁹ Trial Chamber II has observed that it has not been provided with current information on the risk posed to this witness, other than the general risks faced by witnesses who collaborate with the Court.⁶⁰ Moreover, the information provided by the witness mainly concerns [REDACTED].⁶¹ Trial Chamber II finds that the links to the Katanga and Ngudjolo case are very indirect, making it difficult to conclude that the witness would be exposed to further risks in the context of that case.⁶² It envisages disclosure of a non-redacted statement to the defence teams in the Katanga and Ngudjolo proceedings.⁶³

⁵³ DRC-OTP-0066-0131.

⁵⁴ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 50.

⁵⁵ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 50, referring to Annex C to the Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, 24 April 2008, ICC-01/04-01/06-1295-US-Exp-AnxC, paragraph 112. Pursuant to Order ICC-01/04-01/06-2033 dated 09/07/2009, the cover decision was reclassified as confidential *ex parte* Prosecution and Registry only.

⁵⁶ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 50.

⁵⁷ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 51.

⁵⁸ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 51.

⁵⁹ ICC-01/04-01/07-1332, paragraph 59.

⁶⁰ ICC-01/04-01/07-1332, paragraph 59.

⁶¹ ICC-01/04-01/07-1329-Conf-Exp, paragraph 59.

⁶² ICC-01/04-01/07-1332, paragraph 59.

⁶³ ICC-01/04-01/07-1332, paragraph 59.

29. The prosecution has made admissions which adequately cover the potentially exculpatory material set out in this witness's statement for the purposes of the Lubanga case and he clearly indicated that he will no longer collaborate with the Court when the prosecution was last able to contact him. In those circumstances, for the purposes of the Lubanga trial, Trial Chamber I accepts the proposals for redactions advanced by the prosecution, and observes that there is no basis for ordering more extensive disclosure in the present case. It is for Trial Chamber II to assess the risks to the witness if his identity is disclosed in the Katanga and Ngudjolo case (including the fact that he is arguably only indirectly linked to that case), and to determine whether disclosure is necessary, and, if so, its extent. [REDACTED].

Witness DRC-OTP-WWWW-0047⁶⁴

30. Witness 47 ([REDACTED]) provides a 17-page unsigned statement that was not disclosed in the Lubanga case; however, it contains Rule 77 information on [REDACTED] that is relevant in both cases.⁶⁵ [REDACTED].⁶⁶ [REDACTED].⁶⁷ [REDACTED].⁶⁸ The prosecution informs the Chamber that the witness was interviewed in 2005 [REDACTED].⁶⁹ [REDACTED].⁷⁰ [REDACTED].⁷¹

31. Trial Chamber II observes that the prosecution submitted that the witness did not have a telephone number, but gave no information on an objective risk to his security.⁷² It notes that the statement is scarcely relevant to the defence in

⁶⁴ DRC-OTP-0150-0449–DRC-OTP-0150-0465; ICC-01/04-01/06-2083-Conf-Exp-Anx1.

⁶⁵ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 52. The prosecution will disclose the statement and file a separate request for redactions to his statement once the Chamber has determined if the identity should be disclosed (ICC-01/04-01/06-2083-Conf-Exp-AnxA, footnote 69).

⁶⁶ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 52, referring to ICC-01/04-01/07-986-Conf-Exp.

⁶⁷ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 53.

⁶⁸ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 53.

⁶⁹ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 53.

⁷⁰ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 54.

⁷¹ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph, 54.

⁷² ICC-01/04-01/07-1332, paragraph 60.

the Katanga and Ngudjolo case.⁷³ For this reason, it proposes to disclose a non-redacted statement in that case.⁷⁴

32. The Chamber finds that the reasons provided by the prosecution as to why this witness may be at risk are not sufficient to order the exceptional measure of non-disclosure of information. It also notes with great concern that this information has thus far not been disclosed to the defence in the Lubanga case, although it clearly falls within the scope of the prosecution's disclosure obligation under Rule 77 of the Rules. Although it is not potentially exculpatory material, the information should have been communicated to the defence under Rule 77 of the Rules well in advance of the proceedings.

33. The Chambers orders the disclosure of the statement in the Lubanga case within one week of notification of this decision and any applications for redactions should be made in writing within 48 hours of notification of this Decision, in which case the redacted material is to be disclosed pending the Chamber's decision on the issue.

Witness DRC-OTP-WWWW-0052⁷⁵

34. Witness 52 ([REDACTED]) provides a 10-page signed witness statement that was not disclosed in the Lubanga case; however, it contains Rule 77 information relevant in both cases [REDACTED].⁷⁶ [REDACTED].⁷⁷ The witness currently resides in [REDACTED]. The prosecution contacted the witness on [REDACTED] and he objected to disclosure of his name in either the Lubanga or the Katanga and Ngudjolo case because "disclosure would

⁷³ ICC-01/04-01/07-1332, paragraph 60.

⁷⁴ ICC-01/04-01/07-1332, paragraph 60.

⁷⁵ DRC-OTP-0090-0603–DRC-OTP-0090-0612; ICC-01/04-01/06-2083-Conf-Exp-Anx2.

⁷⁶ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 55. The prosecution will disclose the statement and file a separate request for redactions to his statement once the Chamber has determined if the identity should be disclosed (ICC-01/04-01/06-2083-Conf-Exp-AnxA, footnote 72).

⁷⁷ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 55, referring to ICC-01/04-01/07-986-Conf-Exp.

jeopardize his security and that of his family”.⁷⁸

35. Trial Chamber II notes that the prosecution has not provided precise or current information relating to the security situation of the witness.⁷⁹ At the time Trial Chamber II dealt with the issue, the prosecution had been unable to contact the witness since May 2005 and in those circumstances the prosecution indicated that the witness had not expressed any security concerns and would not be exposed to any risks if his identity is disclosed.⁸⁰ As the information provided by this witness is only tangentially relevant for the defence teams in the Katanga and Ngudjolo proceedings, Trial Chamber II envisages disclosing the identity of the witness in the case before it.⁸¹

36. The Chamber notes that the prosecution successfully contacted the witness after Trial Chamber II dealt with the issue, and that the witness does not consent to the disclosure of his identity in either case. However, the prosecution has not provided any grounds that substantiate the suggestion that the witness will be at risk if his identity is disclosed. Some of the information provided by the witness is of a delicate nature and this may explain why the witness resists disclosure of his identity to the general public. However, if information is relevant to the issues in the case and falls within the scope of the prosecution’s disclosure obligations, applying the criteria established by the Appeals Chamber, non-disclosure can only be authorized if a danger or risk to the witness has been established and non-disclosure is necessary and will not cause prejudice to the rights of the accused. If the individual’s identity is relevant to the case, the unwillingness of a witness to have his identity revealed cannot alone justify non-disclosure. Although the witness suggests that disclosure would jeopardize his security and that of his

⁷⁸ ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 55

⁷⁹ ICC-01/04-01/07-1332, paragraph 61.

⁸⁰ ICC-01/04-01/07-1332, paragraph 61, referring to ICC-01/04-01/07-986-Conf-Exp-Anx6A, page 2.

⁸¹ ICC-01/04-01/07-1332, paragraph 61.

family, the prosecution has not provided any reasons in support of this contention. Given the individual will not be called by the prosecution, and since the information does not appear to be likely to give rise to the risk of retaliation by the accused in the two cases, the Chamber orders disclosure to the accused in the Lubanga case (but not to the public).

37. The Chamber orders the disclosure of the statement in the Lubanga case within one week of notification of this decision, and any applications for redactions should be made in writing within 48 hours of notification of this Decision, in which case the redacted material is to be disclosed pending the Chamber's decision on the issue.

Witness DRC-OTP-WWWW-0068⁸²

38. The prosecution has prepared a 3-page Investigator's Note of the interview with Witness 68 ([REDACTED]), which contains Rule 77 information [REDACTED].⁸³ [REDACTED].⁸⁴ The prosecution submits that the information is relevant in both cases, but has not yet been disclosed in either trial.⁸⁵ [REDACTED].⁸⁶ [REDACTED].⁸⁷ [REDACTED].⁸⁸

39. Trial Chamber II notes that the witness lives in [REDACTED], and at the time Trial Chamber II dealt with the issue, the prosecution had not contacted the witness since his interview in March 2005.⁸⁹ Other than general security considerations, the prosecution was unable to provide precise or current

⁸² DRC-OTP-0150-0057–DRC-OTP-0150-0059; ICC-01/04-01/06-2083-Conf-Exp-Anx3.

⁸³ ICC-01/04-01/06-1083-Conf-Exp-AnxA, paragraph 57. The witness referred to in paragraph 57 is Witness 52 instead of Witness 68. However, due to the heading above paragraph 57 of the cover filing and the name of the witness as indicated in Annex 3, which also corresponds to the name associated with Witness 68 in the decision of Trial Chamber II, the Chamber assumes that this is merely a typographical error.

⁸⁴ ICC-01/04-01/06-1083-Conf-Exp-AnxA, paragraph 57.

⁸⁵ ICC-01/04-01/06-1083-Conf-Exp-AnxA, paragraph 57. The prosecution in the Lubanga case will disclose the statement and will file a separate request for redactions once the Chamber determines if the witness's identity should be disclosed (footnote 75).

⁸⁶ ICC-01/04-01/06-1083-Conf-Exp-AnxA, paragraph 57, referring to ICC-01/04-01/07-986-Conf-Exp.

⁸⁷ ICC-01/04-01/06-1083-Conf-Exp-AnxA, paragraph 58.

⁸⁸ ICC-01/04-01/06-1083-Conf-Exp-AnxA, paragraph 58.

⁸⁹ ICC-01/04-01/07-1329-Conf-Exp, paragraph 62.

information on his security situation and it did not provide reasons to justify non-disclosure of the witness's identity.⁹⁰ Trial Chamber II indicates that if the name [REDACTED] are redacted in order to protect the identity of the witness, this would render the document unusable for the defence.⁹¹ It is unpersuaded that the proposed redactions are justified, and it contemplates disclosing the name of the witness to the defence teams in the case before it.⁹²

40. As with the previous witness, the Chamber observes that the prosecution successfully contacted the witness after Trial Chamber II dealt with the issue, and that the witness does not consent to the disclosure of his identity in either case. Here also, the prosecution has not provided any grounds to substantiate the suggested risk to the witness if his identity is disclosed. The Investigator's Note contains information that the witness would prefer not to be made public.

41. In all the circumstances, for reasons that are identical to those applied to the previous witness, the Chamber orders the disclosure of the statement in the Lubanga case within one week of notification of this decision, and any applications for redactions should be made in writing within 48 hours of notification of this Decision, in which case the redacted material is be disclosed pending the Chamber's decision on the issue

Witness DRC-OTP-WWWW-0113⁹³

42. Witness 113 ([REDACTED]) gave a 13-page signed witness statement that the prosecution submits is relevant in both the Lubanga and the Katanga and Ngudjolo case as it contains Rule 77 information [REDACTED].⁹⁴ The witness

⁹⁰ ICC-01/04-01/07-1332, paragraph 62.

⁹¹ ICC-01/04-01/07-1329-Conf-Exp, paragraph 62.

⁹² ICC-01/04-01/07-1329-Conf-Exp, paragraph 62.

⁹³ DRC-OTP-0096-0036–DRC-OTP-0096-0048; DRC-OTP-01/04-01/06-2083-Conf-Exp-Anx4.

⁹⁴ DRC-OTP-2083-Conf-Exp-AnxA, paragraph 59

is a civilian from [REDACTED].⁹⁵ It has not been disclosed in the Lubanga case [REDACTED].⁹⁶ [REDACTED].⁹⁷ [REDACTED].⁹⁸ [REDACTED].⁹⁹ Should the Chamber order disclosure of the statement and the witness's identity, the prosecution seeks limited redactions to protect family members as set out in the confidential *ex parte* Annex 4.¹⁰⁰

43. Trial Chamber II has indicated that the prosecution has not demonstrated the existence of an objective risk to the security of this witness if her identity is disclosed and contemplates full disclosure of her identity in the case before it.¹⁰¹ As with the other witnesses, the prosecution was only able to contact Witness 113 after Trial Chamber II had dealt with the issue.

44. Although the prosecution does not provide a detailed assessment of the potential risk in the Lubanga case, its observation that the information provided by the witness does not relate directly to the current charges against Thomas Lubanga is a clear indication that the prosecution does not consider that the witness will be endangered following disclosure of her identity in the Lubanga case. Furthermore, the prosecution has not referred to any of the potential security measures, [REDACTED].

45. On [REDACTED] and in paragraph [REDACTED] of the statement, the prosecution seeks the non-disclosure of [REDACTED],¹⁰² [REDACTED],¹⁰³ as well as [REDACTED], along with [REDACTED].¹⁰⁴ In paragraph [REDACTED], the prosecution seeks the non-disclosure of [REDACTED].¹⁰⁵

⁹⁵ DRC-OTP-2083-Conf-Exp-AnxA, paragraph 59.

⁹⁶ DRC-OTP-2083-Conf-Exp-AnxA, paragraph 59, referring to ICC-01/04-01/07-986-Conf-Exp.

⁹⁷ DRC-OTP-2083-Conf-Exp-AnxA, paragraph 60.

⁹⁸ DRC-OTP-2083-Conf-Exp-AnxA, paragraph 60.

⁹⁹ DRC-OTP-2083-Conf-Exp-AnxA, paragraph 60.

¹⁰⁰ DRC-OTP-2083-Conf-Exp-AnxA, paragraph 60.

¹⁰¹ DRC-OTP-01/04-01/07-1332, paragraph 63.

¹⁰² [REDACTED].

¹⁰³ [REDACTED].

¹⁰⁴ [REDACTED].

¹⁰⁵ [REDACTED].

The prosecution also requests the non-disclosure of [REDACTED] in paragraph [REDACTED],¹⁰⁶ a reference to [REDACTED] in paragraph [REDACTED],¹⁰⁷ the [REDACTED] and [REDACTED] in paragraph [REDACTED],¹⁰⁸ and the [REDACTED] in paragraph [REDACTED].¹⁰⁹ Additionally, the prosecution seeks the non-disclosure of the [REDACTED] in paragraph [REDACTED], [REDACTED].¹¹⁰

46. None of the information is of any relevance to the Lubanga case. The proposed redactions are very limited and they do not impair the legibility or usability of the document. [REDACTED]. In the circumstances, the Chamber is of the view that the proposed redactions do not result in prejudice to the rights of the accused. In accordance with Article 68(1) and Article 64(6)(e) of the Statute and Rule 81(4) of the Rules, the Chamber authorizes the non-disclosure of this information, as proposed by the prosecution.

47. The Chamber orders the disclosure of the identity of, and the statement provided by, Witness 113 to the defence in the Lubanga case with the redactions as described above, once the prosecution has ensured that the witness has been informed of this step [REDACTED].

IV. Conclusion

48. By way of summary:

(i) DRC-OTP-WWWW-0037

The identity of Witness 37 is not to be disclosed in the Lubanga case. [REDACTED].

¹⁰⁶ [REDACTED].

¹⁰⁷ [REDACTED].

¹⁰⁸ [REDACTED].

¹⁰⁹ [REDACTED].

¹¹⁰ [REDACTED].

(ii) DRC-OTP-WWWW-0023

The Chamber maintains its existing protective measures for Witness 23 in the Lubanga case (*viz.* an admission of fact in lieu of the disclosure of a redacted version of his statement).
[REDACTED].

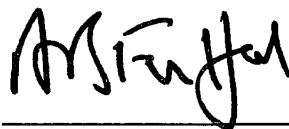
(iii) DRC-OTP-WWWW-0047, DRC-OTP-WWWW-0052 and DRC-OTP-WWWW-0068

The Chamber orders the disclosure of the three statements in the Lubanga case (but not to the public) within one week of notification of this decision and any applications for redactions should be made in writing within 48 hours of notification of this Decision, in which case the redacted material is to be disclosed pending the Chamber's decision on the issue.

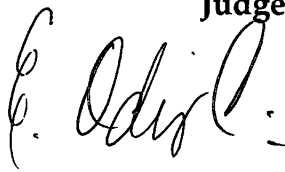
(iv) DRC-OTP-WWWW-0113

The Chamber orders the disclosure of the identity of and the statement provided by Witness 113 to the defence in the Lubanga case, with the redactions as described above once the prosecution has ensured that the witness has been informed of this step and [REDACTED].

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 16 March 2010

At The Hague, The Netherlands