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**International
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Court**

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TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Silvia Fernández de Gurmendi

**SITUATION IN DARFUR, SUDAN
IN THE CASE OF
*THE PROSECUTOR v. ABDALLAH BANDA ABAKAER NOURAIN
AND SALEH MOHAMMED JERBO JAMUS***

Public document

**Public Redacted Decision on the prosecution's request for non-disclosure or
redactions of material relating to Witnesses 304, 305, 306 and 312**

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

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Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IV (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (“Banda and Jerbo case”), acting pursuant to Articles 54(1)(a), 54(3)(f), 64(3), 67(2), 68(1) and 68(5) of the Rome Statute (“Statute”), Rules 76(1) and (4), 77, 81(2), 81(4) and 87 of the Rules of Procedure and Evidence (“Rules”), and Regulation 42 of the Regulations of the Court (“Regulations”), issues the following Decision on the prosecution’s request for non-disclosure or redactions of material relating to Witnesses 304, 305, 306 and 312.

I Background and submissions

1. During the status conference on 19 April 2011, the Trial Chamber held that it was not necessary for the Office of the Prosecutor (“prosecution”) to wait to file its application for redactions to the statements and material of nine witnesses for whom protective measures were still pending.¹ Rather, the prosecution could apply immediately for two types of redactions: “if necessary, temporary redactions to remain until protective measures have been fully effected, and other redactions” it deemed necessary in relation to this material.² The Chamber considered that this course of action would enable the disclosure of the full witness statements of these nine individuals without further delay. Once protective measures were put in place, the prosecution could request the lifting of the temporary redactions.³

2. Pursuant to the Trial Chamber’s oral order of 19 April 2011,⁴ the prosecution filed submissions on outstanding issues concerning witness protection

¹ Transcript of hearing on 19 April 2011, ICC-02/03-05/09-T-10-ENG-CT-WT, page 29, lines 3 to 4.

² *Ibid.*, lines 4 to 7.

³ *Ibid.*, lines 8 to 10.

⁴ *Ibid.*, page 27, line 25 to page 28, line 4.

on 9 May 2011.⁵ A detailed analysis of the security situation of the nine persons concerned was annexed to the submissions.⁶

3. The Registry filed a separate status update on the security situation of the abovementioned persons.⁷
4. On 6 June 2011, the prosecution filed the "Prosecution's Application for Redactions Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence" ("Original Prosecution Application").⁸ In the Original Prosecution Application, the prosecution requests that three categories of redactions be applied to the transcripts and related material of, *inter alia*, witnesses DAR-OTP-WWWW-0304 ("Witness 304"), DAR-OTP-WWWW-0305 ("Witness 305"), DAR-OTP-WWWW-0306 ("Witness 306") and DAR-OTP-WWWW-0312 ("Witness 312").⁹ The three categories of redactions requested are (i) redactions to the names and information pertaining to further and ongoing investigations¹⁰; (ii) redactions to the names and identifying information of the family members of the witnesses at issue or names of places that could give away their current locations,¹¹ as well as other persons at risk on account of the activities of the Court;¹² and (iii) temporary redactions to the names and identifying information of the witnesses.¹³

⁵ Prosecution's Consolidated Filing, Pursuant to the Chamber's Oral Decisions dated 19 April 2011 on (i) evidence to be relied on at trial, (ii) an update on article 54(3)(e) lifting procedures and (iii) an update on issues concerning witnesses protection [sic], 9 May 2011, ICC-02/05-03/09-142.

⁶ Annex to Prosecution's Consolidated Filing, Pursuant to the Chamber's Oral Decisions dated 19 April 2011 on (i) evidence to be relied on at trial, (ii) an update on article 54(3)(e) lifting procedures and (iii) an update on issues concerning witnesses protection, 9 May 2011, ICC-02/05-03/09-142-AnxA.

⁷ Victims and Witnesses Unit's report on security situation of witnesses [REDACTED], 9 May 2011, ICC-02/05-03/09-141-Conf-Exp.

⁸ Prosecution's Application for Redactions Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence, 6 June 2011, ICC-02/05-03/09-159-Conf-Exp. A public redacted version was filed on 24 June 2011 (notified on 27 June 2011): ICC-02/05-03/09-159-Red.

⁹ The Chamber will address the redactions concerning the five other witnesses in separate decisions.

¹⁰ ICC-02/05-03/09-159-Red, paragraph 19.

¹¹ *Ibid.*, paragraph 15.

¹² *Ibid.*, paragraph 23.

¹³ *Ibid.*, paragraph 17.

5. On 13 June 2011, the prosecution filed the "Prosecution's Revised List of Evidence and Revised List of Witnesses, in light of the Agreement of Facts between the Parties," which no longer included Witnesses 304, 305, 306 and 312.¹⁴
6. On 11 July 2011, the Chamber instructed the prosecution to provide it with additional information regarding the status of Witnesses 304, 305, 306 and 312.¹⁵ In particular, the Chamber requested the prosecution to inform it of whether it maintained its request for redactions in relation to these individuals,¹⁶ and whether it would seek to disclose the material pursuant to Article 67(2) of the Statute or Rule 77 of the Rules.¹⁷ The prosecution was instructed to file a revised written application by 15 July 2011, setting out the legal basis for disclosure and indicating by way of highlights whether the portions of the material to be disclosed was potentially exculpatory or under Rule 77 material.¹⁸ The Chamber instructed the prosecution to immediately disclose to the defence the statements of the four witnesses concerned in the proposed redacted form in the event the prosecution intended to maintain its request for redactions.¹⁹ The defence was instructed to file its observations, if any, on the redactions sought by the prosecution by 8 August 2011.²⁰
7. On 15 July 2011, the prosecution filed the "Prosecution's Request for Non-Disclosure of Four Witness statements, or in the Alternative, to Maintain Request for Redactions Previously Sought Pursuant to Rules 81(4) of the Rules

¹⁴ Prosecution's Revised List of Evidence and Revised List of Witnesses, in light of the Agreement of Facts between the Parties, 13 June 2011, ICC-02/05-03/09-162 and Confidential Annex to Prosecution's Revised List of Evidence and Revised List of Witnesses, in light of the Agreement of Facts between the Parties, 13 June 2011 ICC-02/05-03/09-162-Conf-AnxC.

¹⁵ Email communication from a Legal Officer of the Trial Chamber to the prosecution dated 11 July 2011 at 15:37.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Email communication from a Legal Officer of the Trial Chamber to the parties dated 11 July 2011 at 15:37.

²⁰ *Ibid.*

of Procedure and Evidence” (“Revised Prosecution Application”).²¹

8. On 20 July 2011, the prosecution filed the “Prosecution’s Provision of Further and Revised Information on Four Witnesses’ Statements” (“Second Revised Prosecution Application”).²² In this filing, the prosecution reiterates its request for the authorisation of the non-disclosure of the statements and material relating to Witnesses 304, 305, 306 and 312; or, in the event that the Trial Chamber decides the statements should be disclosed, for the authorisation of the redactions sought by the prosecution in the Original Prosecution Application.²³ It further submits that “[t]he additional disclosure of identities or other information, which would be disclosed in unredacted statements, could potentially endanger the witnesses themselves and is, in this circumstance, unnecessary.”²⁴ [REDACTED].²⁵ [REDACTED].²⁶ [REDACTED].²⁷
9. While the prosecution concedes the four witnesses provide Article 67(2) and Rule 77 information, [REDACTED].²⁸ The prosecution contends that the disclosure of the four individuals’ identities could expose them to a risk which cannot currently be assessed, given the fact that their whereabouts are

²¹ Prosecution’s Request for Non-Disclosure of Four Witnesses statements, or in the Alternative, to Maintain Request for Redactions Previously Sought Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence, 15 July 2011, ICC-02/05-03/09-181-Conf-Exp. By email communication from a Legal Officer of the Trial Chamber to the prosecution at 12:00 on 29 July 2011, the Chamber ordered the prosecution to file public redacted versions of its Revised Prosecution Application. A public redacted version of the Revised Request was filed on 1 August 2011: Public Redacted Version of “Prosecution’s Request for Non-Disclosure of Four Witnesses statements, or in the Alternative, to Maintain Request for Redactions Previously Sought Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence”, 1 August 2011, ICC-02/05-03/09-181-Red.

²² Prosecution’s Provision of Further and Revised Information on Four Witnesses’ Statements, 20 July 2011, ICC-02/05-03/09-183-Conf-Exp. By email communication from a Legal Officer of the Trial Chamber to the prosecution at 12:00 on 29 July 2011, the Chamber ordered the prosecution to file a public redacted version of its Second Revised Prosecution Application. A public redacted version was filed on 1 August 2011: Public Redacted Version of “Prosecution’s Provision of Further and Revised Information on Four Witnesses’ Statements”, 1 August 2011, ICC-02/05-03/09-183-Red.

²³ ICC-02/05-03/09-183-Red, paragraph 29.

²⁴ ICC-02/05-03/09-183-Red, page 3.

²⁵ ICC-02/05-03/09-183-Conf-Exp., paragraph 12.

²⁶ ICC-02/05-03/09-183-Conf-Exp, paragraph 29.

²⁷ *Ibid.*, paragraph 12.

²⁸ ICC-02/05-03/09-183-Conf-Exp, paragraph 13.

unknown.²⁹ While it submits that these considerations “favour non-disclosure of the statements and identities of the witnesses,”³⁰ the prosecution requests that in the event the Trial Chamber were to find that the material should be disclosed, “the relevant excerpts” of the material should be disclosed in “anonymous redacted form”.³¹ The prosecution further contends that the themes identified in the four transcripts are “replicated in all meaningful and material respects” in the summaries of other witnesses ([REDACTED]) who are available to testify and “will be questioned by the defence on those themes”.³²

10. On 22 August 2011, the defence filed the “Defence Response to Public Redacted Version of ‘Prosecution’s Request for Non-disclosure of Four Witness statements, or in the Alternative, to Maintain Request for Redactions Previously Sought Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence’, filed on 15 July 2011”³³ (“Defence Response to the Revised Prosecution Application”).
11. The defence opposes the Revised Prosecution Application “in its entirety”.³⁴ It submits that pursuant to Article 67(2) of the Statute and Rule 77 of the Rules, the prosecution is “under an absolute obligation to disclose” the transcripts of the interviews of the four witnesses.³⁵ It thus requests full disclosure of the transcripts and related material pertaining to Witnesses 304, 305, 306 and 312, including the identity and identifying information of these persons.³⁶

²⁹ *Ibid.*, paragraph 26.

³⁰ ICC-02/05-03/09-183-Red, paragraph 14.

³¹ *Ibid.*

³² ICC-02/05-03/09-183-Conf-Exp, paragraph 13.

³³ Defence Response to Public Redacted Version of “Prosecution’s Request for Non-disclosure of Four Witness statements, or in the Alternative, to Maintain Request for Redactions Previously Sought Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence”, 22 August 2011, ICC-02/05-03/09-201.

³⁴ ICC-02/05-03/09-201, paragraph 3.

³⁵ ICC-02/05-03/09-201, paragraph 3.

³⁶ ICC-02.05-03/09-201, paragraph 4.

12. Observing an “emerging trend to requests of similar nature” that necessitate multiple responses, the defence requests that the Chamber issue an authoritative ruling on the prosecution’s obligation to disclose the statements of all witnesses no longer intended to be relied upon at trial, which contain exculpatory evidence and/or information material to the preparation of the defence.³⁷

13. [REDACTED].³⁸ [REDACTED].

14. [REDACTED].³⁹[REDACTED].⁴⁰ [REDACTED].⁴¹ [REDACTED].⁴²

15. The prosecution further submits that

[REDACTED].⁴³

II. Analysis and conclusions

16. The Chamber is seised with a request for non-disclosure of [REDACTED] in the alternative, a request for redactions to this material.

17. The Chamber notes that the prosecution no longer intends to rely on Witnesses 304, 305, 306 and 312 at trial. Therefore, no disclosure obligation exists in relation to these witnesses pursuant to Rule 76(1) of the Rules.

18. The Chamber notes, however, that in its Revised Prosecution Application and Second Revised Prosecution Application, the prosecution notes that the transcripts and related materials pertaining to Witnesses 304, 305, 306 and 312

³⁷ ICC-02/05-03/09-201, paragraph 48.

³⁸ Prosecution’s Application to the Chamber Arising out of the Defence Request for Disclosure, 21 September 2011, ICC-02/05-03/09-221-Conf-Exp.

³⁹ ICC-02/05-03/09-221-Conf-Exp, paragraph 4.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ ICC-02/05-03/09-221-Conf-Exp, paragraph 5.

contain, to varying degrees, potentially exculpatory evidence or information that would be material to the preparation of the defence within the scope of Article 67(2) of the Statute and Rule 77 of the Rules.⁴⁴

19. Pursuant to Article 67(2) of the Statute, the prosecution shall, as soon as practicable, disclose to the defence evidence “in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence”. Rule 77 of the Rules extends the prosecution’s disclosure obligation to documents which are “material to the preparation of the defence.”⁴⁵ The Appeals Chamber has held that the term “material to the preparation of the defence” is to be understood as referring to “all objects that are relevant for the preparation of the defence”.⁴⁶

20. Article 67(2) of the Statute and Rule 77 of the Rules place “mandatory disclosure obligations” on the prosecution.⁴⁷ Items that are potentially exculpatory or material to the defence must be disclosed in a form such that they may be effectively used in the investigation and preparation of the defence of the accused.⁴⁸ This requires that items are disclosed in their original form. Along

⁴⁴ ICC-02/05-03/09-181-Red, paragraph 7; ICC-02/05-03/09-183-Red, paragraph 8

⁴⁵ See Redacted Version of Decision on the “Defence Motion for Disclosure Pursuant to Rule 77”, 29 July 2011, ICC-01/05-01/08-1594-Red, paragraph 21 (“As is apparent from the above jurisprudence, the prosecution’s disclosure obligations under Rule 77’s materiality prong are broad”); Decision on the scope of the prosecution’s disclosure obligations as regards defence witnesses, 12 November 2010, ICC-01/04-01/06-2624, paragraph 16 (“It follows from this Decision of the Appeals Chamber that the prosecution’s disclosure obligations under Rule 77 of the Rules are wide, and they encompass, *inter alia*, any item that is relevant to the preparation of the defence, and including not only material that may undermine the prosecution case or support a line of argument of the defence but also anything substantive that is relevant, in a more general sense, to defence preparation”).

⁴⁶ Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433, paragraph 2.

⁴⁷ *Ibid.*, paragraph 50.

⁴⁸ See Article 64(3)(c) which establishes the duty of the Trial Chamber to “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”. See also ICTY, *Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T*, Trial Chamber II, Decision on “Motion for relief from Rule 68 violations by the Prosecutor and for sanctions to be imposed pursuant to rule 68bis and motion for adjournment while matters affecting justice and a fair trial can be resolved”, 30 October 2002, paragraph

these lines, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") has ruled that "[...] if the exculpatory material is enclosed in a statement, it is the statement that needs to be disclosed" and that "in order to make real use of the material, the [d]efence is entitled to be provided with the exculpatory material in its original form [...]"⁴⁹ The Chamber notes the statement of Trial Chamber I in *The Prosecutor v. Thomas Lubanga Dyilo* ("Lubanga case") that "[a]lthough the decisions of other international courts and tribunals are not part of directly applicable law under Article 21 of the Statute, the *ad hoc* tribunals are in a clearly comparable position to the Court in this context [...] In the result, their experience is potentially of direct relevance to the resolution of this issue."⁵⁰ Accordingly, the Chamber finds that, in principle, the material in question should be disclosed in its *entirety* and *original form*.

21. In the *Lubanga* case, however, Trial Chamber I exceptionally authorised the non-disclosure of the original interview transcripts of a witness on the basis that disclosure thereof, "even with redactions, creates an unwarranted risk that the identity of this individual will be revealed."⁵¹
22. The Chamber further notes another decision of Trial Chamber I in the *Lubanga* case which has accepted alternatives to full disclosure of information by the prosecution to the defence which included "redacted versions or summaries,

26. See also, Otto Triffterer and William A. Schabas - Rights of the Accused, in Otto Triffterer, Commentary on the Rome Statute of the ICC: Observers' Notes Article by Article (2008), page 864.

⁴⁹ ICTY, *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Trial Chamber II, Decision on "Motion for relief from Rule 68 violations by the Prosecutor and for sanctions to be imposed pursuant to rule 68bis and motion for adjournment while matters affecting justice and a fair trial can be resolved", 30 October 2002, paragraph 26.

⁵⁰ See Decision on the Defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, paragraph 15.

⁵¹ Redacted Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information" of 5 December 2008 and Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information" of 12 March 2009, 24 June 2009, ICC-01/04-01/06-1980-Anx2, paragraph 72.

proposed admissions of fact, and alternative sources of *tu quoque* evidence.”⁵²

(i) Non-Disclosure of Interview Transcripts of Witnesses 304, 305, 306 and 312 or Disclosure of Excerpts thereof

23. The prosecution requests the Chamber to authorise the non-disclosure of the interview transcripts of Witnesses 304, 305, 306 and 312,⁵³ or to authorise the disclosure of excerpts only. The prosecution contends that the Article 67(2) and Rule 77 material contained in these transcripts is minimal and the defence is already in possession of the summarised versions of the transcripts.⁵⁴
24. The defence submits that the disclosure of summaries is not sufficient to satisfy the disclosure requirements at trial laid down in the Statute and in the Rules.⁵⁵
25. In light of the considerations in paragraphs 20 *et seq* above, the Chamber is not persuaded that the interview transcripts may be withheld in their entirety or disclosed in summary form only. The Chamber reaches this conclusion on the basis that the material contains information falling within the ambit of Article 67(2) of the Statute and Rule 77 of the Rules. The Chamber finds that the prosecution’s submission that the information is ‘minimal’ is without merit. The mere fact that the material contains *some* information that could be potentially exculpatory or material to the preparation of the defence suffices to persuade the Chamber that the defence is, in principle, entitled to full disclosure of the material. Where, however, the Chamber’s duty to protect victims, witnesses, and third persons requires it, such disclosure may be subject to the appropriate

⁵² Redacted Decision on the “Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing Tu Quoque Information” of 5 December 2008, 2 June 2009, ICC-01/04-01/06-1924-Anx2, paragraph 25.

⁵³ ICC-02/05-03/09-159-Red.

⁵⁴ ICC-02/05-03/09-181-Red, paragraphs 7 and 8.

⁵⁵ ICC-02/05-03/09-201, paragraph 3.

protective measures such as redactions.

(ii) Temporary Redactions

Chamber's Approach relating to redactions

26. The Chamber acknowledges that real safety and security concerns exist for the four individuals. This concern is heightened by the fact that they are currently unreachable, and their whereabouts remain unknown.⁵⁶ Mindful of its duty to take appropriate measures to protect the persons "at risk on account of the activities of the Court",⁵⁷ enshrined in Article 68(1) of the Statute, the Chamber finds that the statements cannot currently be disclosed in their *entirety* and *original form*. The Chamber considers that the disclosure of the witnesses' identities should be delayed until 20 January 2012, to give the prosecution the adequate amount of time at this stage of the proceedings to try to resolve the issue. Meanwhile the prosecution is ordered to employ its best efforts to (i) locate Witnesses 304, 305, 306 and 312 and establish contact with a view to obtaining their consent to the disclosure of their identities to the defence; (ii) upon locating the said individuals, immediately refer them to the VWU for an assessment of adequate protective measures to be put in place. This is because the objective should be full disclosure of the relevant material at the earliest possible date (and consequently, the lifting of temporary redactions granted in the present Decision), subject to the limited redactions granted under Rules 81(2) and 81(4) of the Rules as set out in the annexes.

⁵⁶ See Prosecution's Provision of Further and Revised Information on Four Witnesses' Statements, 20 July 2011, ICC-02/05-03/09-183-Conf-Exp, paragraph 26.

⁵⁷ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, paragraph 1.

27. If the prosecution is unable to locate, contact and secure the consent of the witnesses at issue, or otherwise resolve the underlying disclosure issue, the Trial Chamber will need to consider whether a fair trial may still be conducted in the absence of the full disclosure to the defence of the potentially exculpatory or Rule 77 material.
28. The Chamber now turns to an analysis of the temporary redactions requested by the prosecution.
29. According to the Appeals Chamber, the requirements that have to be met for a Chamber to authorise the non-disclosure of information are the following: (i) the existence of an “objectively justifiable risk”⁵⁸ to the safety of the person concerned or which may prejudice further or ongoing investigations;⁵⁹ (ii) the risk must arise from disclosing the particular information to the accused;⁶⁰ (iii) the infeasibility or insufficiency of less restrictive protective measures;⁶¹ (iv) an assessment as to whether the redactions sought are “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”;⁶² and (v) the obligation to periodically review the decision authorising the redactions should circumstances change.⁶³
30. In assessing whether any such request for partial non-disclosure should be

⁵⁸ *Ibid.*, paragraph 71.

⁵⁹ *Ibid.*, paragraph 97.

⁶⁰ *Ibid.*, paragraph 71(b).

⁶¹ Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, ICC-01/04-01/06-568, paragraph 37; Judgement 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.

⁶² Judgement 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 34.

⁶³ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-475, paragraph 73(c).

authorised, the Chamber is required to carefully assess the issue on a case-by-case basis with specific regard to the rights of the accused.⁶⁴

31. The Chamber must, in particular be satisfied that the prosecution has sufficiently justified its request for the non-disclosure of information to the defence, and that the aforementioned criteria are fulfilled, before proceeding to grant a request.
32. Furthermore, Regulation 42(1) of the Regulations stipulates that protective measures, once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court and shall continue after proceedings have been concluded, subject to revision by a Chamber.
33. The Chamber discusses the main issues relevant to the proposed redactions below. The analysis of the specific redactions sought in relation to each witness is set out in the confidential *ex parte* prosecution and VWU only annexes to the present Decision. The details of the redactions considered below in general terms are referenced in the annexes.

Redactions pursuant to Rule 81(2) of the Rules

34. The prosecution seeks the Chamber's authorisation to apply redactions to the names and initials of prosecution investigators as well as prosecution and Registry interpreters who were present during the interviews of Witnesses 304, 305, 306 and 312. The prosecution submits that the disclosure of the names and identities of the prosecution and Court staff that may be required to go back to the field in regions facing ongoing conflicts to meet with witnesses and collect

⁶⁴ See *Ibid.*, paragraph 2.

further evidence, at this stage of the proceedings, may render them easily traceable. This would result in an increased risk to them and to the prosecution's ongoing investigations.

35. The prosecution also seeks permission to redact the name of the interview locations where Witness 312's interview was conducted, as it submits that there exist few interview locations that are safe to be used in the Darfur investigation and disclosure of the location would jeopardise the investigating activity and thus prejudice further and ongoing investigations.
36. The Chamber is satisfied that the disclosure of the names and initials of prosecution and Court staff would endanger not only the safety of the abovementioned individuals, but also the prosecution's ongoing investigations. The Chamber finds that, at this stage of the proceedings, no less intrusive measures are possible. The Chamber considers that the temporary redactions do not violate the right of the accused to a fair trial as the redactions to the names and initials of the prosecution field staff and the locations where interviews were held does not affect the substance of the documents and are irrelevant to the contested issues on the basis of the information known at this stage.⁶⁵ The Chamber notes that the redaction of the initials of prosecution investigators as well as prosecution and Registry interpreters should also be applied to sections of the transcripts the prosecution identified as being material to the preparation of the defence pursuant to Rule 77 of the Rules. The Chamber is satisfied that these redactions do not affect the defence's ability to use the documents. Accordingly, the Chamber grants the requested redactions pursuant to Rule 81(2) of the Rules.

⁶⁵ See Redacted Decision on Intermediaries, ICC-01/04-01/06-2434-Red2, 31 May 2010, paragraph 6.

Redactions pursuant to Rule 81(4) of the Rules

37. The prosecution seeks the Chamber's authorisation to redact all identifying information of Witnesses 304, 305, 306 and 312. The Chamber notes that such identifying information includes the witnesses' names, signatures and initials; date and place of birth; current and prior occupations (and related dates); education (and related dates); specific languages spoken; and any information that could potentially lead to the identification of the witness, e.g. his or her participation in missions, conferences or specific events, or through disclosing the identity of people the witness interacted with. The prosecution submits that anonymity was previously granted to the four witnesses in the case of *The Prosecutor v. Bahr Idriss Abu Garda*, and that the requested redactions are consistent with the protective measures ordered in that case.⁶⁶
38. For the reasons set out above, the Chamber finds that the temporary redactions of the names and other identifying information of Witnesses 304, 305, 306 and 312 are justified at this stage. In particular, it notes that the disclosure of identifying information other than the witnesses' names would potentially lead to the identification of the witnesses endangering their safety and security.
39. The Chamber further notes that redactions applied to the witnesses' names and other identifying information including [REDACTED], affect sections of the transcripts the prosecution identified as potentially exculpatory or material to the preparation of the defence pursuant to Article 67(2) of the Statute and Rule 77 of the Rules. The Chamber finds that the temporary redactions do not violate the right of the accused to a fair trial as sufficient time will be afforded to the defence to conduct the necessary investigations, upon the lifting of the

⁶⁶ ICC-02/05-03/00-159-Conf-Exp-AnxA, pages 17, 20, 25, 36; ICC-02/05-03/09-159-Conf-Exp-AnxB, pages 12, 15, 17; ICC-02/05-03/09-159-Conf-Exp-AnxC, pages 14, 15-16, 25, 26, 28; ICC-02/05-03/09-159-Conf-Exp-AnxE, pages 10, 30-31, 62-63, 59, 100.

redactions in question, depending on the results of the prosecution's efforts (see paragraphs 26 and 27 above). In any event the Chamber will ensure that no prejudice is caused to the accused.

40. The Chamber has taken note of the justifications put forward with regard to the redaction of contextual information that could lead to the identification of Witnesses 304, 305, 306 and 312. It considers that some of the contextual information the prosecution generally sought to redact is not covered by the proposed redactions applied to Witness 304, 305, 306 and 312's interview transcripts as submitted to the Chamber for review. In order to ensure consistency in applying redactions and the effectiveness of the protective measure granted for these witnesses, the Chamber *proprio motu* orders additional redactions to phrases and sentences that could potentially lead to the identification of the witnesses and endanger their security and safety (see details set out in annexes A to D to the present Decision).
41. The Chamber also instructs the prosecution to review the consistency of the redactions applied in the translated sections of the transcripts. It has come to the attention of the Chamber that some redactions may have been inconsistently applied in the Arabic or English translation of phrases and sentences redacted in the other language used during the interview. In this regard the Chamber refers the prosecution to its analysis of the proposed redactions to the interview transcripts of Witnesses 304 and 305 set out in detail in annexes A and B to the present Decision.
42. The prosecution further seeks the Chamber's authorisation to apply redactions to the names of the four witnesses' family members, their current whereabouts, as well as to the identity of third persons, pursuant to Rule 81(4) of the Rules.

The prosecution submits that the disclosure of their names and current whereabouts would pose an objectively justifiable risk to their safety and/or physical and psychological well-being and unnecessarily infringe upon the witnesses' and their families' right to privacy.

43. The Chamber is indeed persuaded that, at this stage, the disclosure of the names and current whereabouts of the witnesses' family members would pose an objectively justifiable risk to their safety and security as these individuals are not in any way connected to the activities of the Court and the information is irrelevant to the contested issues on the basis of the information known at this stage.⁶⁷ Considering the volatile security situation in the Republic of the Sudan, revealing the identities of the family members would expose them to an unjustified risk. The Chamber also finds that these redactions are the least intrusive measure available for the protection of these third persons. The proposed redactions do not affect the understanding and legibility of the document and do not, in the Chamber's view, violate the right of the accused to a fair trial as they do not go to the substance of the core issues in the case. Accordingly, the Chamber grants the requested redactions pursuant to Rule 81(4) of the Rules.

(iii) [REDACTED]

44. [REDACTED]. [REDACTED]⁶⁸ and [REDACTED].⁶⁹

45. [REDACTED].⁷⁰

⁶⁷ ICC-01/04-01/06-2434-Red2, 31 May 2010, paragraph 6.

⁶⁸ ICC-02/05-03/09-221-Conf-Exp, paragraph 4.

⁶⁹ ICC-02/05-03/09-221-Conf-Exp, paragraph 5.

⁷⁰ Redacted Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information" of 5 December 2008 and Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information" of 12 March 2009, 24 June 2009, ICC-01/04-01/06-1980-Anx2, paragraph 72.

46. [REDACTED].

47. [REDACTED].

48. [REDACTED].

49. FOR THE FOREGOING REASONS, THE CHAMBER

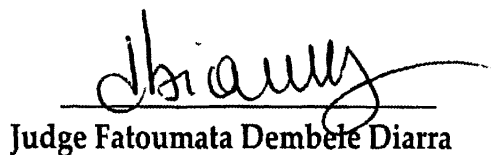
- a. **GRANTS** the prosecution request for the temporary non-disclosure [REDACTED];
- b. **DENIES** the prosecution request for full non-disclosure of interview transcripts or disclosure of excerpts;
- c. **GRANTS** on a temporary basis, the prosecution request for redactions pursuant to Rule 81(4) and Rule 81(2) of the Rules as outlined in annexes A, B, C, and D to this Decision;
- d. **ORDERS**, *proprio motu*, on a temporary basis, redactions as outlined in detail in annexes A to D to this Decision;
- e. **ORDERS** the prosecution to deploy its best efforts to (i) locate Witnesses 304, 305, 306 and 312 and establish contact with a view to obtaining their consent to the disclosure of their identities to the defence; and (ii) upon locating the said individuals, to immediately refer them to the VWU for an assessment of adequate protective measures to be put in place;
- f. **ORDERS** the prosecution to revert back to the Chamber on the outcome of its efforts no later than 20 January 2012; and

- g. **ORDERS** the prosecution to immediately disclose to the defence the material in redacted form, as approved in the annexes to the present Decision, and file a disclosure note informing the Chamber.

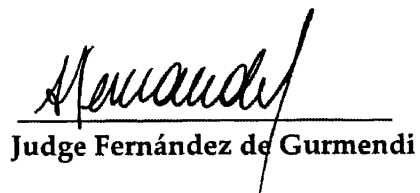
Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'Aluoch', written over a horizontal line.

Judge Joyce Aluoch

A handwritten signature in black ink, appearing to read 'Diarra', written over a horizontal line.

Judge Fatoumata Dembele Diarra

A handwritten signature in black ink, appearing to read 'Fernández', written over a horizontal line.

Judge Fernández de Gurmendi

Dated this 28 February 2012

At The Hague, The Netherlands