

**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 Non-Disclosure of
Information in Transcripts of Re-Interviews with Prosecution Witnesses"**

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

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Legal Representatives of the Applicants

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Defence Support Section

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Detention Section

**Victims Participation and Reparations
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Other

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”) renders the following decision (“Decision”) on the “Prosecution’s Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses” (“Request”)¹:

I. Background and submissions

1. In its decision of 19 November 2009,² the Chamber authorised the Office of the Prosecutor (“prosecution”) to contact certain witnesses it had called, with a view to preparing for the defence case. The meetings or interviews were to be audio or video recorded, and they are subject to full disclosure obligations.³
2. The prosecution subsequently conducted further interviews with a number of its witnesses and relevant material was disclosed to the defence. Transcripts of two interviews were disclosed in redacted form,⁴ pending determination of the present Request.
3. The Request for authorisation to apply redactions to certain information in the transcripts of two interviews conducted with prosecution witnesses in accordance with the Chamber’s decision of 19 November 2009 was filed by the prosecution on 15 April 2010.⁵ The redactions are sought pursuant to Articles 54(3)(f), 64 and 68 of the Rome Statute (“Statute”) and Rule 81(4) of

¹ Prosecution’s Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses, 15 April 2010, ICC-01/04-01/06-2392-Conf-Exp. A public redacted version of the Request was filed on 19 April 2010, ICC-01/04-01/06-2392-Red.

² Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 19 November 2009, ICC-01/04-01/06-2192-Conf. A public redacted version was issued on 20 January 2010, ICC-01/04-01/06-2192-Red.

³ Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, ICC-01/04-01/06-2192-Red, paragraph 66.

⁴ The prosecution submits four interview transcripts to which redactions have been applied as annexes to its request. They bear the ERN numbers DRC-OTP-0226-0487, DRC-OTP-0226-0520, DRC-OTP-0223-0638 and DRC-OTP-0223-0687 and they relate to two additional interviews with trial witness DRC-OTP-WWWW-0089 and non-trial witness DRC-OTP-WWWW-0500 respectively.

⁵ Prosecution’s Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses, 15 April 2010, ICC-01/04-01/06-2392-Conf-Exp.

the Rules of Procedure and Evidence (“Rules”). A public redacted version of the request was filed on 19 April 2010.⁶ The Chamber shortened the deadline for responses to the Request pursuant to Regulation 34 of the Regulations of the Court (“Regulations”) to 29 April 2010.⁷

4. In particular, the prosecution seeks to apply redactions to information in four transcripts that are part of additional interviews conducted with prosecution witnesses DRC-OTP-WWWW-0089 and DRC-OTP-WWWW-0500. The prosecution submits that the information it seeks to withhold from the defence relates to (i) the whereabouts of witnesses participating in the International Criminal Court Protection Program (“ICCPP”), and (ii) the names and whereabouts of family members of non-trial witnesses. It is averred that non-disclosure of this information is necessary in order to protect their safety. The prosecution maintains that the proposed redactions do not affect the value of, or hinder the defence’s ability to assess, the relevant information,⁸ and it is suggested they do not impact adversely on issues relevant to the defence case.⁹ The prosecution submits the redactions are, therefore, not prejudicial to or inconsistent with the rights of the accused.¹⁰
5. The defence filed its observations on 29 April 2010.¹¹ It did not formulate observations regarding either disclosure of the current address of witness DRC-OTP-WWWW-0089 or the names and addresses of family members of

⁶ Prosecution’s Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses, 19 April 2010, ICC-01/04-01/06-2392-Red.

⁷ Email communication to the parties and participants through the Legal Adviser to the Trial Division on 20 April 2010.

⁸ Prosecution’s Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses, 19 April 2010, ICC-01/04-01/06-2392-Red, paragraph 4.

⁹ Prosecution’s Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses, 19 April 2010, ICC-01/04-01/06-2392-Red, paragraph 4.

¹⁰ Prosecution’s Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses, 19 April 2010, ICC-01/04-01/06-2392-Red, paragraph 4.

¹¹ Réponse de la Défense à la “Prosecution’s Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses”, déposé le 16 avril 2010, 29 April 2010, ICC-01/04-01/06-2405.

witness DRC-OTP-WWWW-0500.¹² The defence does, however, object to the prosecution's request to maintain redactions to the names and identifying information of two individuals the prosecution refers to as 'innocent third parties',¹³ in the transcripts of the interview with DRC-OTP-WWWW-0500.

6. The legal representatives for victims did not file any observations on the issue.

II. Applicable Law and relevant Decisions

7. The Chamber has considered the following provisions of the Statute and the Rules of the Court that are relevant to the Prosecution's request:

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

¹² Réponse de la Défense à la "Prosecution's Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses", déposé le 16 avril 2010, 29 April 2010, ICC-01/04-01/06-2405, paragraph 4.

¹³ Réponse de la Défense à la "Prosecution's Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses", 29 April 2010, ICC-01/04-01/06-2405, déposé le 16 avril 2010, paragraph 5.

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.

[...]

8. In its decision of 19 November 2009,¹⁴ the Chamber held that, particularly in the absence of objection by the defence, it was appropriate for the prosecution to re-interview three witnesses it had called to give evidence; the meetings were to be audio or video recorded;¹⁵ and the prosecution was to discharge its disclosure obligations in full.¹⁶ The Chamber held that this approach is of general application, thus enabling the prosecution to re-interview witnesses it had previously called, having provided advance notice to the Chamber and the defence.¹⁷

¹⁴ Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 19 November 2009, ICC-01/04-01/06-2192-Conf. A public redacted version was issued on 20 January 2010, ICC-01/04-01/06-2192-Red.

¹⁵ Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, ICC-01/04-01/06-2192-Red, paragraph 66.

¹⁶ Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, ICC-01/04-01/06-2192-Red, paragraph 66.

¹⁷ Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, ICC-01/04-01/06-2192-Red, paragraph 66.

9. The Appeals Chamber has established criteria to be applied when a Chamber, in exceptional circumstances, is considering authorising 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 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 It was further emphasised that there should be an examination as to whether less restrictive protective measures are sufficient and feasible in the circumstances.¹⁹

10. Although these criteria were established in the course of pre-trial proceedings, this Chamber has held that they are equally applicable to the trial stage of the case.²⁰ In particular, the Chamber has held that its responsibility under Article 64(6)(e) to “[p]rovide for the protection of the accused, witnesses and victims” includes providing protection for all those at risk, in the context of this trial, on account of the activities of the Court.²¹

11. In a later judgment on an appeal brought in the Katanga and Ngudjolo case, the Appeals Chamber developed its earlier ruling when determining that “Rule 81 (4) of the Rules [...] 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 Rome Statute and the Rules [...], as expressed in

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, paragraphs 21 – 23.

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 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, confidential redacted version of 31 March 2010, ICC-01/04-01/06-2206-Conf and public redacted version of 22 February 2010, ICC-01/04-01/06-2206-Red, paragraph 15.

²¹ Decision on the “Prosecution 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, public redacted version, ICC-01/04-01/06-1924-Anx2, paragraph 2.

article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect that category of persons.”²² It further 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].”²³

12. In addition, this Chamber has previously authorised permanent redactions to the names of individuals referred to as “third parties” when, *inter alia*, the information was not relevant to the known issues in the case, provided they do not render the documents in question unintelligible or unusable.²⁴

III. Analysis and Conclusions

13. Bearing in mind, in particular, its obligations to protect individuals at risk on account of the activities of the Court and to ensure that the rights of the accused are not compromised, the Chamber has conducted a case-by-case analysis of the proposed redactions.

Information relating to the location of a witness admitted into the ICCPP

14. The Prosecution applies to redact information, pursuant to Rule 81(4) of the Rules, which may reveal the current location of DRC-OTP-WWWW-0089.²⁵
- This witness has been relocated as part of the Court’s protection program. The

²² Judgement 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 1.

²³ Judgement 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.

²⁴ Transcripts of the hearing of 13 December 2007, ICC-01/04-01/06-T-65-ENG, page 3, lines 1-13; Transcript of the hearing of 18 January 2008, ICC-01/04-01/06-T-72-OCNF-EXP-ENG, page 2, lines 8-24; 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; Decision on “Prosecution’s Application for Non-Disclosure of Information”, 17 December 2008, ICC-01/04-01/06-1561-Conf-Exp, paragraphs 13-16.

²⁵ Prosecution’s Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses, 19 April 2010, ICC-01/04-01/06-2392-Red, paragraph 7.

Chamber has previously authorised similar redactions.²⁶

15. The application is unopposed.²⁷

16. In accordance with its earlier decisions, and pursuant to Article 64(6)(e) of the Statute and Rule 81(4) of the Rules, the Chamber considers that redactions to the whereabouts of witnesses within the ICCPP are both necessary and fair. Disclosure would put the witness, and possibly others, at risk on account of the activities of the Court; the information is irrelevant to known issues in the case; and the redactions do not render the material unusable or unintelligible. No lesser protective measures are feasible in the circumstances. Accordingly, the Chamber authorises the redactions.

Information pertaining to the names and whereabouts of family members of non-trial witnesses

17. The prosecution applies to redact information pursuant to Rule 81(4) of the Rules within two transcripts of further interviews with DRC-OTP-WWWW-0500,²⁸ namely the names of members of her family and [REDACTED].²⁹ It is suggested [REDACTED] may reveal the current location of the witness's brothers and father, thereby endangering their safety.³⁰

²⁶ Prosecution's Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses, 15 April 2010, ICC-01/04-01/06-2392-Red, paragraph 9; the prosecution refers to the Chamber's earlier decision authorizing redactions to places of current residence of protected witnesses: Decision on the Prosecution's Request for Non-Disclosure of Information of 19 December 2008, and the Prosecution's Request for Non-Disclosure of Information of 4 February 2009, 10 December 2009, ICC-01/04-01/06-2208-Conf-Exp. A confidential redacted version of the decision was issued on 31 March 2010, ICC-01/04-01/06-2208-Conf-Red; a (corrected) public redacted version was issued on 12 March 2010, ICC-01/04-01/06-2208-Red-Corr.

²⁷ Réponse de la Défense à la "Prosecution's Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses", déposé le 16 avril 2010, 29 April 2010, ICC-01/04-01/06-2405, paragraph 4.

²⁸ DRC-OTP-0226-0487 and DRC-OTP-0226-0521.

²⁹ Prosecution's Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses, 15 April 2010, ICC-01/04-01/06-2392-Conf-Exp, paragraph 10.

³⁰ Prosecution's Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses, 19 April 2010, ICC-01/04-01/06-2392-Red, paragraph 10.

18. It is further submitted that since neither witness DRC-OTP-WWWW-0500 nor members of her family are witnesses in the present case, their whereabouts are not relevant to the known issues in the case.³¹ The prosecution relies on a number of rulings by the Single Judge in the Katanga and Ngudjolo case, when it was held that disclosure of names and identifying information of family members of prosecution witnesses to the defence, including information that could lead to the disclosure of their current whereabouts, may pose an additional risk to their safety and well-being.³²

19. It is observed that the Chamber has previously authorised redactions to names and identifying information for members of witnesses' families and prosecution sources, when the information was irrelevant to the known issues in the case.³³

20. In its response, filed on 29 April 2010, the defence did not advance observations on the issue.³⁴

21. The Chamber has previously authorised redactions to the identities of non-trial witnesses and the members of prosecution witnesses' families,³⁵ on a case-by-case basis. In particular, the Chamber has focussed on whether the

³¹ Prosecution's Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses, 19 April 2010, ICC-01/04-01/06-2392-Red, paragraph 11.

³² Prosecution's Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses, 19 April 2010, ICC-01/04-01/06-2392-Red, paragraph 12.

³³ Prosecution's Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses, 19 April 2010, ICC-01/04-01/06-2392-Red, paragraph 13.

³⁴ Réponse de la Défense à la "Prosecution's Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses", déposé le 16 avril 2010, 29 April 2010, ICC-01/04-01/06-2405, paragraph 4.

³⁵ See for instance: Decision on the "Prosecution's Request for Non-Disclosure of Information" of 19 December 2008, and the "Prosecution's Request for Non-Disclosure of Information" of 4 February 2009, ICC-01/04-01/06-2208-Conf-Exp, paragraphs 28, 39, 42, 58, 59, 63, 69, 74, 77 and 80; 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 34-35; 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-Anx 1, paragraphs 34-35. 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 34-35.

proposed redactions relate to information that is relevant to a live issue in the case, and whether they may undermine the rights of the accused.

22. In addressing the relevance of particular information to any live issue in the case, the Chamber, particularly at this stage in the proceedings, will consider the defence case and strategy. The identity of certain prosecution witnesses and members of their families has become a highly contentious issue in the case. Therefore, the Chamber has been especially cautious in determining whether the identities of these individuals are potentially relevant to the case.

23. Critically, this information relates to members of the family of a prosecution witness who was not called to give evidence, and in any event does not come within the ambit of Article 67(2) of the Statute of Rule 77 of the Rules. It follows that the identities and the location of members of her family are irrelevant to any live issue in the case. Furthermore, the redactions do not render the material unintelligible or in any other way unusable. The redactions, therefore, do not undermine the rights of the accused and the application is granted.

Information concerning “innocent third parties”

24. The prosecution applies to redact the names and identifying information of individuals who are not witnesses in the present case, in the transcripts of interviews with DRC-OTP-WWWW-0089, pursuant to Rule 81(4) of the Rules. In particular, the prosecution seeks to redact the names [REDACTED] or [REDACTED] and [REDACTED] to protect their safety.³⁶ It is argued that their names and whereabouts as “third parties” are irrelevant to the known issues in the case. It is suggested that redacting this information does not

³⁶ Prosecution’s Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses, 15 April 2010, ICC-01/04-01/06-2392-Conf-Exp, paragraph 14.

affect the value or content of the documents, or render them in any way unintelligible or unusable.³⁷

25. The defence submits that the prosecution has not clearly identified the relevant passages within the transcripts, and as a result, it is impossible to identify the relevant “innocent third parties”. However, the defence also submits that from the context of the additional interview with witness DRC-OTP-WWWW-0089, the redacted information may relate to (i) a person who may be able to testify as to the presence of DRC-OTP-WWWW-0089 in an armed group, and (ii) to one or several persons who may have informed witness DRC-OTP-WWWW-0089 of the movements of a defence witness and his or her contacts with the defence team.³⁸ It requests this information in order to conduct further investigations in relation to witness DRC-OTP-WWWW-0089.³⁹ Moreover, the defence submits that the prosecution has not sufficiently explained how disclosure will create material security risks.⁴⁰

26. The Chamber has previously authorised redactions to information identifying “third parties”.⁴¹ However, as the trial has developed, the identities of certain “third parties” have become a live issue in the case, and given the precise investigatory steps identified by the defence (as set out above) the Chamber is persuaded that these names relate to live issues in the trial. Moreover, the prosecution has failed to provide sufficient details of the adverse security

³⁷ Prosecution’s Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses, 19 April 2010, ICC-01/04-01/06-2392-Red, paragraphs 15 and 16.

³⁸ Réponse de la Défense à la “Prosecution’s Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses”, déposé le 16 avril 2010, 29 April 2010, ICC-01/04-01/06-2405, paragraph 7.

³⁹ Réponse de la Défense à la “Prosecution’s Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses”, dépose le 16 avril 2010, 29 April 2010, ICC-01/04-01/06-2405, paragraph 8.

⁴⁰ Réponse de la Défense à la “Prosecution’s Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses”, dépose le 16 avril 2010, 29 April 2010, ICC-01/04-01/06-2405, paragraph 9.

⁴¹ Decision of 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 34-35.

implications that may arise following disclosure. The Chamber therefore refuses the application.

IV. Conclusion

27. For these reasons, and pursuant to Articles 54(3)(f) and 64(6)(e) of the Statute and Rule 81(4) of the Rules, the Chamber hereby

- a. grants the application to redact the information relating to the whereabouts of witness DRC-OTP-WWWW-0089 and family members of witness DRC-OTP-WWWW-0500 in the transcripts of the additional interviews;
- b. rejects the prosecution request to redact the names of third parties within the additional interview transcripts of DRC-OTP-WWWW-0089.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 7 June 2010

At The Hague, The Netherlands