

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06

Date: 24 June 2009

TRIAL CHAMBER I

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

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

Public Annex 2

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

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Jean Louis Gilissen
Mr Jean Chrysostome Mulamba
Nsokoloni
Mr Paul Kabongo Tshibangu
Mr Hervé Diakiese
Unrepresented Victims

Legal Representatives of the Applicants

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, delivers the following decision (“Decision”) on the “Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information” and the “Prosecution’s Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information”:¹

I. Background and submissions

1. On 21 December 2007 the Office of the Prosecutor (“prosecution”) informed the Chamber that it had disclosed to the defence excerpts of witness statements containing potentially exculpatory information or Rule 77 material, some of which contained redactions not previously authorized.² It submitted that the witness statements contain information that merits disclosure in accordance with Article 67(2) of the Rome Statute (“Statute”) or Rule 77 of the Rules of Procedure and Evidence (“Rules”), but that the witnesses would be at risk if their identities are revealed.³ It requested “the authorization of (i) the non-disclosure of the full statements including the identity of the respective witnesses (i.e. the disclosure of excerpts); as well as (ii) the non-disclosure of certain portions of the excerpts (i.e. redactions within the excerpts) on the basis of Article 54(3)(f)”.⁴

2. At a status conference on 18 January 2008, the Chamber decided that the

¹ Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542; the full confidential *ex parte* prosecution only version of the request is attached as Annex A to Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA; Prosecution’s Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009, ICC-01/04-01/06-1772; the full confidential *ex parte* prosecution only version of the request is attached as Annex A to the Prosecution’s Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009, ICC-01/04-01/06-1772-Conf-Exp-AnxA.

² Prosecution’s Application for Non-Disclosure of Information on the basis of Article 54(3)(f), 21 December 2007, ICC-01/04-01/06-1102, paragraphs 4 and 5.

³ Prosecution’s Application for Non-Disclosure of Information on the basis of Article 54(3)(f), 21 December 2007, ICC-01/04-01/06-1102, paragraphs 6-8.

⁴ Prosecution’s Application for Non-Disclosure of Information on the basis of Article 54(3)(f), 21 December 2007, ICC-01/04-01/06-1102, paragraph 10.

prosecution is not under an obligation to serve material relating to the general use of child soldiers in the Democratic Republic of the Congo ("DRC") on the defence.⁵

3. Following a request for leave to appeal⁶ (granted by the Chamber⁷) the Appeals Chamber on 11 July 2008 held that the appellant "sufficiently demonstrated that the material relating to the general use of child soldiers in the DRC is material to the preparation of his defence", reversed the Trial Chamber's oral decision of 18 January 2008 and held that the "Trial Chamber will have to determine whether or not the appellant has a right to access the entire statements containing information on the general use of child soldiers".⁸
4. On 13 June 2008, the Trial Chamber ordered a stay of the proceedings,⁹ which it thereafter lifted at a status conference on 18 November 2008,¹⁰ once the causative issues had been resolved. Simultaneously, the Chamber provisionally set the date for the commencement of the trial as 26 January 2009.¹¹
5. Additionally, on 18 November 2008, the Trial Chamber invited the parties and participants to address the issue of the disclosure of *tu quoque* information.¹²

⁵ Transcript of hearing on 18 January 2008, ICC-01/04-01/06-T-71-ENG, page 10, lines 10-13.

⁶ Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision orale de la Chambre de première instance I rendue le 18 janvier 2008 (*Règle 155 du Règlement de procédure et de preuve*), 28 January 2008, ICC-01/04-01/06-1134.

⁷ Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, 6 March 2008, ICC-01/04-01/06-1210; Corrigendum to Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, 14 March 2008, ICC-01/04-01/06-1210-Corr.

⁸ Judgement 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 OA 11, paragraphs 82 and 86.

⁹ Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401.

¹⁰ Transcript of hearing on 18 November 2008, ICC-01/04-01/06-T-98-ENG, page 3, lines 22-25, page 4, line 1.

¹¹ Transcript of hearing on 18 November 2008, ICC-01/04-01/06-T-98-ENG, page 7, lines 23-25.

¹² Transcript of hearing on 18 November 2008, ICC-01/04-01/06-T-98-ENG, page 5, lines 14-22.

6. At a status conference on 25 November 2008, the prosecution advised the Trial Chamber that witness statements from forty-three witnesses containing *tu quoque* information had been disclosed in excerpted form to the defence;¹³ indeed, the identity of some of the witnesses had been redacted.¹⁴ The prosecution informed the Chamber of the disclosure of over 150 items that include analogous information on the use of child soldiers,¹⁵ and the prosecution relied on its earlier admission of fact relating to the use of child soldiers by groups other than the UPC/FPLC in Ituri.¹⁶ The prosecution further indicated that it had disclosed a significant volume of material relating to child soldiers, in addition to that of a *tu quoque* nature, which had the potential to assist the defence in understanding and investigating the circumstances in which the children were allegedly recruited by various armed groups.¹⁷ Additionally, of the witness statements previously disclosed in excerpted form, five statements contain Rule 77 material in addition to information of a *tu quoque* nature, and a further dozen witnesses provide Rule 77 material, most of which had been included in the prosecution's 21 December 2007 filing.¹⁸

7. At the status conference of 25 November 2008 the defence submitted that it does not accept that information relating to the use of child soldiers comes within the category of *tu quoque* evidence, and suggested that instead it is directly relevant to the charges the accused faces and the preparation of his defence. Furthermore, the defence argued that an admission of fact will not materially assist it to understand the general context and circumstances of the

¹³ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 28, lines 14-17.

¹⁴ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 28, lines 20-22.

¹⁵ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 29, lines 10-17.

¹⁶ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 29, lines 2-9; Confidential Annex C to the Prosecution's Notification of Exculpatory and Rule 77 Material to the Defence on 18 and 20 November 2008, 21 November 2008, ICC-01/04-01/06-1545-Conf-Anx155, page 7, last column.

¹⁷ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 33, lines 12-21.

¹⁸ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 36, line 8 – page 37, line 1.

use of child soldiers in the DRC.¹⁹ The defence requested disclosure of the statements in full for the preparation of the accused's defence, submitting that summaries or analogous information (provided as an alternative) do not enable proper investigation of the particular area of evidence.²⁰ The defence also submitted that it did not accept that security risks are a valid reason not to disclose exculpatory material if the individuals are not to be called as witnesses, and it reiterated its general request for the information to be disclosed in full.²¹

8. During the status conference the Chamber ordered the prosecution to provide the Chamber with the undisclosed material in fully non-redacted form and in the format in which the prosecution intended to disclose the materials to the defence,²² along with any proposed admissions of fact²³ and alternative evidence²⁴ relevant to the information in each statement. Finally, the Chamber ordered the prosecution to provide an update on the security situation for each of the forty-three witnesses whose identity the prosecution sought to protect, to the extent that it is available.²⁵

ICC-01/04-01/06-1542²⁶

9. On 5 December 2008, the prosecution filed the "Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77

¹⁹ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 31, line 20 – page 32, line 11.

²⁰ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 32, lines 12-22.

²¹ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 32, line 23 – page 33, line 8.

²² Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 34, lines 12-16 and page 37, lines 7-10.

²³ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 31, lines 3-9, page 34, lines 12-16, page 37, lines 10-13.

²⁴ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 30, line 22 to page 31, line 2.

²⁵ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 35, lines 1-13.

²⁶ Corrections to the chart listing the proposed form of disclosure, the proposed admissions of fact and items of alternative evidence in relation to each witness, attached as Annex 1 (ICC-01/04-01/06-1542-Anx1-Conf) to the application, were sent to the Trial Chamber in an email to the Legal Advisor to the Trial Division on 9 June 2009.

Information”.²⁷ It informed the Chamber that ten witnesses, rather than twelve witnesses as stated during the status conference of 25 November 2008, provide Rule 77 information. It submitted that the statements of two of the ten witnesses could be disclosed without redactions to their identity.²⁸ The prosecution requested authorization not to disclose the identity of, and identifying information relating to, eight other individuals providing Rule 77 information on the basis of Articles 54(3)(f), 61, 64, 68 of the Statute and Rules 81(4) and 77 of the Rules.²⁹ Furthermore, it sought authority to disclose alternative forms of the relevant information provided by each individual.³⁰

ICC-01/04-01/06-1772

10. On 12 March 2009, the prosecution filed the “Prosecution’s Request for Non-Disclosure of Information in one Witness Statement containing Rule 77 Information”.³¹ It informed the Chamber that on 6 March 2009, Witness DRC-OTP-WWWW-0163 had agreed to disclosure of his identity, and that the prosecution withdraws its request of 5 December 2008 in relation to this witness. The Prosecution now seeks authorization to disclose his interview with limited redactions, and notes that it is seeking the same redactions as sought before Trial Chamber II.³²

The prosecution’s requests

(i) Non-disclosure of the identity of Witness DRC-OTP-WWWW-0316

11. The prosecution submits a 2 page report on the military profile of Thomas

²⁷ Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542.

²⁸ Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542, paragraph 3.

²⁹ Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542, paragraph 4.

³⁰ Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542, paragraph 4.

³¹ Prosecution’s Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009, ICC-01/04-01/06-1772; the full confidential *ex parte* prosecution only version of the request is attached as Annex A to the Prosecution’s Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009, ICC-01/04-01/06-1772-Conf-Exp-AnxA.

³² Prosecution’s Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009, ICC-01/04-01/06-1772, paragraphs 2-4.

Lubanga written by this witness, for which it requests the redaction of the witness's name and letters which reveal his position, as set out at the end of the document.³³ The prosecution submits that the report contains Rule 77 information since it describes the relationship between Thomas Lubanga Dyilo and Uganda.³⁴ The prosecution proposed an admission of fact, and identified items of alternative evidence that cover the relevant information.³⁵ The Chamber is reminded that the prosecution has requested authorization to redact the identity of this witness in other documents, on the same basis.³⁶

12. This individual is an [REDACTED], who, *inter alia*, [REDACTED] in the DRC.³⁷ The prosecution informed the Chamber that he [REDACTED].³⁸ It suggests that if his name is disclosed, this will compromise his past and future work, as well as his safety and security, and that of [REDACTED].³⁹ [REDACTED].⁴⁰

(ii) Non-disclosure of the identity of Witness DRC-OTP-WWWW-0018⁴¹

13. The prosecution submits a 12 page statement taken from this witness in French, for which it requests redactions to his name and all other identifying

³³ Annex 2 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-Anx2 (ERN: DRC-OTP-0142-0004-DRC-OTP-0142-0005); Redacted version: Annex 3 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx3 (ERN: DRC-OTP-0142-0004-DRC-OTP-0142-0005); Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542, paragraph 6.

³⁴ Annex 1 to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx1, page 2.

³⁵ Annex 1 to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx1, page 2.

³⁶ Public redacted Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542, paragraph 8.

³⁷ Attachment A to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 6.

³⁸ Attachment A to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 8.

³⁹ Attachment A to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 8.

⁴⁰ Attachment A to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 9.

⁴¹ In an email sent to the Legal Advisor to the Trial Division on 9 June 2009, the prosecution indicated that the correct witness code is the code used in the main filing (DRC-OTP-WWWW-0018), rather than the code contained in the chart attached as Annex 1 (ICC-01/04-01/06-1542-Anx1-Conf) to the application.

information.⁴² The prosecution submits that the statement contains Rule 77 information insofar as it refers to a coalition between the Hema militias of the UPC and Rwandan troops (“les effacés”) during 2002 to attack a village.⁴³ The prosecution has identified a section of the statement as providing potentially exculpatory information relating to the lack of children among the UPC soldiers guarding the prisoners [REDACTED].⁴⁴ The prosecution has also submitted a proposed admission and alternative evidence for consideration by the Chamber.⁴⁵

14. This witness has provided a statement that may be used as evidence in the case against Mathieu Ngudjolo and Germain Katanga.⁴⁶ The prosecution has submitted that the witness can only be contacted via an intermediary, [REDACTED] resides in a village in Ituri that is not within the range of the Court’s Initial Response System (“IRS”).⁴⁷ The Prosecutor has suggested that the Court has no means of ensuring [REDACTED] protection or managing the risks following disclosure [REDACTED].⁴⁸

(iii) Redactions to the interview transcript of Witness DRC-OTP-WWWW-0163

15. As this witness has now agreed to disclose his identity in the present case,⁴⁹

⁴² Annex 4 to the Prosecution’s Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-Anx4 (ERN: DRC-OTP-0096-0116-DRC-OTP-0096-0127); Redacted version: Annex 5 to the Prosecution’s Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx5 (ERN: DRC-OTP-0096-0116-DRC-OTP-0096-0127); Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542, paragraph 6.

⁴³ Annex 1 to Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx1, page 3.

⁴⁴ Annex 1 to Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx1, page 3.

⁴⁵ Annex 1 to Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx1, page 3.

⁴⁶ Attachment A to Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 13.

⁴⁷ Attachment A to Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 16.

⁴⁸ Attachment A to Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 16.

⁴⁹ Prosecution’s Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009, ICC-01/04-01/06-1772, paragraph 2.

the prosecution withdraws its earlier request⁵⁰ for authorization, first, for non-disclosure of information and, second, to provide the defence with a summary of the French transcript of the relevant interviews (including verbatim extracts of the sections that are potentially material to defence preparation).⁵¹ In the present application, the prosecution seeks leave to disclose the interview transcripts with limited redactions, and submits that these do not affect the defence's ability to assess comprehensively the information provided by the witness, and they do not affect any information that is material to the preparation of the defence.⁵² It submits the transcript of three parts of the interview for which it proposes redactions on the basis of Article 54(3)(f) of the Statute and Rule 81(2) and 81(4) of the Rules.⁵³ The prosecution informs the Chamber that the redacted statement of the witness and the screening note were disclosed to the defence on 10 March 2009.⁵⁴

16. This individual was interviewed by the prosecution under Article 55(2) of the Statute. The prosecution requests redactions to: (i) the identity of a witness in the case against Germain Katanga and Mathieu Ngudjolo Chui (until protective measures are put in place [REDACTED]), and (ii) [REDACTED] communication between witnesses and the Office of the Prosecutor, under

⁵⁰ Original: Annex 7 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008. ICC-01/04-01/06-1542-Conf-Exp-Anx7 (ERN: DRC-OTP-1015-0017-DRC-OTP-1015-0291; DRC-OTP-1016-0018-DRC-OTP-1016-0043); Summary: Annex 6 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx6 (No ERN as it is a prosecution generated document); Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542, paragraphs 16-19.

⁵¹ Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009. ICC-01/04-01/06-1772, paragraph 2.

⁵² Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009. ICC-01/04-01/06-1772, paragraph 5.

⁵³ Annexes 2, 3 and 4 to the Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009, with highlights identifying the proposed redactions: ICC-01/04-01/06-1772-Conf-Exp-Anx2 (ERN: DRC-OTP-1015-DRC-OTP1015-0058), ICC-01/04-01/06-1772-Conf-Exp-Anx3 (ERN: DRC-OTP-1015-0031-DRC-OTP-1015-0058) and ICC-01/04-01/06-1772-Conf-Exp-Anx4 (DRC-OTP-1016-0018-DRC-OTP-1016-0043); Annexes 5, 6, and 7 to the Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009, with redactions as disclosed to the defence: ICC-01/04-01/06-1772-Conf-Anx5 (ERN: DRC-OTP-1015-DRC-OTP1015-0058), ICC-01/04-01/06-1772-Conf-Anx6 (ERN: DRC-OTP-1015-0031-DRC-OTP-1015-0058) and ICC-01/04-01/06-1772-Conf-Anx7 (DRC-OTP-1016-0018-DRC-OTP-1016-0043).

⁵⁴ Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009, ICC-01/04-01/06-1772, paragraph 7.

Article 54(3)(f) and Rules 81(2) and 81(4) of the Rules.⁵⁵

17. In the 28 page interview transcript from 10 June 2007, the prosecution seeks authority to redact the name of a witness in the *Katanga* case [REDACTED] at lines 59, 148, 149, 234, 235, 260, and 278. [REDACTED] – at lines 247, 248, and 249. At line 282 the prosecution furthermore seeks to redact the words [REDACTED], as these may lead to the identification of the witness, when read in context.⁵⁶
18. For the 28 page interview transcript from 11 June 2007, the prosecution seeks leave to redact the words [REDACTED] at lines 12 and 13 as these indicate [REDACTED] communication between witnesses and the prosecution.⁵⁷
19. As regards the 26 page interview transcript of 12 June 2007, the prosecution seeks to redact [REDACTED] at lines 645, 647, 648, 708 and 711.⁵⁸ This refers to the same witness in the *Katanga* case mentioned above.
20. In response to a request for clarification from the Chamber,⁵⁹ the prosecution provided further information justifying the proposed redactions, reflecting

⁵⁵ Annex A to the Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009, ICC-01/04-01/06-1772-Conf-Exp-AnxA, paragraph 7.

⁵⁶ Annex 2 to the Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009, with highlights identifying the proposed redactions: ICC-01/04-01/06-1772-Conf-Exp-Anx2 (ERN: DRC-OTP-1015-0031-DRC-OTP1015-0058); Annex 5 to the Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009, with redactions as disclosed to the defence: ICC-01/04-01/06-1772-Conf-Anx5 (ERN: DRC-OTP-1015-0031-DRC-OTP1015-0058).

⁵⁷ Annex 3 to the Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009, with highlights identifying the proposed redactions: ICC-01/04-01/06-1772-Conf-Exp-Anx3 (ERN: DRC-OTP-1015-0031-DRC-OTP1015-0058); Annex 6 to the Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009, with redactions as disclosed to the defence: ICC-01/04-01/06-1772-Conf-Anx6 (ERN: DRC-OTP-1015-0031-DRC-OTP1015-0058).

⁵⁸ Annex 4 to the Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009, with highlights identifying the proposed redactions: ICC-01/04-01/06-1772-Conf-Exp-Anx4 (ERN: DRC-OTP-1016-0018-DRC-OTP1016-0043); Annex 6 to the Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009, with redactions as disclosed to the defence: ICC-01/04-01/06-1772-Conf-Anx6 (ERN: DRC-OTP-1016-0018-DRC-OTP1016-0043).

⁵⁹ Email communication to the prosecution through the Legal Adviser to the Trial Division on 27 March 2009.

those sought to this witness's interview before Trial Chamber II.⁶⁰ As regards the witness, the name of whom is to be redacted, the prosecution informs the Chamber that [REDACTED], the prosecution submits that the redaction of this witness's name is necessary in the interim.⁶¹

21. As to the request to redact [REDACTED] communication with this witness [REDACTED]. In the prosecution's submission, revealing that these witnesses [REDACTED] identifying those who have cooperated with the prosecution. The latter informs the Chamber that Trial Chamber II has permitted redactions of this type to witness statements, accepting they do not undermine an understanding of the substance of the material. The prosecution notes, however, that these redactions by Trial Chamber II have only been authorized to remain place until 30 days prior to the start of trial unless the prosecution makes a supplementary request to maintain the redactions at least 45 days before the start of trial. Given that the trial before Trial Chamber II is scheduled to commence on 24 September 2009, the redactions will be lifted by 24 August 2009 unless a further application is made to maintain the redactions. In order not to violate the protective measures applied by Trial Chamber II, the prosecution now seeks identical redactions in this case [REDACTED].⁶²

(iv) Non-disclosure of the identity of Witness DRC-OTP-WWWW-0044

22. This concerns a French statement taken from Witness DRC-OTP-WWWW-0044.⁶³ The prosecution requests authorization [REDACTED] identity, and to provide a summary of the statement that includes verbatim extracts of the

⁶⁰ Email communication from the prosecution through the Legal Adviser to the Trial Division on 30 March 2009.

⁶¹ Email communication from the prosecution through the Legal Adviser to the Trial Division on 30 March 2009.

⁶² Email communication from the prosecution through the Legal Adviser to the Trial Division on 30 March 2009.

⁶³ Original: Annex 9 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-Anx9 (ERN: DRC-OTP-0160-0448-DRC-OTP-0160-0471).

sections providing information that may be material to the preparations of the defence.⁶⁴ The prosecution identified Rule 77 material relating to the cooperation between the APC and the Hema / Gegere in order to revolt against Wamba, as well as information about Rwandan and Ugandan support of the UPC.⁶⁵ In addition, the prosecution submits that the witness can provide potentially exculpatory information relating to the financial support provided to the UPC by Hema businessmen and the political influence these persons sought.⁶⁶ The prosecution has also proposed an admission of fact and, alternatively, has identified alternative evidence covering the information addressed by this witness.⁶⁷

23. [REDACTED].⁶⁸ [REDACTED] about the political direction of the UPC/FPLC. [REDACTED] detailed information about the creation of the UPC/FPLC in 2000, Thomas Lubanga's command role, as well as his strategy and goals relating to the armed conflict against non-Hema militias. [REDACTED] provides information about the means of communication within the FPLC, [REDACTED].⁶⁹ The prosecution suggests that due to [REDACTED] may be identified if a statement, even if redacted, is disclosed. [REDACTED], but the telephone contacts for this witness are out of date, and the prosecution therefore has no means of contacting [REDACTED] to alert [REDACTED] identity is disclosed.⁷⁰

⁶⁴ Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542, paragraphs 21-24; Summary: Annex 8 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx8 (No ERN as it is a prosecution generated document).

⁶⁵ Annex 1 to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx1, page 5.

⁶⁶ Annex 1 to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx1, page 6.

⁶⁷ Annex 1 to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx1, pages 5 and 6.

⁶⁸ Attachment A to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 29.

⁶⁹ Attachment A to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 30.

⁷⁰ Attachment A to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 35.

(v) Non-disclosure of the identity of Witness DRC-OTP-WWWW-0035

24. The prosecution requests the non-disclosure of this witness's identity and suggests providing a 3 page summary of the interview transcript comprising 929 pages, with verbatim extracts of the sections providing information that may be material to the preparation of the defence.⁷¹ The prosecution submits that on two pages of this transcript it has identified potentially exonerating information on Uganda's role and Thomas Lubanga's command and control, insofar as the witness states that the Ugandans ordered the attack on Bunia.⁷² The prosecution has also indicated alternative evidence covering the information addressed by this witness, which it suggests provides a substitute for the proposed summary.⁷³

25. The witness was a combatant in the UPC/FPLC, [REDACTED], and he was interviewed by the prosecution in accordance with Article 55(2) of the Statute. He provides information on recruitment and training of soldiers in the UPC/FPLC, their participation in combat and the military structures of the UPC/FPLC.⁷⁴ The prosecution suggests that the witness's identity is likely to be revealed, given the topics he discussed during his long interview.⁷⁵ [REDACTED], and [REDACTED] he informed the prosecution that [REDACTED].⁷⁶

⁷¹ Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542, paragraphs 21-24; Original: Annex 11 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-Anx11, (ERN: DRC-OTP-0161-0017-DRC-OTP-0161-2026); Summary: Annex 10 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx10, (No ERN as this is a prosecution generated document).

⁷² Annex 1 to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx1, page 7. The chart erroneously refers to Rule 77 material, although the filings correctly refer to potentially exonerating material: ICC-01/04-01/06-1542, paragraph 26; ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraphs 39 and 40.

⁷³ Annex 1 to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx1, page 7.

⁷⁴ Annex 10 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx10, (No ERN as this is a prosecution generated document), page 1.

⁷⁵ Attachment A to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 42.

⁷⁶ Attachment A to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 43.

(vi) Non-disclosure of the identity of Witness DRC-OTP-WWWW-0037

26. The prosecution requests non-disclosure of the identity of this witness, and proposes providing a 6 page summary of the French interview transcript, with verbatim extracts of the sections that include information that may be potentially exonerating or material to the preparation of the defence.⁷⁷ The potentially exonerating material concerns children having possibly joined the UPC voluntarily.⁷⁸ The Rule 77 material relates to a Rwandan by the name of Safari who was present at Mandro camp; Rwandans giving weapons to the UPC; and Uganda providing military training to UPC/FPLC recruits.⁷⁹ The prosecution has proposed an admission of fact, and it has identified alternative evidence to the information in the interview. Furthermore, it suggests disclosing either the summary or the alternative evidence to the defence.⁸⁰

27. This witness was interviewed by the prosecution under Article 55(2) of the Statute. He was a combatant of the UPC/FPLC and provides information about its structure, and its recruitment and training strategies, as well as the provision of arms and training by Uganda and Rwanda.⁸¹ This includes incriminatory information, namely Thomas Lubanga allegedly addressing approximately 700 recruits before they left for training in Uganda, among

⁷⁷ Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542, paragraphs 31-34; Original: Annex 13 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-Anx13, (ERN: DRC-OTP-0161-0251-DRC-OTP-0161-0614); Summary: Annex 12 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx12, (No ERN as this is a prosecution generated document). The prosecution's chart, ICC-01/04-01/06-1542-Conf-Anx1 erroneously indicates that a redacted version is to be disclosed.

⁷⁸ Annex 1 to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx1, page 8.

⁷⁹ Annex 1 to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx1, page 9.

⁸⁰ Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542, paragraph 29.

⁸¹ Annex 12 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx12, (No ERN as this is a prosecution generated document), page 1.

whom were children between 12 and 15 years of age, and the presence of 90 - 100 recruits of 12 and 15 years of age at the Mandro training camp.⁸² The prosecution has sought to protect this witness's identity on the grounds that he is an 'insider', particularly since he is a member of the UPC/FPLC who provided a lengthy interview on many topics.⁸³ The prosecution is no longer in contact with him and cannot, therefore, alert him to the availability of the IRS, or provide the relevant emergency contact details and advice on closely monitoring his security situation in advance of disclosure of his identity.⁸⁴

(vii) Non-disclosure of the identity of Witness DRC-OTP-WWWW-0101

28. A 9 page statement was taken in French from this witness. The prosecution requests the non-disclosure of his identity, and has proposed providing a redacted version of the witness statement, or alternative evidence, to the defence.⁸⁵ The prosecution identified Rule 77 material relating to several aspects of Rwandan support for, and cooperation with, the UPC.⁸⁶ The prosecution has also proposed an admission of fact for consideration by the Chamber. The Chamber notes that in a more recent filing concerning disclosure of sources in the meta-data in accordance with the Consolidated E-Court Protocol, the prosecution also seeks authorization not to disclose this witness's identity.⁸⁷

⁸² Annex 12 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx12, (No ERN as this is a prosecution generated document), pages 1 and 2.

⁸³ Attachment A to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 52.

⁸⁴ Attachment A to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 53.

⁸⁵ Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542, paragraphs 36-38; Original: Annex 14 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-Anx14, (ERN: DRC-OTP-0104-0123-DRC-OTP-0104-0131); Redacted version: Annex 15 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx15, (ERN: DRC-OTP-0104-0123-DRC-OTP-0104-0131).

⁸⁶ Annex 1 to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx1, page 10.

⁸⁷ Prosecution's Application for Non-Disclosure of Sources contained in the metadata in compliance with the Consolidated E-Court Protocol, 16 April 2009, ICC-01/06-1820-Conf-Exp: Public Redacted Version: Prosecution's Application for Non-Disclosure of Sources contained in the metadata in compliance with the Consolidated E-Court Protocol, 14 May 2009, ICC-01/06-1871.

29. This witness is a [REDACTED], who has, *inter alia*, participated [REDACTED].⁸⁸ [REDACTED].⁸⁹ [REDACTED].⁹⁰ The prosecution is unable to contact the witness, [REDACTED]. It cannot, therefore, alert him to the availability of the IRS, or provide the relevant emergency contact details and advice on closely monitoring his security situation in advance of disclosure of his identity.⁹¹

(viii) Non-disclosure of the identity of Witness DRC-OTP-WWWW-0270

30. The prosecution has requested the non-disclosure of the identity of this witness, and has proposed providing a summary of the French and Lingala interview transcript, with verbatim extracts of the sections providing information that may be potentially exonerating or material to the preparation of the defence.⁹² The Rule 77 material identified by the prosecution relates to Uganda changing its alliances, and particularly by cooperating both with the UPC and Ngudjolo's troops; additionally, the presence of UPDF soldiers during the attacks in Bogoro and fighting with the UPC against the Lendu during the second attack.⁹³ The prosecution proposed an admission of fact and identified alternative evidence for the interview transcript. It has requested authorization to disclose either the summary or the alternative

⁸⁸ Attachment A to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 56.

⁸⁹ Attachment A to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 58 and footnote 14.

⁹⁰ Attachment A to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 58.

⁹¹ Attachment A to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 60.

⁹² Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542, paragraphs 40-43; Original: Annex 17 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-Anx17, (ERN: DRC-OTP-0159-0292-DRC-OTP-0159-0546); Summary: Annex 16 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx16 (No ERN as this is a prosecution generated document).

⁹³ Annex 1 to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx1, page 11.

evidence.⁹⁴

31. Witness DRC-OTP-WWWW-0270 was interviewed by the prosecution under Article 55(2) of the Statute. He was a combatant in the FNI/FRPI and can provide information on the structure of the FNI/FRPI and the incidents in which he participated.⁹⁵ The prosecution suggests that this witness is an 'insider', whose identity may be revealed by the topics discussed during his lengthy interview.⁹⁶ The prosecution is unable to contact the witness, [REDACTED]. It cannot, therefore, alert him to the availability of the IRS or provide the relevant emergency contact details and advice on monitoring his security situation closely in advance of disclosure of his identity.⁹⁷

Response of the Defence

32. On 15 December 2008 the defence filed a response,⁹⁸ in which it observes that the relevant statements contain not only information that is relevant for the preparation of the defence, but also exculpatory material.⁹⁹ It submits that the obligation of the prosecution to disclose the identities of the witnesses arises under both Article 67(2) of the Statute and Rule 77 of the Rules.¹⁰⁰ It reiterates its submission that disclosure in these circumstances should be non-redacted and cites those parts of the decision of the Appeals Chamber from 11 July

⁹⁴ Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542, paragraph 38.

⁹⁵ Annex 16 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx16, page 1.

⁹⁶ Attachment A to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 67.

⁹⁷ Attachment A to Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-AnxA, paragraph 68.

⁹⁸ Réponse de la Défense à la "Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information" du 8 décembre 2008 et à la "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" du 11 décembre 2008, 15 December 2008, ICC-01/04-01/06-1555.

⁹⁹ Réponse de la Défense à la "Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information" du 8 décembre 2008 et à la "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" du 11 décembre 2008, 15 December 2008, ICC-01/04-01/06-1555, paragraph 5.

¹⁰⁰ Réponse de la Défense à la "Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information" du 8 décembre 2008 et à la "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" du 11 décembre 2008, 15 December 2008, ICC-01/04-01/06-1555, paragraph 6.

2008 where it addressed Rule 77 of the Rules.¹⁰¹

33. The defence argues that information disclosed to the accused is of no material assistance if the identity of the relevant witnesses is concealed, because it cannot be used effectively during the trial or in the course of its investigations.¹⁰² It submits that the admissions of fact are not a sufficient alternative as they only cover limited parts of the information from the witnesses in question.¹⁰³ Furthermore, the defence contends that the proposed admissions are vague, possibly indicating that the prosecution does not feel bound by them, and reservations of any kind generally undermine their value.¹⁰⁴

34. Additionally, the defence submits that the alternative evidence proposed by the prosecution does not rectify the problems created by incomplete disclosure because, first, some of the items cannot be used as probative evidence during the trial; second, some have been provided in redacted form, thereby diminishing their utility for the defence; third, the defence will be “deprived” of evidence because substitute items have been provided, with the result that not all the evidence on the topic will be introduced during the trial; and finally, even if two documents contain equivalent information they usually also contain distinct elements that can only be dealt with effectively and meaningfully as evidence if both documents are introduced as evidence

¹⁰¹ Réponse de la Défense à la “Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information” du 8 décembre 2008 et à la “Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” du 11 décembre 2008, 15 December 2008, ICC-01/04-01/06-1555, paragraphs 7-9.

¹⁰² Réponse de la Défense à la “Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information” du 8 décembre 2008 et à la “Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” du 11 décembre 2008, 15 December 2008, ICC-01/04-01/06-1555, paragraph 10.

¹⁰³ Réponse de la Défense à la “Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information” du 8 décembre 2008 et à la “Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” du 11 décembre 2008, 15 December 2008, ICC-01/04-01/06-1555, paragraph 11.

¹⁰⁴ Réponse de la Défense à la “Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information” du 8 décembre 2008 et à la “Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” du 11 décembre 2008, 15 December 2008, ICC-01/04-01/06-1555, paragraph 11.

during the proceedings.¹⁰⁵

35. The defence observes that it had not been informed of the reasons why the identities of each witness are not to be disclosed and submits that it is impermissible to make such a request this late in the proceedings, particularly in those instances where the prosecution has been in possession of the statements for several years.¹⁰⁶

36. The defence submits discrete observations on each of the eight witnesses addressed in the first filing of the prosecution. It particularly notes the date when the prosecution came into possession of the relevant document, and for witnesses DRC-OTP-WWWW-0018, DRC-OTP-WWWW-0044, and DRC-OTP-WWWW-0037, the defence noted that they provide both Rule 77 and Article 67(2) material.¹⁰⁷ The defence requests disclosure of the complete witness statements and the identity of the witnesses.¹⁰⁸

37. In view of the defence's concerns about the wording of the admissions of fact the Chamber suggested to the prosecution that it removes the wording "It has been said..." in a number of instances.¹⁰⁹

38. The prosecution agreed to this proposal in most instances, and it submitted

¹⁰⁵ Réponse de la Défense à la "Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information" du 8 décembre 2008 et à la "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" du 11 décembre 2008, 15 December 2008, ICC-01/04-01/06-1555, paragraph 12.

¹⁰⁶ Réponse de la Défense à la "Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information" du 8 décembre 2008 et à la "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" du 11 décembre 2008, 15 December 2008, ICC-01/04-01/06-1555, paragraph 13-16.

¹⁰⁷ Réponse de la Défense à la "Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information" du 8 décembre 2008 et à la "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" du 11 décembre 2008, 15 December 2008, ICC-01/04-01/06-1555, paragraphs 18-28.

¹⁰⁸ Réponse de la Défense à la "Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information" du 8 décembre 2008 et à la "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" du 11 décembre 2008, 15 December 2008, ICC-01/04-01/06-1555, paragraph 31.

¹⁰⁹ Email communication to the prosecution through the Legal Adviser to the Trial Division on 28 January 2009.

further amendments to the proposed admissions for the consideration by the Chamber.¹¹⁰

39. During the hearing on 31 March 2009, the defence indicated that it would not file a response to the prosecution's "Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information" of 12 March 2009.¹¹¹

II. Applicable Law and relevant decisions

40. The following provisions of the Statute and Rules are relevant in considering this Application:

Article 54

Duties and powers of the Prosecutor with respect to investigations

[...]

3. The Prosecutor may:

[...]

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

Article 64

Functions and powers of the Trial Chamber

[...]

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

[...]

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

(f) Rule on any other relevant matters.

[...]

Article 68

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

¹¹⁰ Email communication from the prosecution through the Legal Adviser to the Trial Division on 2 February 2009.

¹¹¹ Transcript of hearing on 31 March 2009, ICC-01/04-01/06-T-158-ENG, page 2, lines 2-10.

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

[...]

Rule 81

Restrictions on disclosure

1. Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to 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.

[...]

41. During the pre-trial stage of this case, the Appeals Chamber held that "three of the most important considerations for an authorization of non-disclosure of the identity of a witness pursuant to Rule 81 (4) of the Rules of Procedure and Evidence: the endangerment of the witness or of members of his or her family that the disclosure of the identity of the witness may cause; the necessity of the protective measure; and why [...] the measure would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."¹¹²

The Appeals Chamber emphasized that the Chamber should investigate

¹¹² 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 21; This test was confirmed in the Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, paragraph 67.

whether less restrictive protective measures are sufficient and feasible.¹¹³

42. When addressing the use of summaries, the Appeals Chamber referred to a particular judgment of the European Court of Human Rights, in which that Court rejected a suggested violation of the rights of the accused, because the procedures implemented by the judicial authorities sufficiently counterbalanced the handicaps under which the defence suggested it laboured.¹¹⁴ The Appeals Chamber held that “where the Pre-Trial Chamber takes sufficient steps to ensure that summaries of evidence in the circumstances described above are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and with a fair and impartial trial, the use of such summaries is permissible.”¹¹⁵ It specifically noted that the Pre-Trial Chamber would need to take into account, *inter alia*, any impairment of the ability of the defence to challenge the evidence presented by the prosecution following the use of anonymous witnesses and summaries, whenever the Prosecutor was unable to disclose the underlying witness statements and other documents to the defence.¹¹⁶

43. In the *Katanga* case the Appeals Chamber held that “persons other than witnesses, victims and members of their families, may, at this stage of the proceedings, be protected through the non-disclosure of their identities by analogy with other provisions of the Statute and the Rules. The aim is to secure protection of individuals at risk. Thus, by necessary implication, Rule 81(4) should be read to include the words “persons at risk on account of the

¹¹³ 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.

¹¹⁴ 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 50.

¹¹⁵ 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 51.

¹¹⁶ 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 51.

activities of the Court" so as to reflect the intention of the States that adopted the Statute and the Rules of Procedure and Evidence, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect people at risk."¹¹⁷ The Appeals Chamber emphasised that non-disclosure of information for the protection of persons at risk on account of the activities of the Court requires "a careful assessment [...] on a case by case basis, with specific regard to the rights of the [accused]."¹¹⁸

44. In the Chamber's assessment, this decision of the Appeals Chamber extending protection for the groups expressly provided for in Rule 81(4) of the Rules – i.e. witnesses, victims and members of their families – to the "*other persons at risk on account of the activities of the Court*" is to be applied during trial proceedings. Therefore, the Trial Chamber's responsibility under Article 64(6)(e) of the Statute to "[p]rovide for the protection of the accused, witnesses and victims" includes providing for the protection of other persons at risk on account of the activities of the Court.¹¹⁹

45. When addressing the question of whether redactions could be made to interview locations in the *Katanga* case, the Appeals Chamber observed that Rule 81(2) of the Rules provides generally for the non-disclosure of "information", without excluding *per se* certain categories of information. Similarly, Rule 81(4) of the Rules does not expressly rule out the information referred to in Rule 111(1) of the Rules from its ambit. The Appeals Chamber

¹¹⁷ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, paragraph 56.

¹¹⁸ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, paragraph 2.

¹¹⁹ Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" of 5 December 2008, 9 April 2009, ICC-01/04-01/06-1814-Conf, paragraph 34; Corrected version: Annex 1 to the Decision issuing corrected and redacted versions of "Decision on the Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" of 5 December 2008", 2 June 2009, ICC-01/04-01/06-1924-Conf-Anx1, paragraph 34; Public redacted version: Annex 2 to the Decision issuing corrected and redacted versions of "Decision on the Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" of 5 December 2008", 2 June 2009, ICC-01/04-01/06-1924-Anx2, paragraph 34.

therefore concluded that it will need to be determined on a case-by-case basis whether non-disclosure of information subject to Rule 111(1) of the Rules may be authorised by a Chamber. This will be determined in light of the conditions stipulated by Rule 81(2) and/or (4) of the Rules.¹²⁰

46. Further, the Trial Chamber has previously authorised the permanent redaction of the names of persons referred to as third parties, intermediaries and NGOs (together with their field staff) when, *inter alia*, the information was irrelevant to the known issues in the case, so long as this course did not render the document in any way unintelligible or unusable.¹²¹ On the same grounds, the Trial Chamber has also previously authorised redactions to the location of interviews.¹²²

III. Analysis

47. The Chamber has reviewed the information provided by the prosecution and has reached its decision following a case-by-case analysis of each individual witness. Applying the test established by the Appeals Chamber, the Trial Chamber has addressed the necessity for the requested protective measures; the availability of alternatives; and, generally, their overall impact on the documents in question and, in consequence, on the rights of the accused. To ensure that the protective measures proposed are consistent with his rights, the Chamber investigated whether the potential negative effect of any redactions or non-disclosure, as sought by the prosecution, were sufficiently counterbalanced by the proposed alternative measures. As part of this exercise, the Chamber considered the type and extent of the requested

¹²⁰ 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 93.

¹²¹ Transcript of hearing on 13 December 2007, ICC-01/04-01/06-T-65-ENG, page 3; Order granting prosecution's application for non-disclosure of information provided by a witness, 31 January 2008, ICC-01/04-01/06-1146-Conf-Exp. and (confidential redacted version) ICC-01/04-01/06-1221-Conf-Anx1, paragraph 8.

¹²² Transcript of hearing on 18 January 2008, ICC-01/04-01/06-T-72-Conf-Exp, page 2, line 14.

redactions or non-disclosure, and if relevant, the utility of the proposed summary, the proposed admissions of fact or the alternative evidence. The Chamber has applied the general principles set out in its Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information", to the individual, fact-specific situations.¹²³

48. The Chamber has also borne in mind that it has wide-ranging obligations as regards protective measures¹²⁴ that require it to take all necessary steps to protect victims and witnesses, so long as these do not undermine the fairness of the proceedings or materially prejudice the defence. In light of the Appeals Chamber's decision referred to above, this obligation extends to persons who may be at risk on account of activities of the Court.

(i) Witness DRC-OTP-WWWW-0316

49. The Chamber has considered the details of this witness's security situation and notes that the proposed redactions are to the name and role of the report's author, and that otherwise the full content of the report is to be disclosed. No lesser measures appear to be feasible in order to ensure his continued safety and security. It is to be observed that the Chamber previously authorised redactions to the identity of this witness as part of an earlier decision,¹²⁵ although on that occasion he was only referred to in the document in question. However, the security situation of this particular witness continues to warrant protective measures that include the non-

¹²³ Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" of 5 December 2008, 9 April 2009, ICC-01/04-01/06-1814-Conf, paragraphs 25-53; Corrected version: Annex 1 to the Decision issuing corrected and redacted versions of "Decision on the Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" of 5 December 2008", 2 June 2009, ICC-01/04-01/06-1924-Conf-Anx1, paragraphs 25-53; Public redacted version: Annex 2 to the Decision issuing corrected and redacted versions of "Decision on the Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" of 5 December 2008", 2 June 2009, ICC-01/04-01/06-1924-Anx2, paragraphs 25-53.

¹²⁴ See Article 64(6) of the Statute. For further discussion see Reasons for oral decisions lifting the stay of proceedings of 23 January 2009, ICC-01/04-01/06-1644, paragraphs 33-49.

¹²⁵ Decision on "Prosecution's Application for Non-Disclosure of Information" filed on 14 May, 17 December 2008, ICC-01/04-01/06-1561-Conf-Exp, paragraph 13.

disclosure of his identity, and the Chamber is satisfied that these are necessary to ensure, additionally, the security of the witnesses he meets, his ability to continue his critical work and [REDACTED], together with the safety and security of his family.

50. The proposed admissions of fact,¹²⁶ which cover the Rule 77 information contained in the report, have been amended to remove the wording “It has been said” from the first two proposals, so they now read:

- (i) Thomas Lubanga signed an agreement with the political-military movement under the control of the Ugandans for the provision of food to soldiers.
- (ii) For the purpose of the administration of Ituri, the Ugandans imposed the nomination of TLD as Minister of Defence of RCD/K-ML.
- (iii) It has been said that Uganda ordered its army, which was still present in Ituri, to force TLD away from Bunia in 6 March 2003.

51. The alterations to the first two admissions of fact clearly increase their evidential value. Whilst the third admission of fact has not been similarly amended, this relates to the extent of Thomas Lubanga’s control at the material time, and the Chamber will keep the adequacy of this admission under review during the course of the trial, as part of its ongoing obligation to review disclosure in light of the developments in the trial. This limited factor aside, the prosecution’s admissions of fact will ensure the fairness and impartiality of the proceedings. Given that the name of the witness is not to be disclosed, the Chamber has assessed the utility of this material, and it has decided that the admission – together with the redacted statement and the alternative evidence – is a sufficient alternative, because the essential elements revealed by the information are not in dispute. Accordingly, the defence will be able to rely on the prosecution’s admission concerning certain aspects of

¹²⁶ Annex 1 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008. ICC-01/04-01/06-1542-Conf-Anx1, page 2; Email communication from the prosecution to the Trial Chamber through the Legal Adviser to the Trial Division on 2 February 2009.

Uganda's involvement in the conflict rather than seeking to establish them through the witness. Indeed, arguably the defence is put in a more favourable evidential position than it otherwise would have been because of the "certainty" provided by the admission (which is not in itself binding on the Chamber.)

52. Furthermore, the Chamber has reviewed the 7 items of alternative evidence submitted by the prosecution and finds that they provide sufficient information regarding the relationship between Thomas Lubanga, the UPC and Uganda. They are an 87 page witness statement,¹²⁷ an 82 page Human Rights Watch report,¹²⁸ a 33 page International Crisis Group report,¹²⁹ a 4 page hand-written note from a witness,¹³⁰ a 20 page press article from La Colombe Plus,¹³¹ a 33 page Amnesty International report,¹³² and a further 101 page report from Amnesty International.¹³³ The Chamber does not accept that the alternative evidence should be disclosed as a substitute for the redacted document. Instead, the Chamber is of the view that it is necessary to disclose the redacted document and the alternative evidence in order to place the accused in the most favourable position, given that disclosure is to be

¹²⁷ Annex 18 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf- Anx18 (ERN: DRC-OTP-0105-0085-DRC-OTP-0105-0171), paragraph 82.

¹²⁸ Annex 19 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf- Anx19 (ERN: DRC-OTP-0074-0797-DRC-OTP-0074-0878), page DRC-OTP-0074-0818.

¹²⁹ Annex 47 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf- Anx47 (ERN: DRC-OTP-1015-0592-DRC-OTP-1015-0624), page DRC-OTP-1015-0602.

¹³⁰ Annex 20 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf- Anx20 (ERN: DRC-OTP-0127-0139-DRC-OTP-0127-0142), page DRC-OTP-0127-0139. This annex is a handwritten document that is almost illegible.

¹³¹ Annex 21 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf- Anx21 (ERN: DRC-OTP-0134-0126-DRC-OTP-0134-0145), page DRC-OTP-0134-0138. The prosecution's chart erroneously referred to page DRC-OTP-0134-0143.

¹³² Annex 22 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf- Anx22 (ERN: DRC-OTP-0019-0153-DRC-OTP-0019-0185), pages DRC-OTP-0019-0153- DRC-OTP-0019-0155 and DRC-OTP-0019-0170.

¹³³ Annex 23 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf- Anx23 (ERN: DRC-OTP-0074-0526-DRC-OTP-0074-0626), pages DRC-OTP-0074-0572- DRC-OTP-0019-0573.

truncated.

53. The Chamber notes that the defence has correctly observed that this request (*viz.* not to disclose the identity of this witness) comes at a very late stage,¹³⁴ although the underlying reasons for non-disclosure are longstanding.

54. The Chamber is satisfied that disclosure of the content of the report, together with the proposed admission of fact (in its final form) and the alternative evidence, provide all the relevant Rule 77 information to the defence. In view of the proposed measures to counterbalance non-disclosure of the identity of the document's author, the rights of the accused are not prejudiced and the Chamber approves the admission of fact, authorises the non-disclosure of the witness's identity and service of the redacted statement and the alternative evidence to the defence pursuant to Articles 54(3)(f), 64(6)(e) and 68(1) of the Statute and Rule 81(4) of the Rules. In essence, given the material elements of this witness's evidence are not in dispute, the defence will not be prejudiced by lack of information as regards his identity or the timing of this application.

(ii) Witness DRC-OTP-WWWW-0018

55. The proposed redactions to this witness's statement are limited, and they do not render it unintelligible or unusable. In particular, the Rule 77 and potentially exculpatory information is not redacted. In view of the fact that [REDACTED] and is living in an area outside the IRS, no lesser measures appear to be feasible to ensure his continued safety and security.

56. The prosecution's proposed admission of fact¹³⁵ covers a part of the Rule 77

¹³⁴ Réponse de la Défense à la "Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information" du 8 décembre 2008 et à la "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" du 11 décembre 2008, 15 December 2008, ICC-01/04-01/06-1555, paragraphs 14, 15 and 18.

¹³⁵ Annex 1 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx1, page 3; Email communication from the prosecution to the Trial Chamber through the Legal Adviser to the Trial Division on 2 February 2009.

information contained in the witness statement, and since the prosecution has removed the wording “It has been said” it will have utility for the defence and will assist in ensuring the fairness and impartiality of the trial of the accused. It is in the following terms:

The term “*les effacés*” is one used to describe the coalition between the UPC militia and the Rwandan combatants.

Given the name of the witness is not to be disclosed, the admission, particularly when considered together with the redacted statement and the alternative evidence, is a sufficient alternative, because the essential elements revealed by the information are not in dispute. Accordingly, the defence will be able to rely on the prosecution’s admission concerning a coalition between the UPC militia and the Rwandan combatants rather than seeking to establish those matters through the witness. As the Chamber has already noted, arguably the defence is put in a more favourable evidential position than it otherwise would have been because of the “certainty” provided by the admission (which is not in itself binding on the Chamber.)

57. The Chamber notes that the prosecution has further submitted two documents that contain Rule 77 information relating to Rwanda’s support of the UPC.¹³⁶ These are the Amnesty International reports referred to above, and they provide information on the role of Rwanda that – together with the admission of fact – covers the information provided by the witness.

58. In addition, the prosecution submitted three witness statements and one report containing potentially exculpatory information similar to that provided

¹³⁶ Annex 23 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx23(ERN: DRC-OTP-0074-0526–DRC-OTP-0074-0626), pages DRC-OTP-0074-0572– DRC-OTP-0019-0573; Annex 19 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx19 (ERN: DRC-OTP-0074-0797– DRC-OTP-0074-0878), pages DRC-OTP-0074-0813–DRC-OTP-0074-0814.

by the witness. One witness states that he or she did not see child soldiers at the residence of Thomas Lubanga.¹³⁷ Another witness indicates that Thomas Lubanga's bodyguards were aged between 18 and 20 years,¹³⁸ and the last witness relates that there was no involuntary recruitment of children.¹³⁹ The MONUC Child Protection Section report asserts that in the context of an operation within the Rwampara UPC military camp none of the 150 soldiers were children.¹⁴⁰

59. While the Chamber expresses its concern that this statement has been in the possession of the prosecution since May 2005 and that the request to authorize the non-disclosure of the witness' identity comes at this late stage, and although the statement contains potentially exculpatory information, nonetheless the alternative evidence adequately covers the information provided by this witness insofar as it tends to show that child soldiers were not always present during UPC operations.

60. Having reviewed the proposed redactions, the proposed admission and the alternate evidence, the Chamber is satisfied that the defence has received all the relevant Rule 77 and potentially exculpatory material in a form that is intelligible and useable. As with the previous witness, the Chamber considers the merits of this proposal for non-disclosure are not undermined by the prosecution's failure to make a timely application. Given the entirety of the information now made available to the defence, the Chamber finds that there is no identifiable prejudice to the rights of the accused. The Chamber

¹³⁷ Annex 24 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx24 (ERN: DRC-OTP-1006-0054-DRC-OTP-1006-0078), paragraph 161 on page DRC-OTP-1006-0077.

¹³⁸ Annex 25 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx25 (ERN: DRC-OTP-0165-0999-DRC-OTP-0165-1102), paragraph 104 on page DRC-OTP-0165-1024.

¹³⁹ Annex 27 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx27 (ERN: DRC-OTP-1010-0150-DRC-OTP-1010-0153), page DRC-OTP-1010-0153.

¹⁴⁰ Annex 26 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx26 (ERN: DRC-OTP-0172-0242-DRC-OTP-0172-0244), page DRC-OTP-0172-0244.

approves the admission of fact, authorizes the non-disclosure of the witness's identity and the disclosure of the redacted statement together with the alternative evidence in accordance with Articles 54(3)(f), 64(6)(e) and 68(1) of the Statute and Rule 81(4) of the Rules. In essence, given the material elements of this witness's evidence are not in dispute, the defence will not be prejudiced by lack of information as regards his identity or the timing of this application.

(iii) Witness DRC-OTP-WWWW-0163

61. The Chamber considered the prosecution's latest request as regards this witness, and the three sections of the transcript that include the proposed redactions.¹⁴¹ It notes that the identity of the witness is now known to the defence. The substance of the interview and the information about the involvement of Uganda and Kinshasa has been made available to the defence in full, and the surviving – and extremely limited – redactions do not render the interview transcripts unintelligible or unusable.

62. Addressing the application for removal of information identifying a witness in another case, the Chamber observes that he was a source of information for Witness DRC-OTP-WWWW-0163. Nonetheless, the Chamber is persuaded, for the reasons advanced by the prosecution, that the non-disclosure of his name is necessary to ensure his safety and the safety of his family, at least on a temporary basis and until the necessary protective measures have been put in place.

¹⁴¹ Annexes 2, 3 and 4 to the Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009, with highlights identifying the proposed redactions: ICC-01/04-01/06-1772-Conf-Exp-Anx2 (ERN: DRC-OTP-1015-DRC-OTP1015-0058), ICC-01/04-01/06-1772-Conf-Exp-Anx3 (ERN: DRC-OTP-1015-0031-DRC-OTP-1015-0058) and ICC-01/04-01/06-1772-Conf-Exp-Anx4 (DRC-OTP-1016-0018-DRC-OTP-1016-0043); Annexes 5, 6, and 7 to the Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information, 12 March 2009, with redactions as disclosed to the defence: ICC-01/04-01/06-1772-Conf-Anx5 (ERN: DRC-OTP-1015-DRC-OTP1015-0058), ICC-01/04-01/06-1772-Conf-Anx6 (ERN: DRC-OTP-1015-0031-DRC-OTP-1015-0058) and ICC-01/04-01/06-1772-Conf-Anx7 (DRC-OTP-1016-0018-DRC-OTP-1016-0043).

63. As to the proposed redactions relating to [REDACTED] communication, the Chamber has carefully considered the arguments of the prosecution. Given the volatile security situation and the current relevant circumstances within the DRC, the Chamber is satisfied that these are necessary to ensure the safety of the witness. Trial Chamber II has approved similar redactions, which are in any event extremely limited, and they do not affect the substance of the material in any way. The areas of evidence covered by the redactions, as relevant to the trial, have been made available to the defence in full.

64. Therefore, the Chamber authorizes the proposed redactions to the name of the person mentioned by Witness DRC-OTP-WWWW-0163 until the necessary protective measures have been put in place and it permanently authorizes the non-disclosure of [REDACTED] communication in accordance with Articles 54(3)(f), 64(6)(e), 68(1) of the Statute and Rule 81(4) of the Rules (although should Trial Chamber II in due course order disclosure of the name of this individual, Trial Chamber I will review the present order, having been informed immediately of the decision of Trial Chamber II). In essence, there is no known issue in the case as regards this person or the means of communication and, in the result, the defence will not be prejudiced by the lack of this information.

(iv) Witness DRC-OTP-WWWW-0044

65. The Chamber has carefully reviewed the summary of the French interview transcript relating to this witness. It notes that the proposed English summary gives an informative introduction and then includes verbatim quotes in French (without translations) of the Rule 77 and potentially exculpatory information identified by the prosecution.¹⁴² Furthermore, the context of the quoted material is briefly described for each relevant section. The Chamber is

¹⁴² Summary: Annex 8 to the Prosecution's Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information. 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx8 (No ERN as it is a prosecution generated document).

satisfied that the summary contains all the relevant information.

66. The Chamber has also noted that while the prosecution has not proposed an admission of fact as regards the potentially exculpatory information, it has proposed the following admissions relating to the Rule 77 material:¹⁴³

- (i) The military needs of the UPC in 2002 and 2003 were obtained from Rwanda, including ammunitions, arms, and uniforms and that a person called Safari was responsible for obtaining them.
- (ii) UPC soldiers were trained in heavy arms and mines by Rwanda.

67. As with the other proposed admissions of fact, the Chamber is of the view that because the prosecution agreed to remove the words “It is said” or “It has been said”,¹⁴⁴ the evidential value of the admissions is materially enhanced.

68. Furthermore, the Chamber notes that the prosecution has identified 10 items of alternative evidence from different sources concerning cooperation between the Hema and the APC (directed against Wamba), training conducted in Uganda, various forms of support provided to the UPC by Rwanda, and the specific involvement of a Rwandan intelligence officer named Safari. They are the same 87 page witness statement that has also been submitted for the information given by witnesses DRC-OTP-WWWW-0316 and DRC-OTP-WWWW-0163,¹⁴⁵ a 18 page witness statement,¹⁴⁶ a 55 page

¹⁴³ Annex 1 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx1, page 5; Email communication from the prosecution to the Trial Chamber through the Legal Adviser to the Trial Division on 2 February 2009.

¹⁴⁴ Email communication from the prosecution to the Trial Chamber through the Legal Adviser to the Trial Division on 2 February 2009.

¹⁴⁵ Annex 18 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx18 (ERN: DRC-OTP-0105-0085–DRC-OTP-0105-0171), paragraphs 75, 76, 79, 110, 113 and 114. This annex has been referred to twice in regard to different information.

¹⁴⁶ Annex 34 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-Anx34 (ERN: DRC-OTP-0160-0429–DRC-OTP-0160-0446), paragraph 31.

witness statement,¹⁴⁷ a 27 page interview transcript,¹⁴⁸ an 11 page report from an internet site,¹⁴⁹ a 16 page email with information on Ituri,¹⁵⁰ a brief 1 page report of a meeting,¹⁵¹ a 101 page Amnesty International report,¹⁵² the same 82 page Human Rights Watch report referred to above,¹⁵³ and a 104 page witness statement.¹⁵⁴ It is to be noted, however, that one of these documents is a witness statement that has been filed confidentially and *ex parte*,¹⁵⁵ and a further document is a witness statement that has been filed with extensive redactions, which includes removing, first, the identity of the witness and, second, material within the paragraph that contains the relevant Rule 77 information, although the redactions are not to that information.¹⁵⁶ However, weighing these documents overall, the Chamber is satisfied that those transmitted to the defence are in an intelligible and usable form, and they adequately and fairly reflect the redacted information provided by the witness.

¹⁴⁷ Annex 35 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx35 (ERN: DRC-OTP-0132-0343-DRC-OTP-0132-0396), paragraph 39.

¹⁴⁸ Annex 36 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx36 (ERN: DRC-OTP-0173-0107-DRC-OTP-0173-0173), pages DRC-OTP-0173-0129 and DRC-OTP-0173-0130.

¹⁴⁹ Annex 33 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx33 (ERN: CAR-OTP-0005-0381-ERN: CAR-OTP-0005-0391), pages CAR-OTP-0005-0384- CAR-OTP-0005-0385.

¹⁵⁰ Annex 37 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx37 (ERN: DRC-OTP-0202-0195-DRC-OTP-0202-0210), page DRC-OTP-0202-0197.

¹⁵¹ Annex 38 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx38 (ERN: DRC-OTP-0204-0327), page DRC-OTP-0204-0327.

¹⁵² Annex 23 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx23 (ERN: DRC-OTP-0074-0526-DRC-OTP-0074-0626), pages DRC-OTP-0074-0572-DRC-OTP-0074-0573.

¹⁵³ Annex 19 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx19 (ERN: DRC-OTP-0074-0797-DRC-OTP-0074-0878), DRC-OTP-0074-0805 and DRC-OTP-0074-0808-DRC-OTP-0074-0817.

¹⁵⁴ Annex 25 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx25 (ERN: DRC-OTP-0165-0999-DRC-OTP-0165-1102) (The citation given by the prosecution, paragraph 17, is wrong. However, paragraphs 133-136 and 233-235 give information about Rwandan support to the UPC and Thomas Lubanga travelling to Rwanda).

¹⁵⁵ Annex 34 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-Anx34, (ERN: DRC-OTP-0160-0429- DRC-OTP-0160-0446).

¹⁵⁶ Annex 35 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx35, (ERN: DRC-OTP-0132-0343-DRC-OTP-0132-0397).

69. Four additional items of alternative evidence are also available that deal with the role of the businessman Savo¹⁵⁷ (one of which also refers to the businessman Liripa¹⁵⁸). It notes that the alternative evidence, in fact, provides more detail than that provided by the witness.

70. The Chamber is of the view that if the summary and the alternative evidence are collectively made available to the defence, this will place the accused in the most favourable position, given that disclosure is to be truncated.

71. The Chamber is concerned that although the prosecution has been in possession of this document since February 2005, it has not been disclosed to the defence notwithstanding its potentially exculpatory content. This is unacceptable and every effort should be taken so that failures of this kind (which are a marked feature of this application) are not repeated. Nonetheless, the Chamber is of the view that because of the witness's specific security situation, the proposed protective measures are necessary. Although the witness is said to live [REDACTED], the Chamber notes that the prosecution has been unable to make contact [REDACTED] identity may be disclosed. In light of these circumstances, no alternative measure that will ensure the witness's safety is available. Whilst this lack of contact makes a final determination of the potential dangers impossible, the Chamber emphasizes that an inability to reach a firm conclusion on this issue is not the

¹⁵⁷ Annex 19 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx19 (ERN: DRC-OTP-0074-0797–DRC-OTP-0074-0878), pages DRC-OTP-0074-0815– DRC-OTP-0074-0816; Annex 18 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx18 (ERN: DRC-OTP-0105-0085– DRC-OTP-0105-0171), paragraphs 150, 151, 177, and 182; Annex 39 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx39 (ERN: DRC-OTP-0044-0333– DRC-OTP-0044-0362), page DRC-OTP-0044-0343; Annex 40 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx40 (ERN: DRC-OTP-0109-0065– DRC-OTP-0109-0098), paragraphs 74 and 75.

¹⁵⁸ Annex 39 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx39 (ERN: DRC-OTP-0044-0333–DRC-OTP-0044-0362), page DRC-OTP-0044-0343.

equivalent of establishing that the witness is not at risk. Given the volatile and not infrequently dangerous situation in the DRC, the Chamber's wide-ranging obligations¹⁵⁹ require it to take all necessary steps in order to "provide for the protection" of individuals in these circumstances, so long as they do not undermine the fairness of the proceedings and they do not prejudice the defence if this information is withheld.

72. The Chamber is satisfied that the proposed summary with its verbatim quotes, the admissions of fact (which are without the wording "it has been said") and the alternative evidence provide the defence with all the relevant Rule 77 and potentially exculpatory material revealed by this witness. The Chamber has focussed particularly on whether non-disclosure of the witness's identity and the entirety of the original interview materially undermine the accused's ability to prepare his defence, and in the event, for the reasons rehearsed above, it has concluded that there is no identifiable prejudice to the accused. The Chamber therefore approves the admission of fact, authorizes the non-disclosure of the witness's identity, and service of the summary of the statement, together with the alternative evidence, in accordance with Articles 54(3)(f), 64(6)(e) and (f), 68(1) of the Statute and Rule 81(4) of the Rules. In essence, disclosure of the original interview, even with redactions, creates an unwarranted risk that the identity of this individual will be revealed.

(v) Witness DRC-OTP-WWWW-0035

73. The Chamber notes that the prosecution has submitted a 3 page summary of the interview transcript of this witness that comprises 929 pages. Notwithstanding the seemingly dramatic reduction in this material, the

¹⁵⁹ A range of provisions delineate the Chamber's powers as regards protective measures: under Article 64(2), the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses". Further, by Article 64(6) the Chamber, in discharging its functions prior to trial and during the course of the trial, shall provide for the protection of confidential information (64(6)(c) of the Statute) and it shall provide for the protection of the accused, witnesses and victims (64(6)(e) of the Statute). For further discussion see Reasons for oral decisions lifting the stay of proceedings of 23 January 2009, ICC-01/04-01/06-1644, paragraphs 33-49.

Chamber is satisfied that all the relevant Article 67(2) and Rule 77 information has been made available to the defence. Furthermore, the introduction that has been provided is detailed, and it concisely provides the necessary information. The relevant passages are cited verbatim, with only a redaction to two words to avoid identification of the witness.

74. The 3 items of alternative evidence that cover the potentially exonerating and Rule 77 information from this witness¹⁶⁰ are the 82 page Human Rights Watch report referred to above,¹⁶¹ a 6 page newspaper article,¹⁶² and a 33 page Amnesty International report.¹⁶³ The Chamber notes that all these documents provide information about Ugandan involvement in the conflict and its support of the UPC. Witness DRC-OTP-WWWW-0035 stated explicitly that the Ugandans ordered the attack on Bunia and the Human Rights Watch report reflects this aspect of his statement¹⁶⁴ - namely that the Ugandans were "*les grands chefs*" and had ordered the attack in Bunia - by indicating that "[o]n the political level, Ugandans directed important changes in the rebel movements based in Bunia, including removing Wamba dia Wamba as head of the RCD-ML and replacing him by Mbusa Nyamwise; supporting the creation of two coalitions, the Front for the Liberation of Congo (FLC) which grouped rebel movements at the national level and the FIPI which grouped local rebel groups of the Lendu, Alur and dissatisfied Hema; and driving

¹⁶⁰ In the chart the prosecution has submitted this alternative evidence as Rule 77 "Support of Uganda/Rwanda/Kinshasa" information, but in the filing it refers to potentially exonerating information. The information does, in fact, appear to be of an Article 67(2) nature. In the chart, the prosecution has also accidentally indicated Annex 19 twice for the same information.

¹⁶¹ Annex 19 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx19 (ERN: DRC-OTP-0074-0797-DRC-OTP-0074-0978), pages DRC-OTP-0074-0809, DRC-OTP-0074-0823- DRC-OTP-0074-0824.

¹⁶² Annex 41 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx41 (ERN: DRC-OTP-0198-0021-DRC-OTP-0198-0026), pages DRC-OTP-0198-0024 and DRC-OTP-0198-0025, without, however, specifying a date of the alleged weapons delivery to the Hema.

¹⁶³ Annex 22 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx22 (ERN: DRC-OTP-0019-0153-DRC-OTP-0019-0185), pages DRC-OTP-0019-0153-DRC-OTP-0019-0155, DRC-OTP-0019-0170.

¹⁶⁴ Annex 11 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-Anx11, (ERN: DRC-OTP-0161-0017-DRC-OTP-0161-2026), page DRC-OTP-0161-1413.

away the RCD-ML and helping install the UPC in Bunia in August 2002. These changes were directed from Kampala and supported by the Ugandan forces in Ituri”,¹⁶⁵ the statement about the Ugandan army attacking the governor’s residence in Bunia on August 8, 2002, and the statement that “[o]n August 9, 2002 at 2:00 p.m. the Ugandan army, followed by the UPC, again attacked the governor’s residence and the surrounding neighbourhood, known as the *sous-region*, using heavy weapons including tanks”.¹⁶⁶

75. Given an admission of fact has not been advanced by the prosecution, the summary and the alternative evidence must each be made available to the defence.

76. As with other materials, the Chamber notes that the prosecution has been in possession of this document since late 2005, and the earlier observations on this issue are repeated; however, in view of the witness’s personal circumstances the Chamber is persuaded that it can only fulfil its protective obligations by authorizing the non-disclosure of the witness’s identity. No other measures that would sufficiently ensure the safety and security of the witness, as well as that of his family, are available.

77. The Chamber therefore approves the proposals by the prosecution, which afford an appropriate means of protecting a witness who is exposed to risk of harm on account of the activities of the court whilst simultaneously disclosing to the accused exonerating material that may assist in the preparation of his defence. In these circumstances the least necessary protective measures are implemented whilst ensuring there is no consequential unfairness. The Chamber therefore authorizes the non-disclosure of his identity, and the

¹⁶⁵ Annex 19 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx19, (ERN: DRC-OTP-0074-0797–DRC-OTP-0074-0978), page DRC-OTP-0074-0809.

¹⁶⁶ The two latter statements can be found in Annex 19 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx19, (ERN: DRC-OTP-0074-0797–DRC-OTP-0074-0978) at page DRC-OTP-0074-0824.

provision of the summary of the witness' interview transcript together with the alternative evidence in accordance with Articles 54(3)(f), 64(6)(e) and (f), 68(1) of the Statute and Rule 81(4) of the Rules.

(vi) Witness DRC-OTP-WWWW-0037

78. The Chamber has reviewed the proposed 6 page English summary of the 360 page transcript taken from DRC-OTP-WWWW-0037, which includes French verbatim quotes of the potentially exonerating information and the Rule 77 material. The initial summary is detailed and provides a significant amount of information in an appropriately concise manner. The relevant sections have been cited verbatim, with a brief introduction establishing the relevant context.

79. However, the Chamber notes that the page numbers indicated in the summary are not correct. The potentially exonerating information regarding child soldiers having joined the militia voluntarily commences at page DRC-OTP-0161-0320 (from the document that starts at 0315), not page 0358. Furthermore, information that may be of interest to the defence is to be found between the pages 0318 to 0323, only some of which has been included in the summary or the quote. The latter should have indicated that at times parents came to the training camp to recover their children, some of whom were successful while others were refused (page 0319).

80. Given this information has been in the possession of the prosecution since 2005, and that the prosecution has identified potentially exonerating material, the Chamber sees no reason why the latter has not been communicated far earlier in the proceedings. Accordingly, the Chamber reiterates its concern regarding the delay in providing this information.

81. The prosecution has suggested the following admission:

Children joined the UPC voluntarily.

82. Furthermore, three items have been submitted by the prosecution as alternative evidence for the witness's statement that child soldiers may have joined the UPC voluntarily. The 19 page report from the MONUC Child Protection Advisor and the 70 page Amnesty International report support this statement,¹⁶⁷ whilst the 82 page Human Rights Watch report rehearses that the UPC's Commander Bosco claimed that "the underage children were all orphans and that the UPC were looking after them" and that he had insisted that all recruitment was voluntary.¹⁶⁸

83. The prosecution has further submitted an 87 page witness statement that refers to the Rwandan Intelligence Officer Safari.¹⁶⁹ Six further items of alternative evidence relate to Rwanda supplying arms to the UPC: (1) an 82 page Human Rights Watch report,¹⁷⁰ (2) an 11 page internet report,¹⁷¹ (3) a 35 page witness statement,¹⁷² (4) a 51 page All Party Parliamentary Group report on the arms flow in Eastern Congo,¹⁷³ (5) a 49 page witness statement,¹⁷⁴ and

¹⁶⁷ Annex 42 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx42, (ERN: DRC-OTP-0202-0761-DRC-OTP-0202-0779), pages DRC-OTP-0202-0764, DRC-OTP-0202-0767-, DRC-OTP-0202-0771 and DRC-OTP-0202-0774; Annex 43 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx43, (ERN: DRC-OTP-0165-0788-DRC-OTP-0165-0858), page DRC-OTP-0165-0802.

¹⁶⁸ Annex 19 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx19, (ERN: DRC-OTP-0074-0797-DRC-OTP-0074-0978), page DRC-OTP-0074-0851.

¹⁶⁹ Annex 18 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx18 (ERN: DRC-OTP-0105-0085-DRC-OTP-0105-0171), paragraphs 110, 114, and 116.

¹⁷⁰ Annex 19 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx19 (ERN: DRC-OTP-0074-0797-DRC-OTP-0074-0978), pages DRC-OTP-0074-0805, DRC-OTP-0074-0813-DRC-OTP-0074-0814.

¹⁷¹ Annex 33 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx33 (ERN: CAR-OTP-0005-0381-CAR-OTP-0005-0391), pages CAR-OTP-0005-0384-CAR-OTP-0005-0385.

¹⁷² Annex 40 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx40 (ERN: DRC-OTP-0109-0065-DRC-OTP-0109-0099), paragraph 77.

¹⁷³ Annex 44 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx44 (ERN: DRC-OTP-0099-0160-DRC-OTP-0099-0210), page DRC-OTP-0099-0170.

(6) a 30 page witness statement.¹⁷⁵ The prosecution also submitted an 87 page witness statement,¹⁷⁶ a 55 page redacted witness statement,¹⁷⁷ and a 27 page interview transcript¹⁷⁸ that all refer to Hema or UPC recruits receiving training from Uganda.

84. Save for one possible issue, the Chamber is satisfied that the proposed items of alternative evidence, when viewed in their entirety along with the admission, sufficiently cover the information provided by this witness. As above, in order to best protect the rights of the accused, the summary and the alternative evidence must each be made available to the defence. The caveat just expressed is the prosecution should consider including in the summary that on occasion parents came to the training camp to reclaim their children, and that some were successful and others were refused access to them.

85. Therefore, the Chamber approves the proposals of the prosecution, which are an appropriate means of protecting the witness who is exposed to risk of harm on account of the activities of the Court, whilst simultaneously disclosing to the defence the relevant material contained in the witness's statement. As with witness DRC-OTP-WWWW-0044, the protective measures are appropriate despite the fact that the prosecution can no longer contact the witness and a final determination of the potential risk is therefore not possible. In these circumstances the least necessary protective measures will be implemented

¹⁷⁴ Annex 45 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx45 (ERN: DRC-OTP-0126-0422-DRC-OTP-0126-0470), paragraphs 193-194.

¹⁷⁵ Annex 46 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx46 (ERN: DRC-OTP-0127-0074-DRC-OTP-0127-0103), paragraphs 51-54.

¹⁷⁶ Annex 18 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx18, (ERN: DRC-OTP-0105-0085-DRC-OTP-0105-0171), paragraphs 79 and 80.

¹⁷⁷ Annex 35 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx35, (ERN: DRC-OTP-0132-0343-DRC-OTP-0132-0396), paragraph 39.

¹⁷⁸ Annex 36 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx36, (ERN: DRC-OTP-0173-0107-DRC-OTP-0173-0173) pages DRC-OTP-0173-0129 – DRC-OTP-0173-0130.

whilst ensuring there is no unfairness to the accused through the provision of the summary, the alternative evidence and most importantly, the admission of fact. The Chamber therefore approves the admission of fact, authorizes the non-disclosure of the witness's identity and the provision of the summary of the witness's interview transcript, together with the alternative evidence, in accordance with Articles 54(3)(f), 64(6)(e) and (f), 68(1) of the Statute and Rule 81(4) of the Rules.

(vii) Witness DRC-OTP-WWWW-0101

86. The Chamber has reviewed the proposed redactions relating to this witness and notes that they are intended to protect his identity, along with the fact that [REDACTED].

87. In view of the witness's particular circumstances, the Chamber is satisfied that the proposed redactions are necessary to ensure the witness's safety, and that the statement in its proposed form contains sufficient details to enable the defence to evaluate and use the Rule 77 information.

88. Additionally, the prosecution has proposed the following admissions of fact:

- (i) It has been said that the UPC and RCD and Rwanda had a military cooperation agreement with each other.
- (ii) Rwandans were involved in massacres in Ituri.
- (iii) The UPC employed Bosco Ntaganda and Jérôme Kakwaku who were believed by some in the region to be Rwandan.
- (iv) The Rwandans collaborated with the UPC because some of the anti-personnel mines used by the UPC came from Rwanda.
- (v) Rwanda gave support to the UPC during the relevant period, but for a short period.

89. The Chamber requested the prosecution to consider removing the phrase "It

has been said” from the proposed admissions.¹⁷⁹ The prosecution was able to reformulate four of the five suggested admissions (with certain minor amendments).¹⁸⁰ Overall, the Chamber is of the view that admissions two to five adequately reflect the material information provided by the witness, which the defence will be able to utilise in the proceedings. The Chamber notes that the first admission is only of use to the defence in so far as it is an indication that such information exists.

90. Lastly, the Chamber turns to the 9 items submitted by the prosecution as alternative evidence to cover the Rule 77 material relating to the role of Rwanda in relation to the UPC. These are a 30 page Amnesty International report,¹⁸¹ the 82 page Human Rights Watch report,¹⁸² a 20 page press article from La Colombe Plus,¹⁸³ a 70 page report on the political forces in the DRC,¹⁸⁴ a 2 page email,¹⁸⁵ an 11 page report from the internet,¹⁸⁶ 15 pages of meeting reports,¹⁸⁷ a 9 page report on a trip to Kinshasa dealing with arms,¹⁸⁸ and 2

¹⁷⁹ Email communication to the prosecution through the Legal Adviser to the Trial Division on 28 January 2009.

¹⁸⁰ Email communication from the prosecution to the Trial Chamber through the Legal Adviser to the Trial Division on 2 February 2009.

¹⁸¹ Annex 48 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx48 (ERN: DRC-OTP-0154-1301-DRC-OTP-0154-1330), pages DRC-OTP-0154-1301 and DRC-OTP-0154-1310.

¹⁸² Annex 19 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx19, (ERN: DRC-OTP-0074-0797-DRC-OTP-0074-0978), pages DRC-OTP-0074-0805 and DRC-OTP-0074-0818.

¹⁸³ Annex 21 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx21 (ERN: DRC-OTP-0134-0126-DRC-OTP-0134-0145), page DRC-OTP-0134-0138.

¹⁸⁴ Annex 49 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx49, (ERN: DRC-OTP-0038-0493-DRC-OTP-0038-0562), page DRC-OTP-0038-0549.

¹⁸⁵ Annex 50 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx50, (ERN: DRC-OTP-0077-0306-DRC-OTP-0077-0307), page DRC-OTP-0077-0307.

¹⁸⁶ Annex 33 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx33, (ERN: CAR-OTP-0005-0381-CAR-OTP-0005-0391), pages CAR-OTP-0005-0384-CAR-OTP-0005-0385.

¹⁸⁷ Annex 51 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx51, (ERN: DRC-OTP-0202-0856-DRC-OTP-0202-0870), page DRC-OTP-0202-0857.

¹⁸⁸ Annex 52 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx52, (ERN: DRC-OTP-0181-0459-DRC-OTP-0181-0467), page DRC-OTP-0181-0460.

pages of notes on a mission to Ituri.¹⁸⁹ The Chamber notes that whilst these contain little, if any, information that directly relates to Ntaganda¹⁹⁰ and Kakwavu, the prosecution has made an admission of fact covering this part of the information provided by the witness.¹⁹¹

91. The Chamber finds that the redacted witness statement, the alternative evidence and the admissions of fact together provide the defence with all the necessary Rule 77 material from the witness statement and collectively they provide the most effective alternate method of securing fairness for the accused. The Chamber is of the view that it is necessary to disclose the redacted statement, the alternative evidence and the admission of fact in order to place the accused in the most favourable position, given that disclosure is to be truncated. Since the witness cannot be contacted in order to be warned about possible disclosure, the Chamber is persuaded that the consequent risk means that his identity should not be revealed. Given the witness's prominent role, this is necessary to discharge the court's protective obligation.

92. The Chamber therefore approves the admission of fact (in its final form), and authorizes the provision of the redacted statement together with the alternative evidence in accordance with Articles 54(3)(f), 64(6)(e) and (f), 68(1) of the Statute and Rule 81(4) of the Rules.

(viii) Witness DRC-OTP-WWWW-0270

93. The Chamber has reviewed the proposed 3 page English summary of the 255 page transcript taken from Witness DRC-OTP-WWWW-0270 that includes verbatim quotes (in French) of the Rule 77 material. The Chamber notes that

¹⁸⁹ Annex 53 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx53 (ERN: DRC-OTP-0185-0877-DRC-OTP-0185-0878), page DRC-OTP-0185-0877.

¹⁹⁰ Annex 52 to the Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx52, (ERN: DRC-OTP-0181-0459-DRC-OTP-0181-0467), page DRC-OTP-0181-0460 referring to "Commander Bosco" as reporting to Rwanda.

¹⁹¹ See the admission of fact cited in paragraph 88 above: "(iii) The UPC employed Bosco Ntaganda and Jérôme Kakwaku who were believed by some in the region to be Rwandan."

the information on page 0408 immediately before the quoted section – to the effect that the Ugandans were in charge in Bunia and that there had been a conflict between the UPC and the Ugandan – is not included. The Chamber is of the view that this information should be made available to the defence, at least as a part of the summary, if not included in the quotation. However, the Chamber also notes that this witness mainly gives information that is irrelevant to the issues in the case, and that the comments about Ugandan involvement, identified as Rule 77 material, were not elaborated on further by the witness.

94. The prosecution advances the following admissions of fact:

- (i) Up until July 2002 Lompondo negotiated with the Ugandans how to administer Bunia.
- (ii) Up until July 2002 Lompondo was in charge of the administration, but it was the Ugandans who ensured security in the city of Bunia.
- (iii) Uganda soldiers have been seen with UPC militia in Bogoro.
- (iv) The Ugandans supported the Lendu (Ngudjolo) fighting the UPC in Bunia.

95. The Chamber notes that the proposed admissions reflect the content of the Rule 77 material identified in the interview transcript for this witness. It is to be noted that the chart generated by the prosecution is misleading as it states that “[o]n the second attack, UPDF fought with UPC, against the Lendu”,¹⁹² while the witness only suggests that he saw the Ugandans together with soldiers from the UPC.¹⁹³ This should be rectified.

96. The 5 items submitted as alternative evidence by the prosecution are: (1) a 33

¹⁹² Annex 1 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx1, page 11.

¹⁹³ Annex 16 to the Prosecution’s Request for Non-disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx16 (No ERN as this is a prosecution generated document), pages 2 and 3.

page Amnesty International report,¹⁹⁴ (2) 4 pages of handwritten notes,¹⁹⁵ (3) a 33 page International Crisis Group report,¹⁹⁶ (4) a 169 page Human Rights Watch report,¹⁹⁷ and (5) a 27 page witness statement.¹⁹⁸ The Chamber notes that since the witness statement has been submitted as a confidential *ex parte* document, it cannot be used by the defence.¹⁹⁹ Part of the *ex parte* annex corroborates the suggestion of this witness that UPC and UPDF soldiers were present during the second attack on the village of Bogoro and that they each “pushed back” the Lendu combatants.²⁰⁰ The other 4 documents, taken together, cover information about the role of Uganda and its changing alliances given by this witness.²⁰¹

97. The Chamber concludes that the summary, the alternative evidence and the admissions of fact together provide the defence with the relevant Rule 77

¹⁹⁴ Annex 22 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx22, (ERN: DRC-OTP-0019-0153–DRC-OTP-0019-0185), pages DRC-OTP-0019-0153–DRC-OTP-0019-0155, DRC-OTP-0019-0170.

¹⁹⁵ Annex 20 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx20, (ERN: DRC-OTP-0127-0139–DRC-OTP-0127-0142), page DRC-OTP-0127-0139. This annex is a handwritten document that is barely legible.

¹⁹⁶ Annex 31 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx31, (ERN: DRC-OTP-0003-0424–DRC-OTP-0003-0456), pages DRC-OTP-0003-0430, DRC-OTP-0003-0432, DRC-OTP-0003-0434, DRC-OTP-0003-0439.

¹⁹⁷ Annex 32 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx32, (ERN: DRC-OTP-0074-0628–DRC-OTP-0074-0796), pages DRC-OTP-0074-0673–DRC-OTP-0074-0674.

¹⁹⁸ Annex 54 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-Anx54, (ERN: DRC-OTP-1007-0061–DRC-OTP-1007-0087), paragraphs 43 and 45.

¹⁹⁹ Annex 54 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-Anx54, (ERN: DRC-OTP-1007-0061–DRC-OTP-1007-0087).

²⁰⁰ Annex 54 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Exp-Anx54, (ERN: DRC-OTP-1007-0061–DRC-OTP-1007-0087) at paragraphs 42-45.

²⁰¹ Annex 32 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx32, (ERN: DRC-OTP-0074-0628–DRC-OTP-0074-0796), pages DRC-OTP-0074-0673–DRC-OTP-0074-0674; Annex 31 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx31, (ERN: DRC-OTP-0003-0424–DRC-OTP-0003-0456), pages DRC-OTP-0003-0430, DRC-OTP-0003-0432, DRC-OTP-0003-0434, DRC-OTP-0003-0439; Annex 22 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx22, (ERN: DRC-OTP-0019-0153–DRC-OTP-0019-0185), pages DRC-OTP-0019-0153–DRC-OTP-0019-0155, DRC-OTP-0019-0170; Annex 20 to the Prosecution’s Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information, 5 December 2008, ICC-01/04-01/06-1542-Conf-Anx20, (ERN: DRC-OTP-0127-0139–DRC-OTP-0127-0142), page DRC-OTP-0127-0139 (the last document is barely legible).

material that the witness addresses in the statement, and when viewed jointly, they provide the most complete solution to the non-disclosure. As the witness cannot be contacted to be informed that his identity will be disclosed, the Chamber is of the view that the non-disclosure is necessary to ensure his safety. The reasoning in paragraph 71 (for Witness DRC-OTP-WWWW-0044) applies to this witness. A lesser measure of protection is not available. The Chamber therefore approves the admission of fact, authorizes non-disclosure of the identity of the witness and the provision of the summary together with the alternative evidence to the defence in accordance with Articles 54(3)(f), 64(6)(e) and (f), 68(1) of the Statute and Rule 81(4) of the Rules.

IV. Conclusion

98. Based on the foregoing reasoning, the Chamber:

- (i) authorizes non-disclosure of the identities of Witnesses DRC-OTP-WWWW-0316, DRC-OTP-WWWW-0018, DRC-OTP-WWWW-0044, DRC-OTP-WWWW-0101, DRC-OTP-WWWW-0035, DRC-OTP-WWWW-0037, DRC-OTP-WWWW-0270 in accordance with Articles 54(3)(f), 64(6)(f), 68(1) of the Statute and Rule 81(4) of the Rules;
- (ii) authorizes service on the defence of the summaries relating to Witnesses DRC-OTP-WWWW-0037 and DRC-OTP-WWWW-0270 with the corrections indicated in this Decision, together with the alternative evidence as specified;
- (iii) authorizes service on the defence of the summaries of the transcripts relating to Witnesses DRC-OTP-WWWW-0044, DRC-OTP-WWWW-0035 together with the alternative evidence;
- (iv) authorizes service on the defence of the redacted statements of Witnesses DRC-OTP-WWWW0316, DRC-OTP-WWWW-0018, DRC-OTP-WWWW-0101, and the redacted interview transcripts of Witness DRC-OTP-WWWW-0163, together with the alternative evidence; and

(v) approves all admissions of fact in their amended form:

1. Thomas Lubanga signed an agreement with the political-military movement under the control of the Ugandans for the provision of food to soldiers.
2. For the purpose of the administration of Ituri, the Ugandans imposed the nomination of TLD as Minister of Defence of RCD/K-ML.
3. It has been said that Uganda ordered its army, which was still present in Ituri, to force TLD away from Bunia in 6 March 2003.
4. The term "les effacés" is one used to describe the coalition between the UPC militia and the Rwandan combatants.
5. The military needs of the UPC in 2002 and 2003 were obtained from Rwanda, including ammunitions, arms, and uniforms and that a person called Safari was responsible for obtaining them.
6. UPC soldiers were trained in heavy arms and mines by Rwanda.
7. Children joined the UPC voluntarily.
8. It has been said that the UPC and RCD and Rwanda had a military cooperation agreement with each other.
9. Rwandans were involved in massacres in Ituri.
10. The UPC employed Bosco Ntaganda and Jérôme Kakwaku who were believed by some in the region to be Rwandan.
11. The Rwandans collaborated with the UPC because some of the anti-personnel mines used by the UPC came from Rwanda.
12. Rwanda gave support to the UPC during the relevant period, but for a short period.
13. Up until July 2002 Lompondo negotiated with the Ugandans how to administer Bunia.
14. Up until July 2002 Lompondo was in charge of the administration, but it was the Ugandans who ensured security in the city of Bunia.
15. Uganda soldiers have been seen with UPC militia in Bogoro.
16. The Ugandans supported the Lendu (Ngudjolo) fighting the UPC in Bunia.

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

Judge Adrian Fulford

Judge Elizabeth Odio Benito

Judge René Blattmann

Dated this 24 June 2009

At The Hague, The Netherlands