

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 20 July 2010

TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge Joyce Aluoch

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

Public - URGENT

**Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply
Redactions to Witness Statements and Related Documents**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

Mr Nkwebe Liriss
Mr Aimé Kilolo Musamba

Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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States Representatives

Amicus Curiae

REGISTRY

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Ms Silvana Arbia

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Ms Maria Luisa Martinod Jacome

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**Victims Participation and Reparations
Section**

Other

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, (“Bemba case”) issues the following Decision on the Prosecution’s Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents¹ (“prosecution’s Request”).

I. Background

Procedural history before the Trial Chamber

1. At a status conference on 7 October 2009, the Chamber ordered the Office of the Prosecutor (“prosecution” or “OTP”) to provide a list of the outstanding material it seeks to introduce during its evidence, a summary of the ambit of this material, the issues it concerns and the reasons for late service.² This information was provided on 9 October 2009,³ and it included a confidential *ex parte* “Annex A” containing the full names of the witnesses, a summary of their evidence and its relevance.⁴ Following an order by the Chamber,⁵ the prosecution provided the defence with “Annex A” on 6 November 2009.⁶

¹ Prosecution’s Request to Lift, Maintain and Apply Redactions to Witnesses’ Statements and Related Documents, 26 October 2009, ICC-01/05-01/08-572-Conf-Exp with 219 confidential *ex parte* annexes; confidential *ex parte* redacted version notified to the defence filed on 26 October (notified on 27 October 2009), ICC-01/05-01/08-572-Conf-Exp-Red; public redacted version notified on 27 October 2009, ICC-01/05-01/08-572-Red2. Please note that although subsequent footnotes will only cite the confidential *ex parte* filing (ICC-01/05-01/08-572-Conf-Exp), this is intended to include reference to the *ex parte* redacted and public redacted versions of the filing. However, some information will obviously not be available in these versions.

² Transcript of hearing on 7 October 2009, ICC-01/05-01/08-T-14-ENG ET WT, page 9, line 23 to page 10, line 2.

³ Prosecution’s submission of summary and relevance of outstanding materials and reasons these have not been filed, 9 October 2009, ICC-01/05-01/08-552.

⁴ Annex A: Prosecution’s submission of summary and relevance of outstanding materials and reasons these have not been filed, 9 October 2009, ICC-01/05-01/08-552-Conf-Exp-AnxA.

⁵ Order on disclosure of evidence by the Office of the Prosecutor, 4 November 2009, ICC-01/05-01/08-590.

⁶ Prosecution’s disclosure of summary of outstanding materials to the Defence pursuant to the Chamber’s Order on disclosure of evidence by the Office of the Prosecutor of 4 November 2009, 6 November 2009, ICC-01/05-01/08-599; Annex A: Prosecution’s disclosure of summary of outstanding materials to the Defence pursuant to the Chamber’s Order on disclosure of evidence by the Office of the Prosecutor of 4 November 2009, 6 November 2009, ICC-01/05-01/08-599-Conf-Exp-AnxA.

The prosecution's Request of 26 October 2009

2. Also on 7 October 2009, the prosecution indicated it intended to complete disclosure by the end of November 2009.⁷ The prosecution filed a Request on 26 October 2009⁸ in which it seeks, *inter alia*, leave to lift all the redactions relating to five witnesses; to lift partially, and otherwise maintain, the redactions relating to 12 witnesses; to alter the disclosure of the statements of 4 witnesses so that they are in full, rather than in summary form, and to impose limited redactions to these statements; and to impose redactions for 22 witnesses (the statements of 6 of whom are to be disclosed to the defence under Article 67(2) of the Rome Statute ("Statute") or Rule 77 of the Rules of Procedure and Evidence ("Rules")). The Chamber ordered the prosecution to serve the material that was the subject of the Request in its current redacted form, pending a decision on the prosecution's Request.⁹

3. In compliance with the Chamber's order, the prosecution informed the Chamber that it had disclosed 212 items of incriminatory evidence to the defence on 10 November 2009.¹⁰

4. The prosecution's Request is divided into three parts. The first part contains the application to lift, maintain or impose redactions to witness statements and summaries of evidence that the prosecution relied upon during the confirmation hearing.¹¹ This is sub-divided into two sections. The first contains witness statements and related documents for which the prosecution requests that redactions granted by Pre-Trial Chamber III ("PTC III"), on the basis of Rule 81 (2) and (4) of the Rules, are maintained.¹² Furthermore, the

⁷ ICC-01/05-01/08-T-14-ENG-ET, page 9, lines 16 – 18.

⁸ ICC-01/05-01/08-572-Conf-Exp.

⁹ ICC-01/05-01/08-590 paragraph 6.

¹⁰ Prosecution's Communication of Incriminatory Evidence disclosed to the Defence pursuant to the Chamber's Order on disclosure of evidence by the Office of the Prosecutor of 4 November 2009, 11 November 2009, ICC-01/05-01/08-606, paragraph 2.

¹¹ ICC-01/05-01/08-572-Conf-Exp, paragraph 3.

¹² ICC-01/05-01/08-572-Conf-Exp, paragraphs 4 – 5.

prosecution requests that some redactions, previously granted by PTC III, are lifted.¹³ The second section involves witnesses whose statements were disclosed in summary form: the prosecution seeks at this stage to disclose the witness statements (rather than summaries), but with some redactions, on the basis of Rule 81(2) and (4) of the Rules and Article 54(3)(f) of the Statute.¹⁴ The relevant statements and documents are included in Annexes 1 – 16.¹⁵

5. The second part relates to proposed redactions to statements and related material from additional witnesses and certain forensic reports not relied on for the Confirmation of the Charges that the prosecution wishes to introduce at trial.¹⁶ The relevant statements and documents are included in Annexes 17 – 32.¹⁷
6. The third part comprises witness statements that the prosecution seeks to disclose either as potentially exonerating evidence or as material relevant to the preparation of the defence. The prosecution requests imposition of a number of redactions to these documents.¹⁸ The statements and documents are included in Annexes 33 – 38.¹⁹
7. In the prosecution's submission, the scope of redactions it seeks to maintain or have imposed relates to, *inter alia*:

- Information specifically relating to personal security, dignity and privacy of witnesses. Under this category, the Prosecution seeks redactions to the following information: i. the specific locations of residence of witnesses and their family members (only where fixed residential address is provided); and ii. photographs of witnesses

¹³ ICC-01/05-01/08-572-Conf-Exp, paragraphs 5 – 6.

¹⁴ ICC-01/05-01/08-572-Conf-Exp, paragraphs 7 – 8.

¹⁵ ICC-01/05-01/08-572-Conf-Exp, paragraphs 18 – 19.

¹⁶ ICC-01/05-01/08-572-Conf-Exp, paragraphs 9 – 10.

¹⁷ ICC-01/05-01/08-572-Conf-Exp, paragraph 20.

¹⁸ ICC-01/05-01/08-572-Conf-Exp, paragraph 11.

¹⁹ ICC-01/05-01/08-572-Conf-Exp, paragraph 21.

- Information specifically affecting ongoing or further investigations. Under this category, the Prosecution seeks redactions to the following information: i. the exact location(s) in which the Prosecution interviews its witnesses (where specific address or description is provided); ii. the identifying information of Prosecution's field staff given their role in the investigations; and iii. photographs of investigator(s) contained in forensic reports.²⁰

8. Focusing on the factual basis for the Request, the prosecution submits that after an assessment of the general situation, and the particular security situation of each witness it seeks to rely on at trial, the risks that they face can be mitigated if their identities are disclosed to the defence.²¹ The prosecution requests a number of redactions relating to the personal position of various individuals, and in particular the home addresses of witnesses and photographs of them. The prosecution argues that, as the accused will be in possession of the evidence that the witnesses provide along with their identities, withholding their home addresses and their photographic images will not be prejudicial to the preparation of the defence case.²²
9. Moreover, the prosecution seeks a number of redactions to information affecting ongoing or future investigations. This relates to the names and identities of the prosecution's field-staff, the photographs of investigators in documents and reports and, given the limited number of interview locations available in Bangui, the addresses or locations used for interviews. The Chamber is reminded that the accused is in possession of the names of the investigators, the town or city where the interviews were conducted, as well as the evidence provided by each witness. It is therefore submitted that redacting this information (which does not touch on the evidence of the witnesses concerned) will not prejudice the accused's preparation for trial.²³

²⁰ ICC-01/05-01/08-572-Conf-Exp, paragraph 12.

²¹ ICC-01/05-01/08-572-Conf-Exp, paragraphs 14 – 16.

²² ICC-01/05-01/08-572-Conf-Exp, paragraph 15.

²³ ICC-01/05-01/08-572-Conf-Exp, paragraph 16.

10. The prosecution seeks to maintain and apply redactions pursuant to Articles 68(1), 54(3)(f) of the Statute and Rule 81 (2) and (4) of the Rules. It is submitted that disclosure of this information will affect the personal security and privacy of the relevant witnesses and members of their families, and that it will compromise ongoing or future investigations. The prosecution submits that the measures sought (the redactions) are the least intrusive available; they are appropriate; and, given that the defence is in possession of the names and identities of the witnesses, as well as the evidence provided by each of them, the accused's ability to prepare his case is unaffected.²⁴
11. The prosecution also requested an order pursuant to Rule 87(3)(b) of the Rules "that the Defence be prohibited from disclosing such information to a third party."²⁵

The video

12. In the prosecution's Request, redactions were sought to a video, relevant to the evidence of CAR-OTP-WWWW-89 ("witness 89"), which the prosecution seeks to introduce (CAR-OTP-0052-0160) and which contains *inter alia* a number of scenes showing a particular neighbourhood and the home of a witness, a prosecution field-staff member and a witness. Even though the prosecution wishes to apply for redactions to specific portions of the video, due to technical difficulties it was unable to highlight the precise segments it seeks to redact. The prosecution has provided the Chamber with a non-redacted version of the video, and it is prepared to address the Chamber on the precise portions it seeks to disclose to the defence in a redacted form, once the necessary software has been secured.²⁶

²⁴ ICC-01/05-01/08-572-Conf-Exp, paragraph 17.

²⁵ ICC-01/05-01/08-572-Conf-Exp, paragraph 22(f).

²⁶ ICC-01/05-01/08-572-Conf-Exp, paragraph 13.

13. On 26 November 2009, the prosecution filed the “Prosecution’s Submission of Information relating to Video, CAR-OTP-0052-0160”.²⁷ The video was disclosed to the defence in a redacted form on 10 November 2009. In an email communication on 20 November 2009, the Chamber requested further information from the prosecution in relation to the requested redactions.²⁸ In particular, the Chamber asked the prosecution to explain the reasoning behind their request to have certain parts redacted, given that they were prepared to discuss, at a status conference, those sections of the video which they sought to withhold.
14. The prosecution referred to Annex 25.A of its Request, in which it had requested redactions pursuant to Rules 81(2) and 81(4) of the Rules and Article 54(3)(f) of the Statute.²⁹ It argued that, as the defence had been informed of the witness’s identity and was in possession of the evidence, it “would not be prejudicial to the Defence’s preparation of its case” to protect either the residence of the witness or the identities of the prosecution’s field-staff.³⁰ Further, the prosecution “adopts in entirety the reasons canvassed in its Request.”³¹
15. In explaining why it had proposed a status conference to discuss the redactions which had been requested, the prosecution provided two reasons.³² First, the prosecution indicated that, at the time of the Request, it did not have the necessary software to apply highlights to the relevant parts of the video.³³ Second, the prosecution suggested that a status conference would allow the Chamber to view, “firsthand, what the Prosecution is seeking to redact”.³⁴

²⁷ Prosecution’s Submission of Information relating to Video, CAR-OTP-0052-0160, 26 November 2009, ICC-01/05-01/08-614-Conf-Exp.

²⁸ Email Communication from the Legal Adviser of the Trial Division to the prosecution, 20 November 2009.

²⁹ ICC-01/05-01/08-614-Conf-Exp, paragraph 2.

³⁰ ICC-01/05-01/08-614-Conf-Exp, paragraph 2.

³¹ ICC-01/05-01/08-614-Conf-Exp, paragraph 2.

³² ICC-01/05-01/08-614-Conf-Exp, paragraph 3.

³³ ICC-01/05-01/08-614-Conf-Exp, paragraph 3.

³⁴ ICC-01/05-01/08-614-Conf-Exp, paragraph 3.

16. The prosecution submitted that it had applied redactions to the video in a manner consistent with paragraph 6 of the Chamber's Order on Disclosure of Evidence.³⁵ It repeated its request for the Chamber to authorise these proposed redactions.³⁶
17. At an *ex parte* status conference on 27 May 2010, the prosecution indicated that they had obtained the software in order to apply highlights to the relevant parts of the video.³⁷ They agreed to provide the Chamber with a copy of the video, with highlights applied to the portions of the video which the prosecution is seeking to redact, by 16.00 on 31 May 2010.
18. On 31 May 2010, the prosecution provided the Chamber with the document containing justifications relating to those redactions that it had requested leave to lift ("prosecution's justifications").³⁸
19. The prosecution also provided the Chamber with a CD concerning video CAR-OTP-0052-0160.³⁹ This CD contained four images taken from the video, with highlights applied to the areas where the prosecution is seeking to redact information.

Prosecution's Request concerning witness 178

20. The "Prosecution's Request to Apply Redactions to Additional Statements and a Related Document of Witness CAR-OTP-WWWW-0178"⁴⁰ was also filed on 26 November 2009. The prosecution underlined that the additional

³⁵ ICC-01/05-01/08-614-Conf-Exp, paragraph 4.

³⁶ ICC-01/05-01/08-614-Conf-Exp, paragraph 6.

³⁷ Transcript of hearing on 27 May 2010, ICC-01/05-01/08-T-23-CONF-EXP-ENG ET, page 17, lines 5 – 13.

³⁸ Email communication from the prosecution to a Legal Officer of the Trial Division, 31 May 2010.

³⁹ Addendum to the Prosecution's Request to Lift, Maintain and Apply Redactions to Witness' Statements and Related Documents (ICC-01/05-01/08-572-Conf-Exp), 31 May 2010, ICC-01/05-01/08-783-Conf-Exp.

⁴⁰ Prosecution's Request to Apply Redactions to Additional Statements and a Related Document of Witness CAR-OTP-WWWW-0178, 26 November 2009, ICC-01/05-01/08-621 with Confidential *Ex parte* Annexes A, B-1, B-2, B-3, B-4 and C.

statements of witness CAR-OTP-WWWW-0178 (“witness 178”) had become available to it between 1 and 4 November 2009.⁴¹ Consequently, the statements were not available to the prosecution on 26 October 2009, which was the date set by the Chamber as the time limit for requesting redactions.⁴² However, the prosecution commented that this was “prior to the time limit set for the Prosecution to effect its disclosure obligations”.⁴³ The prosecution requested the authorisation of the Chamber to apply limited redactions “to the additional statements and a related document of Witness 0178, consistent with the Request of 26 October 2009.”⁴⁴ It requested an extension to the time limit for requesting redactions, to 26 November 2009.⁴⁵ The Chamber has dealt with this request, and the prosecution’s request to amend the deadline for the submission of all requests relating to redactions to 26 November 2009, by way of retrospective authorisation.

21. The prosecution submitted that it was seeking to apply the redactions “as the least intrusive measures necessary for the protection of the witness and his family pursuant to Articles 68(1), 54(3)(f) of the Statute [...] and Rule 81(4).”⁴⁶ The prosecution argued that, as the identity of the witness has been disclosed to the accused, the proposed redactions would not prejudice his ability to prepare his case. By contrast, disclosure of this information would “jeopardise the safety and privacy of the witness and his family.”⁴⁷

22. In order to disclose this evidence within the time limit set by the Chamber, the prosecution proposed to serve the additional evidence of witness 178 with the requested redactions in place, pending a decision of the Chamber.⁴⁸

⁴¹ ICC-01/05-01/08-621, paragraph 4.

⁴² ICC-01/05-01/08-621, paragraphs 4 – 5.

⁴³ ICC-01/05-01/08-621, paragraph 4.

⁴⁴ ICC-01/05-01/08-621, paragraphs 5 and 12.

⁴⁵ ICC-01/05-01/08-621, paragraphs 5 and 12.

⁴⁶ ICC-01/05-01/08-621, paragraph 8.

⁴⁷ ICC-01/05-01/08-621, paragraph 9.

⁴⁸ ICC-01/05-01/08-621, paragraphs 10 and 12.

Lifting Redactions and additional requests

23. On 20 May 2010, the Chamber asked the prosecution to provide an update on the security implications of lifting redactions to witness statements and related documents.⁴⁹
24. In response, the prosecution filed the “Prosecution’s provision of an update on the security implications of the lifting of redactions” on 25 May 2010.⁵⁰ The submissions focus on the security concerns underpinning the requests to impose or maintain redactions,⁵¹ whereas the Chamber requested information on any security concerns relating to the redactions the prosecution proposed to lift. The prosecution repeated its request to maintain certain redactions and further requested, if the Chamber authorised disclosure of “the identities and fixed residential addresses of some Prosecution witnesses”, that restrictions are placed on the defence as to how the information is used.⁵²
25. The prosecution further requested that the Chamber “impose conditions upon the Defence for the use of photographs”,⁵³ which would involve the Chamber regulating, on a case-by-case basis, “the instances and manner in which this information is to be used by the Defence.”⁵⁴ The prosecution indicated that they would be prepared to make more detailed submissions in relation to this issue at a status conference.⁵⁵

⁴⁹ Email communication from a Legal Officer of the Trial Division to the prosecution, 20 May 2010.

⁵⁰ Prosecution’s provision of an update on the security implications of the lifting of redactions, 25 May 2010, ICC-01/05-01/08-780-Conf-Exp.

⁵¹ ICC-01/05-01/08-780-Conf-Exp, paragraphs 11 – 21.

⁵² ICC-01/05-01/08-780-Conf-Exp, paragraph 28.

⁵³ ICC-01/05-01/08-780-Conf-Exp, paragraph 24.

⁵⁴ ICC-01/05-01/08-780-Conf-Exp, paragraph 25.

⁵⁵ ICC-01/05-01/08-780-Conf-Exp, paragraph 3.

26. Although it is more appropriate to deal with the matters raised in this filing at the same time as certain recent prosecution requests,⁵⁶ the Chamber notes that three of the witnesses who are relevant to the prosecution's Request are referred to, and therefore it is necessary to summarize the position herein. In relation to witnesses 33, 65 and 173, the prosecution submits that it "opposes disclosure for any purposes of photographs and current addresses"⁵⁷ relating to these witnesses.

27. The Chamber initially understood that the prosecution was simply emphasizing the importance of their initial request as regards these particular witnesses. However, not only has the Chamber been unable to identify any existing requests to apply or maintain redactions to photographs of these witnesses, it has been unable to determine whether there are any photographs of these individuals contained in the evidence.⁵⁸

28. The Chamber asked the prosecution to provide "a schedule which sets out all of the photographs, the relevant ERN numbers and the current state of play as regards redactions".⁵⁹ The prosecution provided the Chamber with the schedule of photographs on 31 May 2010.⁶⁰ The Chamber notes that this schedule does not make reference to any photographs of witnesses 33, 65 and 173 and the prosecution is asked to clarify the position in this regard.

29. The Chamber informed the prosecution that the 25 May 2010 filing had not dealt with the security implications of lifting the redactions, as regards the 17

⁵⁶ See Prosecution's Application for Redactions pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence and in accordance with the Chamber's Order of 5 May 2010, 10 May 2010, ICC-01/05-08-772-Conf-Exp and Prosecution's Application for Redactions pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence and in accordance with the Chamber's Order dated 5 May 2010, 20 May 2010, ICC-01/05-778-Conf-Exp.

⁵⁷ ICC-01/05-01/08-780-Conf-Exp, paragraph 27.

⁵⁸ See for witness 33, CAR-OTP-0009-0022, CAR-OTP-0009-0063, CAR-OTP-0009-0100; for witness 65, CAR-OTP-0022-0210, CAR-OTP-0022-0240, CAR-OTP-0022-0262; for witness 173, CAR-OTP-0043-0199, CAR-OTP-0043-0228, CAR-OTP-0043-0250.

⁵⁹ ICC-01/05-01/08-T-23-CONF-EXP-ENG ET, page 7, lines 9 – 11.

⁶⁰ 'Photographs mentioned in our application 572 - REDACTIONS', Email communication from the prosecution to a Legal Officer of the Trial Division, 31 May 2010.

witnesses for whom such requests had been made. The Chamber therefore requested the prosecution to provide this information by 16.00 on 26 May 2010, so that it could be considered in advance of a status conference.⁶¹

30. On 26 May 2010, by way of an email, the prosecution provided the Chamber with a document entitled “Assessment of the security implications of the lifting of the specific redactions requested by the Prosecution in its application 572-Conf-Exp” (“assessment of security implications”).⁶² This document contained information relating to the 17 witnesses for whose witness statements and related documents the prosecution had requested authorisation to lift certain redactions. It concluded in relation to each of these witnesses that disclosure to the defence of the “identifying details” would not increase the risk of intimidation or physical harm.⁶³

31. On 27 May 2010, an *ex parte* status conference was held, with the prosecution and the Victims and Witnesses Unit (“VWU”) in attendance.⁶⁴ Prior to this status conference, the Chamber had prepared a document which set out, *inter alia*, the redactions which the prosecution sought to lift in relation to the statements of each witness (“document prepared by the Chamber”). Underneath each section, the Chamber set out the reason why the redactions had originally been granted by PTC III.⁶⁵ At the status conference, the Chamber provided the prosecution with a paper copy of this document and this was subsequently sent electronically to the prosecution and VWU.⁶⁶ The Chamber indicated that, whilst the prosecution had addressed the security situation of the witnesses in its assessment of the security implications, it had

⁶¹ Email communication from the Legal Advisor of the Trial Division to the prosecution, 25 May 2010.

⁶² Email communication from the prosecution to the Legal Advisor to the Trial Division, 26 May 2010.

⁶³ Assessment of the security implications of the lifting of the specific redactions requested by the Prosecution in its application 572-Conf-Exp, Email Communication from the prosecution to the Legal Advisor to the Trial Division, 26 May 2010.

⁶⁴ ICC-01/05-01/08-T-23-CONF-EXP-ENG ET.

⁶⁵ See ‘Second Decision on the Prosecutor’s requests for redactions’, 1 October 2008, ICC-01/05-01/08-135-Conf; ICC-01/05-01/08-135-Conf-Exp-Anx and ‘Third Decision on the Prosecutor’s requests for redactions’, 6 November 2008, ICC-01/05-01/08-215-Conf; ICC-01/05-01/08-215-Conf-Exp-Anx.

⁶⁶ ICC-01/05-01/08-T-23-CONF-EXP-ENG ET, page 1, lines 19 – 23.

not provided any analysis as to why, for example, redactions regarding family members or third parties were no longer necessary. The Chamber therefore asked the prosecution to use the document prepared by the Chamber to set out why it submits it is now appropriate to lift those redactions.⁶⁷

32. Given the difficulties caused by the failure of the prosecution to identify the individual redactions it was seeking to lift, the Chamber stated that it is critical that Chambers in future are provided with legible copies of the relevant materials, suitably highlighted so that they readily reveal the prosecution's proposals, with the individual passages clearly marked and distinctly highlighted by categories, depending on whether it is suggested disclosure should be effected or the redactions should be maintained.⁶⁸ The prosecution confirmed that it would comply with this recommendation hereafter.⁶⁹

33. The Chamber raised the issue of witness CAR-OTP-WWWW-0036 ("witness 36").⁷⁰ The prosecution had requested leave to lift all the redactions contained in the documents relating to this witness in the prosecution's Request.⁷¹ On 27 January 2010, the prosecution had further requested permission to disclose to the defence statement CAR-OTP-0057-0002 to 0025, an additional statement relating to witness 36. It indicated that it wished to disclose this statement with some redactions.⁷² This request was granted by the Chamber on 5 May 2010,⁷³ although the Chamber noted that the statement had in fact been

⁶⁷ ICC-01/05-01/08-T-23-CONF-EXP-ENG ET, page 2, line 24 to page 6, line 6.

⁶⁸ ICC-01/05-01/08-T-23-CONF-EXP-ENG ET, page 18, line 17 to page 19, line 3.

⁶⁹ ICC-01/05-01/08-T-23-CONF-EXP-ENG ET, page 19, lines 4 – 7.

⁷⁰ ICC-01/05-01/08-T-23-CONF-EXP-ENG ET, page 16, lines 9 – 19 and page 19, lines 14 – 24.

⁷¹ ICC-01/05-01/08-572-Conf-Exp, paragraph 6.

⁷² Prosecution's Second Request Pursuant to Regulation 35(2) of the Regulations of the Court, 27 January 2010, ICC-01/05-01/08-673-Conf-Exp, paragraphs 26 – 28 and paragraph 41.

⁷³ Decision on the prosecution's second application for disclosure of additional evidence, 5 May 2010, ICC-01/05-01/08-767-Conf-Exp.

disclosed to the defence on 17 February 2010 without the Court's express permission.⁷⁴

34. At the status conference, the Chamber enquired as to whether the additional statement of witness 36 had been disclosed in a redacted or a non-redacted form.⁷⁵ The prosecution indicated that the position in relation to the additional statement would need to be investigated.⁷⁶ The prosecution was instructed to send an email to the Legal Advisor to the Trial Division with this information,⁷⁷ and on 27 May 2010 the prosecution informed the Chamber that the last statement of witness 36 had been disclosed in non-redacted form on 17 February 2010.⁷⁸

35. The Chamber reminds the prosecution that for the reasons developed hereafter, once redactions have been imposed pursuant to Rule 81(4) of the Rules (and information is thereby withheld), it is critical that the leave of the Court is sought before the redactions are lifted or the information is otherwise disclosed.

Prosecution application for restrictions on the use of confidential material for defence investigations

36. During the 27 May 2010 status conference, the prosecution indicated that it anticipated seeking the Chamber's permission to restrict the use of materials disclosed to the defence.⁷⁹ The Chamber ordered the prosecution to file written submissions in support of its request by 1 June 2010.⁸⁰ The Chamber

⁷⁴ ICC-01/05-01/08-767-Conf-Exp, paragraph 26; Prosecution's Communication of Incriminating Evidence Disclosed to the Defence on 17 February 2010, 18 February 2010, ICC-01/05-01/08-696.

⁷⁵ ICC-01/05-01/08-T-23-CONF-EXP-ENG ET, page 19, lines 14 – 19.

⁷⁶ ICC-01/05-01/08-T-23-CONF-EXP-ENG ET, page 19, lines 20 – 24.

⁷⁷ ICC-01/05-01/08-T-23-CONF-EXP-ENG ET, page 20, lines 1 – 7.

⁷⁸ Email communication from the prosecution to the Legal Advisor to the Trial Division, 27 May 2010.

⁷⁹ ICC-01/05-01/08-T-23-CONF-EXP-ENG ET, page 12, lines 14 – 25.

⁸⁰ Email communication from a Legal Officer of the Trial Division to the prosecution, 27 May 2010.

further directed that any response by the defence or legal representatives of victims is filed by 8 June 2010.⁸¹

37. The prosecution filed its submissions on 1 June 2010, setting out a proposal for an order by the Chamber restricting the use of non-public information during defence investigations.⁸² In its request, the prosecution outlined the approach taken respectively by Trial Chambers I and II to disclosure of non-public information.⁸³ In particular, the prosecution notes the decision of Trial Chamber II requiring the defence to seek prior leave of the Chamber before disclosing photographs of protected witnesses to members of the public in the course of its investigations.⁸⁴ The prosecution suggests that Trial Chamber III should endorse this approach, and elaborates on it by arguing that the defence should be obliged to consult with the Court prior to disclosing any confidential information in the course of its investigations.⁸⁵

38. The prosecution submits, first, that the defence should not disclose confidential information unless it is truly necessary for the preparation and presentation of the case, and then only when alternative means of investigation are not available.⁸⁶ Under the proposal advanced, before each investigative mission the defence should inform the VWU of the non-public information it wishes to disclose, and to whom, along with the names of victims, witnesses, or third parties who may be at risk as a result of this disclosure.⁸⁷ Thereafter, the VWU, in consultation with the prosecution, is to provide the defence with an assessment of any potential risks to victims,

⁸¹ Email communication from a Legal Officer of the Trial Division to the prosecution, 27 May 2010.

⁸² Prosecution's request for restriction on the use of confidential material for Defence investigations, 1 June 2010, ICC-01/05-01/08-784.

⁸³ ICC-01/05-01/08-784, paragraphs 5 – 8.

⁸⁴ ICC-01/05-01/08-784, paragraph 8, referring to *Décision sur la requête de la Défense de Germain Katanga relative à la communication et l'utilisation de photographies de témoins protégés*, 31 May 2010, ICC-01/04-01/07-2148.

⁸⁵ ICC-01/05-01/08-784, paragraph 9.

⁸⁶ ICC-01/05-01/08-784, paragraph 21(A).

⁸⁷ ICC-01/05-01/08-784, paragraph 21(B).

witnesses, or third parties in connection with the disclosure, including instructions to take measures to reduce this risk.⁸⁸

39. The prosecution proposes that the defence should be required to seek permission from the Chamber before departing from any instructions provided by the VWU.⁸⁹ Likewise, the prosecution submits that if the VWU considers that the defence disclosure proposals require additional protective measures from the Court, the defence should seek leave from the Chamber in advance.⁹⁰ In these circumstances, the Chamber will be asked to make a determination on “the instances and the manner in which the Defence may disclose non-public information”.⁹¹ The prosecution maintains that if, during investigations *in situ*, something unforeseen arises that requires disclosure of non-public information, the defence must first follow the protocol, as it is submitted that “[e]xigency is not a justification for departing from these procedures”.⁹²

40. The prosecution further submits that in accordance with the approach of Trial Chamber I, the defence should record the identity of every individual to whom it discloses non-public information, as well as the circumstances of the disclosure; and if written, non-public material is made available to a member of the public, it must be returned to the defence once the person no longer needs it as part of the preparation of the case.⁹³

41. Finally, following the terms of the protocol developed by the VWU⁹⁴ and approved by Trial Chamber II in the case of *The Prosecutor v. Germain Katanga*

⁸⁸ ICC-01/05-01/08-784, paragraph 21(C).

⁸⁹ ICC-01/05-01/08-784, paragraph 21(D) and (E).

⁹⁰ ICC-01/05-01/08-784, paragraph 21(F).

⁹¹ ICC-01/05-01/08-784, paragraph 21(G).

⁹² ICC-01/05-01/08-784, paragraph 21(H).

⁹³ ICC-01/05-01/08-784, paragraph 21(J) (a) and (b).

⁹⁴ Annex 1: Victims and Witnesses Unit’s observations on the “Protocol on investigations in relation to witnesses benefiting from protective measures”, 27 April 2010, ICC-01/04-01/07-2007.

and Mathieu Ngudjolo Chui (“Katanga and Ngudjolo case”),⁹⁵ the prosecution submits that the defence should be strictly forbidden from disclosing the fact that a person is a witness in the case.⁹⁶ The prosecution proposes that if a third party otherwise becomes aware of this fact, the defence shall inform the individual that this information must be kept confidential and it must obtain a written and signed undertaking not to reproduce or publicise the information, and the defence must inform the VWU.⁹⁷

Response of the principal counsel of the Office of the Public Counsel for Victims

42. On 8 June 2010, the principal counsel of the Office of the Public Counsel for Victims (“legal representative”) filed a response to the prosecution’s application, agreeing in the main with the prosecution’s proposed mechanism for governing defence disclosure of non-public information but suggesting several amendments to the protocol.⁹⁸

43. The legal representative submits that the prosecution’s proposal should apply to all victims as well as any other person who might be at risk, including victim-applicants.⁹⁹ The legal representative further submits that the proposal should be extended to require notification to the legal representatives of victims, as well as advance consultation by the VWU with the legal representatives, whenever a party seeks to disclose non-public information to third parties, if disclosure may affect one of the legal representatives’ clients.¹⁰⁰ The legal representative suggests that if the Trial Chamber endorses the prosecution’s proposal, it should apply equally to all parties.¹⁰¹

⁹⁵ Décision sur le « Protocole régissant les enquêtes concernant les témoins bénéficiant de mesures de protection », 26 April 2010, ICC-01/04-01/07-2047.

⁹⁶ ICC-01/05-01/08-784, paragraph 21(J) (c).

⁹⁷ ICC-01/05-01/08-784, paragraph 21(J) (c).

⁹⁸ Legal Representative’s Response to Prosecution’s request for restriction on the use of non-public material for Defence investigations, 8 June 2010, ICC-01/05-01/08-788.

⁹⁹ ICC-01/05-01/08-788, paragraph 9.

¹⁰⁰ ICC-01/05-01/08-788, paragraphs 10 – 12 and 14.

¹⁰¹ ICC-01/05-01/08-788, paragraph 13.

The defence response

44. On 8 June 2010, the defence filed its response to the prosecution's application, opposing the prosecution's proposal and arguing that the requested measures violated the autonomy of the defence.¹⁰² The defence notes that Trial Chambers I and II have largely¹⁰³ left the question of disclosure of non-public information to the discretion of the defence, whilst requiring detailed record-keeping of disclosure and written undertakings of confidentiality from recipients of confidential information.¹⁰⁴ The defence submits that the prosecution has not provided any concrete examples of deficiencies in the protocols established by Trial Chambers I and II for disclosure of non-public information.¹⁰⁵

45. The defence contends that requiring the VWU to consult with the prosecution concerning any risk to those connected with the prosecution's activities, as suggested in paragraph 21(C) of the prosecution's application, would infringe the right of the defence to conduct confidential investigations.¹⁰⁶ In support of its position, the defence cites jurisprudence from the International Criminal Tribunal for the former Yugoslavia in the *Prosecutor v. Brdjanin and Talic* case.¹⁰⁷

46. The defence further submits that the prosecution's application to prohibit the defence from disclosing the fact that a person is a witness in the case, whilst fully justified in principle, will not always be practical. The defence suggests that whenever it intends to demonstrate that a prosecution witness lacks

¹⁰² Réponse de la Défense à la requête de l'Accusation de restreindre l'utilisation des informations confidentielles pour les enquêtes de la Défense, 8 juin 2010, ICC-01/05-01/08-789, paragraph 6.

¹⁰³ The defence noted that Trial Chamber II had decided to require authorisation from the Court prior to the use of photographs of protected persons. ICC-01/05-01/08-789, paragraph 3.

¹⁰⁴ ICC-01/05-01/08-789, paragraph 3.

¹⁰⁵ ICC-01/05-01/08-789, paragraph 5.

¹⁰⁶ ICC-01/05-01/08-789, paragraph 7.

¹⁰⁷ ICC-01/05-01/08-789, paragraph 7.

credibility because he or she is motivated by animosity, it would be artificial to conceal the fact that this person is a witness.¹⁰⁸

47. Accordingly, the defence suggests that the protocols established in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (“Lubanga case”) and the *Katanga and Ngudjolo* case are sufficient, and it invites the Chamber to reject the prosecution’s proposal.¹⁰⁹

Observations of the VWU

48. On 16 June 2010, the VWU filed its observations, opposing the prosecution’s proposal and setting out an alternative scheme for addressing confidential identifying information.¹¹⁰ In its submissions, the VWU distinguished between written documents (e.g. statements) and other materials (e.g. photographs).¹¹¹

49. The VWU submits that the prosecution’s proposal that the defence inform the VWU in advance of each investigative mission of the non-public information it wishes to disclose is not a workable or realistic solution, because the nature of an ongoing investigation means that some investigative requirements may arise only during a mission.¹¹²

50. The VWU also rejects the prosecution’s suggestion that the VWU, potentially in consultation with the prosecution, should assess the potential risk caused by the defence disclosure proposals and provide the defence with instructions to minimize the risk. The VWU submits it would be inappropriate for it to consult with the prosecution on the investigative activities of the defence.

¹⁰⁸ ICC-01/05-01/08-789, paragraph 9.

¹⁰⁹ ICC-01/05-01/08-789, paragraph 10.

¹¹⁰ Victims and Witnesses Unit’s observations on the restriction on the use of confidential material for Defence investigations, 16 June 2010, ICC-01/05-01/08-798-Conf.

¹¹¹ ICC-01/05-01/08-798-Conf, paragraph 23.

¹¹² ICC-01/05-01/08-798-Conf, paragraph 17.

Furthermore, the VWU resists the suggestion that it is in a position to give directions to either party on their respective investigations.¹¹³ The VWU suggests that its impartiality would be jeopardised if it is required to provide information it receives from an investigating party to anyone other than the judges.¹¹⁴

51. The VWU submitted the following proposal for dealing with confidential identifying information within documents:

[REDACTED]¹¹⁵

52. [REDACTED].¹¹⁶ [REDACTED].¹¹⁷ [REDACTED].¹¹⁸

53. [REDACTED].¹¹⁹

54. [REDACTED].¹²⁰ [REDACTED].¹²¹

55. [REDACTED].¹²² [REDACTED].¹²³

II. Applicable Law

56. In accordance with Article 21(1) of the Statute, the Chamber has considered the following provisions:

¹¹³ ICC-01/05-01/08-798-Conf, paragraphs 18 – 19.

¹¹⁴ ICC-01/05-01/08-798-Conf, paragraph 22.

¹¹⁵ ICC-01/05-01/08-798-Conf.

¹¹⁶ ICC-01/05-01/08-798-Conf, paragraph 31.

¹¹⁷ ICC-01/05-01/08-798-Conf, paragraphs 31 – 33.

¹¹⁸ ICC-01/05-01/08-798-Conf, paragraph 36.

¹¹⁹ ICC-01/05-01/08-798-Conf, paragraph 37.

¹²⁰ ICC-01/05-01/08-798-Conf, paragraph 38.

¹²¹ ICC-01/05-01/08-798-Conf, paragraph 38.

¹²² ICC-01/05-01/08-798-Conf, paragraph 39.

¹²³ ICC-01/05-01/08-798-Conf, paragraph 40.

Article 54 of the Statute**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 of the Statute**Functions and powers of the Trial Chamber**

[...]

3. Upon assignment of a case for trial in accordance with this statute, the Trial Chamber assigned to deal with the case shall:

[...]

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation.

[...]

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; and

(f) Rule on any other relevant matters.

[...]

Article 67 of the Statute**Rights of the Accused**

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

[...]

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

Article 68 of the Statute**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 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 of the Rules
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.

[...]

Rule 87 of the Rules
Protective measures

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

2. A motion or request under sub-rule 1 shall be governed by rule 134, provided that:

(a) Such a motion or request shall not be submitted *ex parte*;

[...]

3. A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*:

[...]

(b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;

[...]

Article 8 of the Code of Professional Conduct for counsel
Respect for professional secrecy and confidentiality

1. Counsel shall respect and actively exercise all care to ensure respect for professional secrecy and the confidentiality of information in accordance with the Statute, the Rules of Procedure and Evidence and the Regulations of the Court.

2. The relevant provisions referred to in paragraph 1 of this article include, *inter alia*, article 64, paragraph 6 (c), article 64, paragraph 7, article 67, paragraph 1 (b), article 68, and article 72 of the Statute, rules 72, 73, and 81 of the Rules of Procedure and Evidence and regulation 97 of the Regulations of the Court. Counsel shall also comply with the relevant provisions of this Code and any order of the Court.
3. Counsel may only reveal the information protected under paragraphs 1 and 2 of this article to co-counsel, assistants and other staff working on this particular case to which the information relates and solely to enable the exercise of his or her functions in relation to that case.
4. Subject to paragraph 3 of this article, counsel may only disclose the information protected under paragraphs 1 and 2 of this article, where such disclosure is provided for by a particular provision of the Statute, the Rules of procedure and Evidence, the Regulations of the Court or this Code or where such disclosure is ordered by the Court. In particular, Counsel shall not reveal the identity of protected victims and witnesses, or any confidential information that may reveal their identity and whereabouts, unless he or she has been authorised to do so by an order of the Court.

III. Analysis and Conclusions

General principles and certain discrete issues

57. The Trial Chamber has approached this application by focusing on the particular circumstances of the present case and the individual applications, and applying the jurisprudence of the Appeals Chamber and that of Trial Chambers I and II (particularly, as regards the former, on the issue of disclosure), and it has taken into account certain Decisions of the Pre-Trial Chamber.
58. The general principles applicable to the individual requests are set out in this “cover” part of the Decision, and the individual requests to impose or maintain redactions are addressed case-by-case in Annex A.
59. Turning, therefore, to the general principles, once assigned to a case, the Trial Chamber shall “[...] provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial” (Article 64(3)(c) of the Statute). In other words, the Chamber shall ensure that an appropriate disclosure regime is in place that can readily be applied, in order to facilitate trial readiness.

60. Once the Chamber is satisfied with the arrangements for disclosure, following assignment, it is not its function to review the prosecution's individual disclosure decisions, in the absence of a particular issue or application that requires determination. Therefore, under the scheme of the Rome Statute framework, the detail and implementation of disclosure to the defence is the responsibility of the prosecution, whilst the Chamber's role is to ensure fairness (*e.g.* under Articles 64(3)(a), 64(8)(b) and 67(1) of the Statute) and, when the situation arises, to resolve situations of doubt or disagreement (Article 67(2) of the Statute).
61. The presumption is that disclosable material will be served in full. Redactions need to be justified individually, under the various provisions of the Rome Statute framework (*e.g.* Articles 64(6)(c) and (e), 68(1), 69(5) and 72 of the Statute and Rule 81 of the Rules).
62. Although the decisions of the Appeals Chamber on restrictions on disclosure have been issued in the context of proceedings before the Pre-Trial Chamber – and therefore they are not strictly binding on the Trial Chamber – the principles that have been identified are of high relevance to trial proceedings.
63. In the *Lubanga* case, the Appeals Chamber emphasized that the Chamber must weigh the consequences of disclosure against non-disclosure: the overall requirements of the situation; the necessity for non-disclosure; the potential for prejudice to the accused; and whether less restrictive protective measures are sufficient and feasible.¹²⁴
64. PTC III in restricted circumstances refused applications for a number of

¹²⁴ 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 OA 5, paragraph 33.

redactions to the addresses of witnesses when the name of the witness had been disclosed to the defence and when they related to past residential addresses. By way of example, PTC III decided as follows:

The Prosecutor requests authorisation to redact the reference to witness's residence [...]. In accordance with the Second Decision on Redactions the Chamber decided that the identity of this witness be disclosed to the defence. The Chamber therefore does not grant authorisation to redact this information.¹²⁵

65. The material before the Trial Chamber indicates that, although the general security situation in the Central African Republic ("CAR") is relatively stable and the risk associated with disclosing the addresses of individuals whose identities are known is therefore not high, appreciable dangers nonetheless exist and there are legitimate safety and privacy concerns for witnesses in this case, under Article 68(1) of the Statute. These are succinctly described in the prosecution's submissions, as follows:

[REDACTED].¹²⁶

66. In addition to these concerns, the Chamber has considered whether the addresses in this context are of relevance to the defence. Self-evidently they assist the accused if he wishes to contact these individuals, or to carry out certain other investigations. However, depending on the circumstances, these steps are likely to be feasible without disclosure of the witness's address, and accordingly there is no foundation for a suggestion that addresses are necessarily relevant and automatically disclosable. Instead, if there are security or privacy concerns, either in general or in relation to a specific individual, the addresses – in the first instance – should not be disclosed, and discrete applications are to be filed if it is suggested that it is necessary to reveal this information if the witness does not consent. Further, these redactions will not render the relevant document unintelligible or unusable.

¹²⁵ ICC-01/05-01/08-135-Conf-Exp-Anx, page 22.

¹²⁶ Prosecution's Submission of Additional Information Pursuant to "Decision on the Security Situation of Witnesses", 5 November 2008, ICC-01/05-01/08-209-Red, paragraphs 26 – 28.

In the *Lubanga* case, on the issue of contact with witnesses, Trial Chamber I decided:

With regard to permitting contact between a party or a participant and the witnesses to be called by the other party or a participant, the overarching consideration is the consent of the witness. Once a witness consents, unless the Chamber rules otherwise, contact should be facilitated. If the party or participant who intends to call a witness objects to the meeting, it shall raise the matter with the Chamber by way of an application in advance of the interview. The party or participant calling the witness is entitled to have a representative present during the interview, unless – again, following an application – the Chamber rules otherwise.¹²⁷

By way of procedure, Trial Chamber I ordered:

A party or participant wishing to interview a witness whom the other party or a participant intends to call, shall first inform the party or participant of the proposal, setting out the suggested time and location of the interview. If the witness consents, the party or participant shall make such contact through the Victims and Witnesses Unit, which shall make the necessary arrangements for the interview. A representative of the Victims and Witnesses Unit shall be present during the interview and the party or participant intending to call the witness may also attend the interview, unless the Chamber has, on an application, ruled otherwise.¹²⁸

67. Trial Chamber II has endorsed Trial Chamber I's approach with the exception that it does not require the VWU to attend the interview of witnesses who are not in the ICCPP and who do not ask for the VWU's assistance during the interview;¹²⁹ the interview may take place without the representative of the party or participant calling him or her if the witness objects.¹³⁰ In addition, Trial Chamber II held that "in some circumstances" it may be more efficient for the party calling the witness to be responsible for making the practical arrangements, in particular for witnesses not included in the ICCPP.¹³¹ Finally, the Chamber added that the VWU shall be responsible for selecting an appropriate and neutral meeting place in case the meeting cannot take

¹²⁷ Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses, 3 June 2008, ICC-01/04-01/06-1372, paragraph 11. See also 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, paragraphs 47 to 52.

¹²⁸ ICC-01/04-01/06-1372, paragraph 14.

¹²⁹ Decision on a number of procedural issues raised by the Registry, ICC-01/04-01/07-1134, paragraph 26.

¹³⁰ ICC-01/04-01/07-1134, paragraph 28.

¹³¹ ICC-01/04-01/07-1134, paragraphs 29-30.

place where the witness is located.¹³²

68. The Chamber proposes to follow the practice implemented by Trial Chamber II. The procedure it developed is less onerous as regards the VWU, and is, *prima facie*, more efficient. By way of clarification, the consent of the witness is to be sought by the party or participant calling the witness.
69. The relative stability of the CAR is a factor that the Chamber has taken into account when assessing whether the requests to lift redactions will have an adverse impact on an individual's security.
70. The Appeals Chamber has held that the criteria for redactions pursuant to Rule 81(4) of the Rules "apply *mutatis mutandis* to redactions sought pursuant to Rule 81(2) of the Rules",¹³³ and as regards redactions to interview locations, the Appeals Chamber set out in an appeal in the *Katanga and Ngudjolo* case that Rule 81(2) provides generally for the non-disclosure of "information", without excluding particular categories of information. Similarly, Rule 81(4) of the Rules does not expressly exclude information referred to in Rule 111(1) of the Rules (*viz.* the records of formal statements during questioning in relation to an investigation or proceedings) from its ambit. The Appeals Chamber concluded in the circumstances that applications for non-disclosure of information coming within this provision will need to be determined on a case-by-case basis, applying Rule 81(2) and (4) of the Rules.¹³⁴
71. In the *Lubanga* case, Trial Chamber I has authorised redactions to the names of those 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

¹³² ICC-01/04-01/07-1134, paragraph 31.

¹³³ ICC-01/04-01/07-475, paragraph 97.

¹³⁴ ICC-01/04-01/07-475, paragraph 93.

question in any way unintelligible or unusable.¹³⁵ For like reasons, Trial Chamber I has authorised redactions to the location of interviews.¹³⁶ Trial Chamber I has revisited its decisions as necessary as the evidence and issues in the trial have unfolded.¹³⁷ This Chamber is similarly persuaded that interview locations and the identities of the prosecution's field-staff will usually be irrelevant, and given that there is a limited pool of available individuals and locations in the CAR in this context, absent a contrary decision, redactions to this information are to be implemented.

72. In relation to the further redactions that were sought to the additional statements and related documents of witness 178, the Chamber has applied the principles as outlined above. These requests are addressed in Annex A to this Decision.

73. For CAR-OTP-0052-0160 (the video), the Chamber observes that the information that the prosecution is seeking to redact – namely a photograph of a field officer, a photograph of a witness and the specific neighbourhood and location of a witness – falls into the categories discussed above. The Chamber will therefore apply the same general principles when considering whether to grant permission to redact the specified portions of the video. Again, this request is addressed in Annex A to this Decision.

74. As to the request to disclose the statements of four witnesses, which PTC III initially ordered to be disclosed in summary form, the Chamber notes that the identities of these witnesses have been disclosed to the defence.¹³⁸ Further, it

¹³⁵ Transcript of hearing on 13 December 2007, ICC-01/04-01/06-T-65-ENG ET WT, page 3, lines 10 – 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; Annex 1 Confidential Redacted version of "Order granting prosecution's application for non-disclosure of information provided by a witness", 11 March 2008, ICC-01/04-01/06-1221-Conf-Anx1, paragraph 8. See ICC-01/04-01/07-475, paragraph 56.

¹³⁶ Transcript of hearing on 18 January 2008, ICC-01/04-01/06-T-72-CONF-EXP-ENG ET, page 2, lines 8 – 17.

¹³⁷ See for instance Redacted Decision on Intermediaries, 31 May 2010, ICC-01/04-01/06-2434-Red2 and Annex.

¹³⁸ ICC-01/05-01/08-606-Conf-Exp-AnxA ; see also ICC-01/05-01/08-669-Conf-Exp-AnxC.

appears that following the Chamber's order of 4 November 2009,¹³⁹ the statements (as opposed to summaries), albeit with limited redactions, were disclosed.¹⁴⁰ Given that these statements have, therefore, been in the possession of the defence for almost 8 months, the Chambers is of the view that it is otiose to rule further on this issue. The Chamber stresses that the prosecution must ensure that in effecting disclosure, it does not infringe existing restrictions imposed by the Court.

75. The Chamber notes that witnesses CAR-OTP-WWWW-0021 ("witness 21"), CAR-OTP-WWWW-0024 ("witness 24"), CAR-OTP-WWWW-0040 ("witness 40"), witness 89 and CAR-OTP-WWWW-0152 ("witness 152"), are no longer to be relied on by the prosecution. Nonetheless, the Chamber has dealt with the requests to impose, maintain or lift redactions in relation to the material from these witnesses as it may be disclosable under Rule 77 of the Rules.

The prosecution's request to lift redactions

76. Once redactions imposed under Rule 81(2) of the Rules are no longer necessary, disclosure does not need the leave of the Chamber. In the *Lubanga* case, Trial Chamber I stated that:

[F]or all documents covered by 81(2), put otherwise documents redacted to protect ongoing investigations, if the Prosecution wish to remove a redaction which the Prosecution originally sought, then that can happen without coming to the Chamber requesting leave, but we should be notified on each and every occasion when a redaction is going to be lifted in that way, and that is simply to make sure that we are kept informed as to what the up-to-date position is.¹⁴¹

77. Conversely, the leave of the Chamber is necessary to lift redactions authorized in accordance with Rule 81(4) because these were imposed to protect witnesses and victims, their family members and other persons at risk on account of activities of the Court, for whom the Chamber has ultimate

¹³⁹ ICC-01/05-01/08-590.

¹⁴⁰ ICC-01/05-01/08-606-Conf-Exp-AnxA.

¹⁴¹ Transcript of hearing on 4 December 2007, ICC-01/04-01/06-T-62-ENG ET WT, page 23, lines 4 – 11.

responsibility pursuant to Article 68(1). In the *Lubanga* case, the Trial Chamber I put the matter thus:

In contrast, for all documents and witness statements covered by 81(4), those are documents [...] in relation to which there have been redactions to protect the safety of witnesses, our preliminary view is that the Prosecution should apply to the Chamber for leave to remove the redaction.¹⁴²

78. Under this heading, the prosecution seeks in part to lift and in part to maintain redactions granted by PTC III to information relevant to 12 witnesses.¹⁴³ Moreover, the prosecution applies to lift all the redactions in the statements of 5 witnesses, and in certain linked documents.¹⁴⁴

79. As the prosecution had not highlighted the redactions it is seeking to lift, the Chamber has been required to investigate the information the prosecution suggests no longer needs protection. Given the potentially serious consequences of disclosing information which may pose a risk to witnesses, victims, members of their families and others, the Chamber has addressed each suggested justification provided by the prosecution, and the individual requests have been analysed on a case-by-case basis in Annex B.

The prosecution's request for restrictions on the use of confidential material for defence investigations

80. Article 8 of the Code of Professional Conduct ("Code") requires counsel to respect professional secrecy and the confidentiality of information, in accordance with the Statute, the Rules of Procedure and Evidence and the Regulations of the Court. Article 8(4) of the Code specifically prevents counsel from disclosing to third parties confidential information relating to the identity of protected victims and witnesses, absent an order of the Court. On this issue, the approach of Trial Chamber I and Trial Chamber II to the

¹⁴² ICC-01/04-01/06-T-62-ENG ET WT, page 23, lines 12 – 16.

¹⁴³ See ICC-01/05-01/08-572-Conf-Exp, paragraph 5.

¹⁴⁴ See ICC-01/05-01/08-572-Conf-Exp, paragraph 6.

disclosure of non-public information has been, in each instance, governed by the twin requirements of necessity and witness security. In the *Lubanga* case, Trial Chamber I issued the following order on the disclosure of non-public information:

8. The provision of information, *inter partes*, of a non-public nature is governed by the twin requirements of necessity and witness-security. When the distribution of information to the public has been limited – for whatever reason – it is appropriate that its use is carefully regulated to ensure compliance with those requirements.

9. Once information has been characterised as being non-public (whether it is characterised as “confidential”, “*ex parte*” or “under seal”), its use should be limited to the strict purposes of the disclosure and members of the public should only be shown those parts of it that are truly necessary for the preparation and presentation of the case of a party or participant.

[...]

12. The Chamber hereby orders that whenever information, which is characterised in a manner more restrictive than “public”, is provided to a party or participant by another party or participant, the party or participant receiving the material should make its content available to the public only to the extent that is truly necessary for the preparation of its case. Whenever information protected by this principle is made available to a member of the public, the party making the disclosure must keep a detailed record thereof. The information shall be made available to only identified members of the public, who shall give a written and signed undertaking not to reproduce or publicise its content, in whole or in part, or to show or disclose it to any other person. If written material covered by this principle is made available to a member of the public, it must be returned to the party or participant who disclosed it once that person no longer needs it for case-preparation. For the purposes of this order, the term “public” includes all persons, governments, organisations, entities, associations and groups. It does not include the judges of the Court, members of the Registry, the Prosecutor and his representatives, the Accused, the defence team, victims granted the right to participate in the proceedings and their legal representatives.

13. Any member of the legal teams of the prosecution, the defence or a participating victim shall, upon no longer being part of those teams, return all “non-public” material in their possession to the relevant person within the team.¹⁴⁵

81. In the *Katanga and Ngudjolo* case, Trial Chamber II ordered the defence teams and the VWU to develop jointly a protocol regulating the disclosure of the identities of protected witnesses in order to “reconcile the necessary protection of witnesses, on the one hand, with the proper functioning of

¹⁴⁵ ICC-01/04-01/06-1372, paragraphs 8 to 13.

defence investigations, on the other”,¹⁴⁶ which Trial Chamber II thereafter approved.¹⁴⁷ On 31 May 2010, Trial Chamber II held that the leave of the Chamber was to be sought prior to disclosure of photographs of protected witnesses to “third parties”.¹⁴⁸

82. In the present case, the prosecution argues that the use of all non-public information by the defence should be subject to individual assessment by the VWU. This proposal constitutes a significant development on the practice approved by Trial Chambers I and II. Moreover, the VWU submits that the proposal is wholly impractical and unworkable,¹⁴⁹ and it is to be noted that the prosecution has not provided any information on the particular risks to witnesses, victims, or third parties in order to justify this suggested labour-intensive procedure. In the circumstances, the Chamber declines to adopt the prosecution’s proposal.

83. The prosecution contends that the defence should be strictly prohibited from disclosing to “third parties” the fact that a person is a witness in the case, and that if this information inadvertently or otherwise becomes known, an undertaking of confidentiality should be requested.¹⁵⁰ Although the defence opposes the prosecution’s application, arguing that it should be permitted, in the course of its investigations, to refer to the status of an individual as a witness, it concedes that maintaining the confidentiality of a person’s status as a witness is, in principle, “good and completely justifiable”.¹⁵¹ The proposal of the VWU on confidential identifying information in documents, which reflects the procedure adopted in the *Katanga and Ngudjolo* case,¹⁵² is as

¹⁴⁶ Instructions sur la manière d’approcher des tiers utiles aux enquêtes de la Défense, 18 December 2009, ICC-01/04-01/07-1734, paragraph 16.

¹⁴⁷ ICC-01/04-01/07-2047.

¹⁴⁸ ICC-01/04-01/07-2148.

¹⁴⁹ ICC-01/05-01/08-798-Conf, paragraph 17.

¹⁵⁰ ICC-01/05-01/08-784, paragraph 21(J) (c).

¹⁵¹ ICC-01/05-01/08-789, paragraph 9.

¹⁵² ICC-01/04-01/07-2007, page 1.

follows:

25. Should it become necessary to use confidential identifying information for the purposes of conducting investigations, for example the name of a protected witness, the investigating party shall not disclose in which way the person is involved with the Court.

26. In the event the investigating party concludes that a third party knows or becomes aware that a named protected person is involved with the Court as a victim or witness, the investigating party shall explicitly inform the third party about the confidential nature of such information and instruct the third party not to disclose this information any further. In these instances, the investigating party shall inform the VWU Head of Protection as soon as possible.¹⁵³

84. This course has been followed, apparently successfully, in the proceedings before Trial Chamber II, and this Chamber is of the view that it provides a satisfactory and feasible method of handling confidential identifying information by the parties and participants during the course of their investigations. Accordingly, the fact that an individual is a witness in the case should not be revealed without the express leave of the Chamber.

85. As to photographs of witnesses and others affected by the work of the Court, pursuant to Article 68(1) of the Statute, the Chamber is required to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.¹⁵⁴ Circulation of an individual's image, without his or her consent, depending on the circumstances, may constitute an unjustified infringement of the right to privacy or "private life".¹⁵⁵ The Chamber has taken into account the potential heightened security concerns that are associated with the circulation of an individual's image and whether disclosure of a photograph may infringe the right to privacy. However, given an accused is on trial, as set out in the cover

¹⁵³ ICC-01/05-01/08-798-Conf.

¹⁵⁴ 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, paragraphs 55 – 56.

¹⁵⁵ ECHR, *Wolfgang SCHÜSSEL vs. Austria*, Third Section Decision as to the Admissibility of Application no. 42409/98, 21 February 2002, paragraph 2.

Decision, the Chamber will apply the following approach to disclosure of photographic images. The presumption is that all the materials disclosed by the prosecution, either as part of the evidence it intends to advance against the accused (Rule 76 of the Rules), or exculpatory evidence or “material” for defence preparation (Article 67(2) of the Statute or Rule 77 of the Rules), will be provided in their entirety. Anything falling within those categories can only be withheld – “redacted” – for good cause (e.g. substantive security concerns) if this step is not inimical to a fair trial.

86. The individual concerned should be consulted, whenever possible, prior to disclosure to ensure there are no unaddressed substantive issues, such as security risks which should be brought to the attention of the Chamber, and absent the latter, the presumption is that there will be full disclosure.

87. Once disclosure has occurred, the Chamber does not consider it appropriate to order a party or participant to make a discrete application in advance, whenever a photograph is to be shown during the course of investigations – this proposal does not sufficiently reflect the exigencies of *in situ* enquiries which have a significant degree of unpredictability. Indeed, this suggestion would frequently render the investigations ineffective. However, the Chamber emphasises that a very high degree of care is to be taken to ensure that the use of photographs does not unnecessarily link the individuals depicted therein with the Court, and particularly the way in which they are involved with the ICC. They should only be used when no satisfactory alternative investigative avenue is available. As with all other non-public information, a detailed record of the disclosure shall be kept by the investigating party.¹⁵⁶

¹⁵⁶ See ICC-01/04-01/06-1372, paragraphs 8 to 13.

Postscript

88. Disclosure is a continuing obligation, and the Prosecutor must ensure that as the evidence and issues in the trial unfold he has continued to discharge his obligations in full.¹⁵⁷

IV. Orders of the Chamber

89. The Trial Chamber hereby:

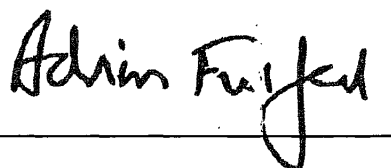
- a. Grants the redactions sought by the prosecution for witnesses CAR-OTP-WWWW-0009 ("witness 9"), CAR-OTP-WWWW-0015 ("witness 15"), CAR-OTP-WWWW-0022 ("witness 22"), CAR-OTP-WWWW-0023 ("witness 23"), CAR-OTP-WWWW-0029 ("witness 29"), CAR-OTP-WWWW-0031 ("witness 31"), CAR-OTP-WWWW-0045 ("witness 45"), CAR-OTP-WWWW-0068 ("witness 68"), CAR-OTP-WWWW-0080 ("witness 80"), CAR-OTP-WWWW-0081 ("witness 81"), and CAR-OTP-WWWW-0087 ("witness 87").
- b. Grants the redactions sought by the prosecution for witnesses CAR-OTP-WWWW-0063 ("witness 63"), CAR-OTP-WWWW-0069 ("witness 69"), CAR-OTP-WWWW-0073 ("witness 73"), CAR-OTP-WWWW-0075 ("witness 75"), CAR-OTP-WWWW-0079 ("witness 79"), CAR-OTP-WWWW-0082 ("witness 82"), CAR-OTP-WWWW-0108 ("witness 108"), CAR-OTP-WWWW-0112 ("witness 112"), CAR-OTP-WWWW-0119 ("witness 119"), CAR-OTP-WWWW-0151 ("witness 151"), CAR-OTP-WWWW-0173 ("witness 173") and witness 178.

¹⁵⁷ See Decision on the lifting, Maintenance and Ordering of Redactions, 22 October 2009, ICC-01/04-01/07-1551-Red2, paragraph 72.

- c. Grants the redactions sought by the prosecution for witnesses 33, 38, 47 and 65.
- d. Grants the redactions sought by the prosecution in respect of the additional statements of witness 178.
- e. Orders, with respect to Annex 25 (and the documents relating to witness 89), that redactions are applied consistently as specified in Annex A to this Decision.
- f. Grants the redactions to the statements that the prosecution seeks to disclose to the defence under Article 67(2) of the Statute and Rule 77 of the Rules, related to witnesses: 21, 24, 40, CAR-OTP-WWWW-0066 ("witness 66"), 89, CAR-OTP-WWWW-0132 ("witness 132"), CAR-OTP-WWWW-0133 ("witness 133"), CAR-OTP-WWWW-0134 (witness 134), CAR-OTP-WWWW-0139 ("witness 139"), 152, and CAR-OTP-WWWW-0161 ("witness 161").
- g. Partially grants the applications to lift the redactions under Rule 81(4) of the Rules, related to witnesses: CAR-OTP-WWWW-0006 ("witness 6"), CAR-OTP-WWWW-0032 ("witness 32"), witness 36 and CAR-OTP-WWWW-0044 ("witness 44") and orders the prosecution to re-disclose the redacted version of this material as soon as practicable.
- h. Grants the application to lift all redactions under Rule 81(4) of the Rules, related to CAR-OTP-WWWW-0042 ("witness 42").
- i. Partially grants the applications to lift the redactions under Rule 81(4) of the Rules, related to witnesses: 9, 15, 22, 29, 31, 45, 68, 80 and 87 and orders the prosecution to re-disclose the redacted version of this material as soon as practicable.

- j. Grants the applications to lift the redactions under Rule 81(4) of the Rules, related to witnesses 23, 40 and 81.
- k. Requests the prosecution to clarify the position concerning any photographs of witnesses 33, 65 and 173 (see paragraph 28 above).
- l. Orders that the approach set out in paragraphs 66 to 68 for contact between a party or participant and a witness to be called at trial shall be followed by the parties and participants.
- m. Orders that the fact that an individual is a witness in the case should not be revealed without the express leave of the Chamber (see paragraph 84).
- n. Orders that the approach to disclosure of photographic images set out in paragraphs 85 to 87 shall be followed by the parties and participants.
- o. Requests that in any future applications, the prosecution identifies those redactions which it proposes to lift, and indicates whether they were granted pursuant to Rule 81(2) or 81(4) of the Rules by applying appropriate highlights.
- p. Orders the prosecution to submit further information in response to the issues raised in Annex B to this Decision, related to witnesses 6, 32, 36, 44, 9, 15, 22, 29, 31, 45, 68, 80 and 87.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge Joyce Aluoch

Dated this 20 July 2010

At The Hague, The Netherlands