

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 2 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
(with confidential Annex 1 and public Annex 2)**

**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"**

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

Legal Representatives of the Applicants

Unrepresented Victims

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

1. The Trial Chamber issued a “Decision on the “Prosecution’s Request for Nondisclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” of 5 December 2008” on 9 April 2009 (“Decision”).¹ A corrigendum to the Decision was issued on 05 May 2009.²

2. It has come to the attention of the Chamber that the Decision contains further clerical errors requiring correction:
 - Paragraph 13, first line, should refer to “15 January 2009” instead of “15 January 2008”;

 - Footnote 53 should refer to “ICC-01/04-01/06-T-103-CONF-EXP-ENG” instead of “ICC-01/04-01/06-T-102-CONF-EXP-ENG”;

 - Paragraph 38, second line, should refer to “witness DRC-OTP-WWWW-0292” instead of “witness DRC-OTP-WWWW-0299”;

 - Footnote 99, first line, should refer to “paragraph 89”;

 - Footnote 100 should refer to “DRC.00130.269” instead of “DRC-OTP-0131-0055”;

 - Footnote 101 should refer to “DRC.00131.055” instead of “DRC.00130.269”;

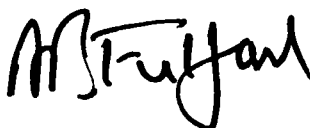
 - Footnote 109 should refer to “page 5, paragraph 6(d)(i)” instead of “page 4, paragraph 6(a)(ii)”;

¹ ICC-01/04-01/06-1814-Conf.

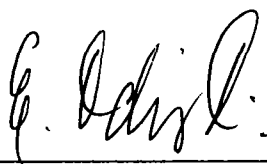
² ICC-01/04-01/06-1836-Conf.

- Footnote 123 should refer to “DRC-00111-728” and “DRC-000111-736” instead of “DRC-0011-728” and “DRC-0011-736”;
 - Footnote 125 should refer to “paragraph 16” instead of “paragraph 15”;
 - Footnote 128, second line, should refer to “DRC-OTP-0152-0751” instead of “DRC-OTP-0152-0752”;
 - Point b of paragraph 55 should refer to “DRC-OTP-WWWW-0292” instead of “DRC-OTP-WWWW-0299”.³
3. For ease of reference, the correct version of the Decision is attached as Confidential (prosecution and defence only) Annex 1.
 4. A public redacted version of the Decision is attached as Public Annex 2.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 2 June 2009

At The Hague, The Netherlands

³ Annex Z to the Prosecution’s Clarifications to the “Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing Tu Quoque Information” filed on 19 December 2008, 19 January 2009, ICC-01/04-01/06-1632-Conf-Exp-AnxZ, page 14 erroneously refers to Witness DRC-OTP-WWWW-0299. The applications themselves (ICC-01/04-01/06-1632-Conf-Exp of 19 January 2009 and ICC-01/04-01/06-1545-Conf-Exp of 5 December 2008) correctly refer to Witness DRC-OTP-WWWW-0292.

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 2 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 Twenty-Five Individuals providing *Tu Quoque* Information" of 5 December 2008

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

Legal Representatives of the Applicants

Unrepresented Victims

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 Twenty-Five Individuals providing *Tu Quoque* 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, or Rule 77, material, some of which contained redactions that had not been previously authorized.² The prosecution submitted that the witness statements contained disclosable information in accordance with Article 67(2) of the Rome Statute (“Statute”) and Rule 77 of the Rules of Procedure and Evidence (“Rules”), but that the witnesses would be at risk if their identities were 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 made the following public order:⁵

¹ Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information, 5 December 2008, ICC-01/04-01/06-1545-Conf-Exp: Public Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information, 10 December 2008, ICC-01/04-01/06-1552.

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.

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

The Prosecution are not under an obligation to serve material that relates to the general use of child soldiers in the DRC.

3. Following a request for leave to appeal,⁶ which was granted by the Chamber,⁷ in its judgment of 11 July 2008, the Appeals Chamber 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”. The Appeals Chamber 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 disclosure of *tu quoque* information.¹²
6. At a status conference on 25 November 2008, the prosecution advised the Trial Chamber that statements from forty-three witnesses containing *tu quoque*

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.

information had been disclosed in excerpted form to the defence¹³ although the identity of some of the witness had been redacted.¹⁴ 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,¹⁵ and it indicated its willingness to make more detailed admissions regarding the recruitment and use of child soldiers by groups other than the UPC/FPLC as a substitute for non-disclosure of the full witness statements.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 In addition, the prosecution suggested that the expert on background and context to be called by the Court, Mr Garretón, could also address the issue of the recruitment and use of child soldiers by armed groups in Ituri,¹⁸ and repeated its proposal to disclose to the defence the names of hundreds of children who were allegedly recruited as child soldiers.¹⁹ The prosecution informed the Chamber that it would be able to disclose the non-redacted statements of five protected witnesses who provide *tu quoque* information.²⁰ Additionally, the prosecution noted that of the witness statements previously disclosed in excerpted form, five contain Rule 77 material in addition to *tu quoque* evidence and a further dozen witnesses provide Rule 77 material, most of which had been included in its filing of 21 December 2007.²¹

7. At the status conference of 25 November 2008 the defence submitted that it

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 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.

¹⁶ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 29, line 23 - page 30, line 9.

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 33, line 22 - page 34, line 2.

¹⁹ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 34, lines 3-9.

²⁰ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 35, lines 16-21.

²¹ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 36, line 8 - page 37, line 1.

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 use of child soldiers in the DRC.²² The defence requested the 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.²³ 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 reiterated its general request for the information to be disclosed in full.²⁴

8. During the status conference the Chamber ordered the prosecution to provide the Chamber with the undisclosed material in non-redacted form and in the format in which the prosecution intended to disclose the materials to the defence,²⁵ along with any proposed admissions of fact²⁶ and alternative evidence²⁷ 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.²⁸

9. On 5 December 2008 the prosecution requested authority not to disclose the identity of eight individuals on the basis of Articles 54(3)(f), 61, 64, 68 of the

²² Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 31, line 20 – page 32, line 11.

²³ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 32, lines 12-22.

²⁴ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 32, line 23 – page 33, line 8.

²⁵ 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.

²⁶ 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.

²⁷ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 30, line 22 to page 31, line 2.

²⁸ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 35, lines 1-13.

Statute and Rules 81(4) and 77 of the Rules.²⁹ This filing is addressed in a separate decision.

10. On 5 December 2008 the prosecution similarly sought leave not to disclose the identity of twenty-five of the forty-three individuals who provided information on the general use of child soldiers, on the basis of Articles 54(3)(f), 64 and 68 of the Statute and Rules 77, 81(2) and (4) of the Rules, and this application is the subject of the instant decision.³⁰ The prosecution proposed alternatives to the non-redacted information, including redacted versions or summaries, proposed admissions of fact and other items of evidence containing *tu quoque* or other Rule 77 information. The filing contains information on each item, along with an update on the security situation for the twenty-five individuals and the disclosure proposed for each item. The original documents and the suggested redacted or summarised versions were attached as annexes. The prosecution also submitted a chart of one hundred and forty-five items of evidence containing information on the use of child soldiers by other armed groups which have already been disclosed to the defence (along with nine items of alternative Rule 77 information).³¹ The prosecution requested an extension of the page limit by 20 pages for this filing on the basis of Regulation 37(2) of the Regulations of the Court (“Regulations”) so that it may provide the Trial Chamber with comprehensive information.³²

11. On 10 December 2008 the prosecution filed a public version of its request not to disclose the identity of these twenty-five individuals, which included

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 Twenty-Five Individuals providing *Tu Quoque* Information, 5 December 2008. ICC-01/04-01/06-1545-Conf-Exp.

³¹ Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information, 5 December 2008. ICC-01/04-01/06-1545-Conf-Anx155.

³² Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information, 5 December 2008. ICC-01/04-01/06-1545-Conf-Exp, paragraph 7.

certain clarifications, corrections and an update.³³ The prosecution informed the Chamber that as a result of the disclosure to date, together with its current proposals, the defence will have access to the full, rather than excerpted, statements containing *tu quoque* information for eighteen of the forty-three witnesses, and that the identities of the eighteen will be known to the defence.³⁴ The prosecution grouped the remaining twenty-five individuals, whose identity it seeks to protect, into two categories: eighteen “vulnerable witnesses”, and seven “other witnesses”. In relation to each of the “vulnerable witnesses”, the prosecution proposed disclosing a redacted version of the statements, requested authorisation to make the proposed redactions and suggested making certain admissions of fact.³⁵ In relation to the “other witnesses”, the prosecution proposed disclosing redacted versions of four statements, and three summaries.³⁶ Finally, it proposed admissions of fact for each of the seven “other witnesses”.³⁷ The prosecution submitted that the *tu quoque* information contained within the statements of the twenty-five witnesses, or summaries thereof, would be provided to the defence in non-redacted form.³⁸ The prosecution filed a chart detailing the proposed form of disclosure for each statement, as well as admissions of fact for each witness, as a confidential prosecution- and defence-only annex.³⁹

12. On 15 December 2008 the defence filed a response,⁴⁰ in which it observed that

³³ Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information, 10 December 2008, ICC-01/04-01/06-1552.

³⁴ Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information, 10 December 2008, ICC-01/04-01/06-1552, paragraph 4.

³⁵ Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information, 10 December 2008, ICC-01/04-01/06-1552, paragraphs 10 and 13-67.

³⁶ Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information, 10 December 2008, ICC-01/04-01/06-1552, paragraph 68.

³⁷ Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information, 10 December 2008, ICC-01/04-01/06-1552, paragraphs 69-93.

³⁸ Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information, 10 December 2008, ICC-01/04-01/06-1552, paragraph 94.

³⁹ Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information, 10 December 2008, ICC-01/04-01/06-1552-Conf-Anx.

⁴⁰ 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

the relevant statements contain not only information that is relevant for the preparation of the defence, but also exculpatory material.⁴¹ It submitted, therefore, that the suggested 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.⁴² It reiterated its submission that disclosure in these circumstances should be non-redacted and it cited the decision of the Appeals Chamber from 11 July 2008 where it addressed Rule 77 of the Rules.⁴³ The defence argued that information disclosed to the accused is useless if the identities of the relevant witnesses are concealed, because it cannot be used effectively during the trial or in the course of investigations.⁴⁴ It submitted that the admissions of fact are not a sufficient alternative as they only cover limited parts of the information given by the witnesses.⁴⁵ Furthermore, the defence contended 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.⁴⁶ The defence submitted that the alternative evidence proposed by the prosecution does not rectify the problems created by incomplete disclosure because, first, some of the items

Identity of Twenty-Five Individuals providing *Tu Quoque* Information” du 11 décembre 2008, 15 December 2008, ICC-01/04-01/06-1555.

⁴¹ 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.

⁴² 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.

⁴³ 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

⁴⁴ 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.

⁴⁵ 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.

⁴⁶ 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.

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 during the proceedings.⁴⁷ The defence observed that it had not been informed of the reasons why the identities of each witness are not to be disclosed, and submitted that it was impermissible to make such a request this late in the proceedings, particularly given the prosecution has been in possession of some of the statements for several years.⁴⁸ The defence noted that the filing exceeded the page limit stipulated in the Regulations, and relied on an Appeals Chamber decision that authorisation for extension of the page limit must be obtained in advance.⁴⁹ It submitted that although the request for an extension was referred to in paragraph 7 of the filing, the defence had not been informed of the request or of any relevant decision taken in this respect.⁵⁰ In conclusion, the defence requested disclosure of the complete witness statements, along with the identities of the witnesses.⁵¹

⁴⁷ 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.

⁴⁸ 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 13-16.

⁴⁹ 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 29.

⁵⁰ 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 30.

⁵¹ 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.

13. An *ex parte* status conference was held on 15 January 2009 to investigate specific questions relating to the proposed admissions of fact and the proposed redactions. In advance the Chamber provided a list of questions to the prosecution,⁵² and during the hearing the Chamber invited the prosecution to review its proposals for each witness and to submit written responses to the questions.⁵³
14. On 19 January 2009, the prosecution provided further information regarding the need for protective measures for each witness,⁵⁴ and elaborated on the type of redactions it sought and the security situation of each individual witness. Furthermore, the prosecution informed the Chamber that three witnesses had now agreed to disclosure of their identities.⁵⁵ The prosecution reiterated its request for authorization not to disclose the identities of the other twenty-two witnesses.⁵⁶ For the latter group, this includes suggested redactions to identifying information for each witness,⁵⁷ “internal work products”,⁵⁸ interview locations,⁵⁹ intermediaries,⁶⁰ names, initials and

⁵² Email communication to the prosecution through the Legal Adviser to the Trial Division on 13 January 2009.

⁵³ Transcript of hearing on 15 January 2009, ICC-01/04-01/06-T-103-CONF-EXP-ENG, page 1, line 20-page 2, line 11 and page 4, lines 7-17.

⁵⁴ Prosecution’s Clarifications to the “Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” filed on 19 December 2008, 19 January 2009, ICC-01/04-01/06-1632-Conf-Exp.

⁵⁵ Prosecution’s Clarifications to the “Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” filed on 19 December 2008, 19 January 2009, ICC-01/04-01/06-1632-Conf-Exp. paragraph 7; Prosecution’s Submission of a Public Redacted Version of its 19 January 2009 “Prosecution’s Clarification to the “Prosecution’s Request for non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” filed on 19 December 2008” with annex, 26 January 2008, ICC-01/04-01/06-1650, paragraph 7. This concerns Witnesses DRC-OTP-WWWW-0155, DRC-OTP-WWWW-0281 and DRC-OTP-WWWW-0176.

⁵⁶ Prosecution’s Submission of a Public Redacted Version of its 19 January 2009 “Prosecution’s Clarification to the “Prosecution’s Request for non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” filed on 19 December 2008” with annex, 26 January 2008, ICC-01/04-01/06-1650, paragraph 7.

⁵⁷ Prosecution’s Clarifications to the “Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” filed on 19 December 2008, 19 January 2009, ICC-01/04-01/06-1632-Conf-Exp, paragraphs 15-44; Prosecution’s Submission of a Public Redacted Version of its 19 January 2009 “Prosecution’s Clarification to the “Prosecution’s Request for non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” filed on 19 December 2008” with annex, 26 January 2008, ICC-01/04-01/06-1650, paragraphs 15-44.

⁵⁸ Prosecution’s Clarifications to the “Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” filed on 19 December 2008, 19 January 2009, ICC-01/04-01/06-1632-Conf-Exp, paragraph 46; Prosecution’s Submission of a Public Redacted Version of its 19 January 2009 “Prosecution’s Clarification to the “Prosecution’s Request for non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” filed on 19 December 2008” with annex, 26 January 2008, ICC-01/04-01/06-1650, paragraph 46.

signatures of those present when the interviews were conducted (i.e. interpreters and psychotherapists,)⁶¹ prosecution sources,⁶² the names and whereabouts of the family members or guardians,⁶³ and victims.⁶⁴ The prosecution submitted that the *tu quoque* information provided by these witnesses was of limited use to the defence and that the redactions would not be prejudicial.⁶⁵ The prosecution agreed with the suggestion of the Chamber to amend the wording of the admissions of fact, save that it proposed a different timeframe for an admission relating to Witness DRC-OTP-WWWW-

⁵⁹ Prosecution's Clarifications to the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" filed on 19 December 2008, 19 January 2009, ICC-01/04-01/06-1632-Conf-Exp, paragraph 47; Prosecution's Submission of a Public Redacted Version of its 19 January 2009 "Prosecution's Clarification to the "Prosecution's Request for non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" filed on 19 December 2008" with annex, 26 January 2008, ICC-01/04-01/06-1650, paragraph 47.

⁶⁰ Prosecution's Clarifications to the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" filed on 19 December 2008, 19 January 2009, ICC-01/04-01/06-1632-Conf-Exp, paragraph 48; Prosecution's Submission of a Public Redacted Version of its 19 January 2009 "Prosecution's Clarification to the "Prosecution's Request for non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" filed on 19 December 2008" with annex, 26 January 2008, ICC-01/04-01/06-1650, paragraph 48.

⁶¹ Prosecution's Clarifications to the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" filed on 19 December 2008, 19 January 2009, ICC-01/04-01/06-1632-Conf-Exp, paragraphs 49 and 50; Prosecution's Submission of a Public Redacted Version of its 19 January 2009 "Prosecution's Clarification to the "Prosecution's Request for non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" filed on 19 December 2008" with annex, 26 January 2008, ICC-01/04-01/06-1650, paragraphs 49 and 50.

⁶² Prosecution's Clarifications to the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" filed on 19 December 2008, 19 January 2009, ICC-01/04-01/06-1632-Conf-Exp, paragraph 51; Prosecution's Submission of a Public Redacted Version of its 19 January 2009 "Prosecution's Clarification to the "Prosecution's Request for non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" filed on 19 December 2008" with annex, 26 January 2008, ICC-01/04-01/06-1650, paragraph 51.

⁶³ Prosecution's Clarifications to the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" filed on 19 December 2008, 19 January 2009, ICC-01/04-01/06-1632-Conf-Exp, paragraphs 52 and 53; Prosecution's Submission of a Public Redacted Version of its 19 January 2009 "Prosecution's Clarification to the "Prosecution's Request for non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" filed on 19 December 2008" with annex, 26 January 2008, ICC-01/04-01/06-1650, paragraphs 52 and 53.

⁶⁴ Prosecution's Clarifications to the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" filed on 19 December 2008, 19 January 2009, ICC-01/04-01/06-1632-Conf-Exp, paragraphs 54 and 55; Prosecution's Submission of a Public Redacted Version of its 19 January 2009 "Prosecution's Clarification to the "Prosecution's Request for non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" filed on 19 December 2008" with annex, 26 January 2008, ICC-01/04-01/06-1650, paragraphs 54 and 55.

⁶⁵ Prosecution's Clarifications to the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" filed on 19 December 2008, 19 January 2009, ICC-01/04-01/06-1632-Conf-Exp, paragraphs 7 and 13; Prosecution's Submission of a Public Redacted Version of its 19 January 2009 "Prosecution's Clarification to the "Prosecution's Request for non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" filed on 19 December 2008" with annex, 26 January 2008, ICC-01/04-01/06-1650, paragraphs 7 and 13.

0064.⁶⁶ The prosecution provided a chart including the details of the proposed redactions.⁶⁷ A public redacted version was filed on 26 January 2008.⁶⁸

II. Applicable law and relevant decisions

15. The following provisions of the Statute and Rules are relevant to this issue:

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

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

⁶⁶ Prosecution's Clarifications to the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" filed on 19 December 2008, 19 January 2009, ICC-01/04-01/06-1632-Conf-Exp, paragraphs 56, 57.

⁶⁷ Annex Z to Prosecution's Clarifications to the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" filed on 19 December 2008, 19 January 2009, ICC-01/04-01/06-1632-Conf-Exp-AnxZ. The revised redacted versions have also been filed as Annexes A1-X1.

⁶⁸ Prosecution's Submission of a Public Redacted Version of its 19 January 2009 "Prosecution's Clarification to the "Prosecution's Request for non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" filed on 19 December 2008" with annex, 26 January 2008, ICC-01/04-01/06-1650.

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.

[...]

Regulation 37

Page limits for documents filed with the Registry

1. A document filed with the Registry shall not exceed 20 pages, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber.

2. The Chamber may, at the request of a participant, extend the page limit in exceptional circumstances.

16. In the present case, the Appeals Chamber has held that “three of the most important considerations for an authorisation of non-disclosure of the identity of a witness pursuant to rule 81 (4) of the Rules of Procedure and Evidence [are]: 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.”⁶⁹ The

⁶⁹ 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; See also, 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.

Appeals Chamber emphasized that the Pre-Trial Chamber should investigate whether less restrictive protective measures are sufficient and feasible.⁷⁰

17. When addressing the use of summaries of evidence, the Appeals Chamber referred to a judgement of the European Court of Human Rights (*Doorson v. The Netherlands*, application no. 20524/92), in which that Court rejected a suggested violation of the fair-trial rights of the accused on the basis of the use of anonymous evidence, because the procedures followed by the judicial authorities sufficiently counterbalanced the handicaps under which the defence laboured.⁷¹ However, it is to be observed that the consistent approach of the European Court of Human Rights has been that “no conviction should be based solely or to a decisive extent upon the statements or testimony of anonymous witnesses”.⁷² 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.”⁷³ It specifically noted that the Pre-Trial Chamber will need to take into account *inter alia* any impairment of the ability of the defence to challenge the evidence presented by the prosecution due to the use of anonymous witnesses, and the use of summaries without disclosure to the defence of the underlying witness statements and other documents.⁷⁴

⁷⁰ 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.

⁷¹ 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.

⁷² *R v Davis* [2008] UKHL 36, paragraphs 26, 75 – 90.

⁷³ 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.

⁷⁴ 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.

18. In the *Katanga* case the Appeals Chamber held that that “persons other than witnesses, victims and members of their families, may, at this stage of the proceedings, be protected through the non-disclosure of their identities by analogy with other provisions of the Statute and the Rules. The aim is to secure protection of individuals at risk. Thus, by necessary implication, rule 81(4) should be read to include the words “persons at risk on account of the activities of the Court” so as to reflect the intention of the States that adopted the Statute and the Rules of Procedure and Evidence, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect people at risk.”⁷⁵ 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].”⁷⁶

19. 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) provides generally for the non-disclosure of “information”, without excluding per se certain categories of information from non-disclosure. Similarly, rule 81(4) does not expressly rule out the information referred to in rule 111(1) from its ambit. The Appeals Chamber therefore concludes that it will have to be determined on a case-by-case basis whether the non-disclosure of information that is required to be recorded pursuant to rule 111(1) 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.”⁷⁷

⁷⁵ 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.

⁷⁶ 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.

⁷⁷ 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.

20. The principles outlined by the Appeals Chamber, although developed in the procedural context of the Confirmation of the Charges, are highly relevant to the present issue.

21. The Trial Chamber has previously authorised the permanent redaction of the names of those referred to as third parties, intermediaries and NGOs (together with their field staff) when, *inter alia*, the information was irrelevant to the known issues in the case, so long as this course did not render the document in any way unintelligible or unusable.⁷⁸ For similar reasons, the Trial Chamber has also authorised redactions to the location of interviews.⁷⁹

III. Analysis and Conclusions

Extension of page limit

22. The defence opposed the prosecution's request for an extension of the page limit, pursuant to Regulation 37(2) of the Regulations. The prosecution submitted that the present application is exceptional, as the submissions contain a complete rehearsal of the content of the statements, updated security information on each of the 25 witnesses and a description of the proposed method of disclosure.⁸⁰

23. The Appeals Chamber has decided that "[a]n application for the extension of the page limit envisaged by the Regulations of the Court and its approval by a Chamber are prerequisites for the submission of an extended document."⁸¹

⁷⁸ 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.

⁷⁹ Transcript of hearing on 18 January 2008, ICC-01/04-01/06-T-72-CONF-EXP, page 2, line 14.

⁸⁰ Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information, 5 December 2008, ICC-01/04-01/06-1545-Conf-Exp, paragraph 7; Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information, 10 December 2008, ICC-01/04-01/06-1552, paragraph 7.

⁸¹ Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 OA3, paragraph 4; Decision on the re-filing of the document in support of the appeal, 22 July 2008, ICC-01/04-01/06-1445 OA13, paragraph 8.

However, the Chamber notes that while the Appeals Chamber in one decision found that “[u]nlike regulation 35 (2), second sentence, of the Regulations of the Court in respect of time limits, the Regulations of the Court do not provide for a retroactive extension of page limits”,⁸² it previously determined that “[d]erogation from the ordained procedure should not, in this case, stand in the way of looking into the entirety of the document submitted” and went on to conclude that the exceptional circumstances of the case warranted the extension.⁸³

24. The Chamber itself requested the instant information from the prosecution,⁸⁴ and the latter duly informed the Chamber of its intention to apply for an extension to the page limit. Given the filing appropriately includes a considerable amount of information concerning the twenty-five individuals, the Chamber is satisfied that the circumstances are exceptional (for the purposes of Regulation 37(2) of the Regulations) and warrant an extension.

Redactions and alternative forms of disclosure

25. In its *ex parte* submission, the prosecution seeks authorisation for non-disclosure of the identities of twenty-five individuals who provide *tu quoque* information, and who in two cases additionally provide Rule 77 information.⁸⁵ The prosecution has proposed alternatives to the full disclosure of this information, including by way of disclosure of redacted versions or summaries, proposed admissions of fact, and alternative sources of *tu quoque* evidence.⁸⁶

⁸² Decision on the re-filing of the document in support of the appeal, 22 July 2008, ICC-01/04-01/06-1445 OA13, paragraph 8.

⁸³ Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 OA3, paragraph 4

⁸⁴ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 30, line 22 to page 31, line 9, page 34, lines 12-16, page 35, lines 1-13 and page 37, lines 7-13.

⁸⁵ Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information, 5 December 2008, ICC-01/04-01/06-1545-Conf-Exp, paragraph 6.

⁸⁶ ICC-01/04-01/06-1545-Conf-Exp, paragraph 6.

26. The Chamber has approached the request for the non-disclosure of identity and the suggested alternative forms of disclosure of information for each witness individually, based on the information provided by the prosecution in its filings of 5 December 2008 and 19 January 2009. The Chamber has applied the test established by the Appeals Chamber, addressing whether the witness may be endangered if his or her identity is disclosed to the defence, examining the availability of alternative protective measures, and evaluating the impact of the protective measures on the rights of the accused. Factors that the Chamber has taken into consideration in determining whether the proposed protective measures are consistent with the rights of the accused include the type and extent of the redactions requested by the prosecution and, where relevant, the utility of the proposed summary, the proposed admission of fact or the alternative evidence as measures that sufficiently counterbalance nondisclosure of the particular information to the accused.

27. As regards the potential dangers faced by these witnesses, the Chamber observes that the prosecution has been unable to contact several of them to investigate their current position, making a final determination of the potential dangers that they face impossible. However, the Chamber emphasizes that an inability to reach a firm conclusion on this issue is not the equivalent of establishing that the witness is not at risk. Given the volatile and not infrequently dangerous situation in the Democratic Republic of Congo, the Chamber's wide-ranging obligations⁸⁷ require it to make all necessary rulings in order to "provide for the protection" for these individuals, so long as they do not undermine the fairness of the proceedings. The Chamber has

⁸⁷ A range of provisions delineate the Chamber's powers as regards protective measures: under Article 64 (2), "[t]he 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 Decision lifting the stay of proceedings, 23 January 2009, ICC-01/04-01/06-1644, paragraphs 33-49.

focussed particularly on whether non-disclosure materially undermines the accused's ability to prepare his defence, or otherwise causes him prejudice.

28. The Chamber has discussed below the main issues relevant to the proposed redactions, summaries, admissions of fact and alternative evidence. The individual analysis for each witness is attached as a confidential *ex parte* prosecution-only annex. The prosecution has provided all statements to the defence in the format which they have proposed for disclosure, either as redacted versions or summaries,⁸⁸ together with a chart listing the proposed admissions of fact relating to each witness.⁸⁹ The defence has also received a chart listing 145 items of previously disclosed evidence containing *tu quoque* information, as well as 9 items of disclosed, alternative Rule 77 evidence.⁹⁰

Types of redactions

29. For twenty-two witnesses, the prosecution seeks to redact⁹¹ information relating to their identities, including personal data, such as the name, date and place of birth of the witnesses, and the identities of their parents and siblings. Redactions are also sought for other material that may lead to the identification of these witnesses, such as unusual injuries, or discrete functions they have undertaken, or their involvement in particular incidents, along with details that tend to identify a witness as the source of relevant information. In the view of the Chamber, the proposed measures are necessary, and they are the least necessary to protect these twenty-two witnesses: in each instance, they are exposed to security risks if their identities are revealed.

⁸⁸ Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information, 10 December 2008, ICC-01/04-01/06-1552, footnote 14.

⁸⁹ Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information, 10 December 2008, ICC-01/04-01/06-1552, footnote 15.

⁹⁰ Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information, 10 December 2008, ICC-01/04-01/06-1552, footnote 16.

⁹¹ Annex to Prosecution's Submission of a Public Redacted Version of its 19 January 2009 "Prosecution's Clarification to the "Prosecution's Request for non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" filed on 19 December 2008" with annex, 26 January 2008, ICC-01/04-01/06-1650, paragraphs 7-13.

30. The prosecution seeks leave to redact so-called “internal work products”, the locations of interviews, the identity of intermediaries, those who were present during interviews and prosecution sources, and the names and whereabouts of family members, guardians and victims.⁹² In each instance the prosecution submitted, first, that the information was irrelevant to any issue in the case, second, the redactions do not render the relevant documents unintelligible or unusable and, third, no lesser measures are available to ensure the continued safety of those at risk.⁹³
31. Rule 81(1) of the Rules explicitly excludes from disclosure the internal documents (“reports, memoranda or other internal documents”) prepared by “a party, its assistants or representatives” in connection with the investigation or preparation of the case. It is of note that the ICTY Rules of Procedure and Evidence contain an almost identical provision: Rule 70(A). It would be unhelpful to attempt in the context of this decision to define the material covered by this provision, but it includes, *inter alia*, the legal research undertaken by a party and its development of legal theories, the possible case strategies considered by a party, and its development of potential avenues of investigation. The Chamber further ensured that the relevant material was limited only to internal documents of the prosecution, and redactions were only authorised if the information was not of a kind that required disclosure under the Statute. It is to be stressed that the material covered by this provision can be entire documents or parts thereof. Furthermore, the Chamber ensured the redactions did not change the substance of the relevant parts of the documents, and in each instance they remained intelligible and

⁹² Annex to Prosecution’s Submission of a Public Redacted Version of its 19 January 2009 “Prosecution’s Clarification to the “Prosecution’s Request for non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” filed on 19 December 2008” with annex, 26 January 2008, ICC-01/04-01/06-1650, paragraphs 46-55.

⁹³ Annex to Prosecution’s Submission of a Public Redacted Version of its 19 January 2009 “Prosecution’s Clarification to the “Prosecution’s Request for non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” filed on 19 December 2008” with annex, 26 January 2008, ICC-01/04-01/06-1650, paragraph 45.

useable.

32. As regards the other categories of information, the Appeals Chamber found that Rule 81(2) of the Rules relates to the non-disclosure of any information or material that may prejudice further or ongoing investigations.⁹⁴ Although the Appeals Chamber in that decision was addressing redactions approved by the Pre-Trial Chamber, Rule 81(2) is not restricted to that stage of the proceedings; indeed, the sub-rule merely prohibits the introduction of such material or information into evidence during the trial without adequate prior disclosure to the accused. The Trial Chamber has, therefore, applied the approach outlined by the Appeals Chamber.
33. Since investigations are still ongoing as regards several cases in the DRC, and given at least one location referred to by these witnesses is still used by the prosecution to interview witnesses, the Chamber is satisfied that disclosure of this information may impede current investigations. Critically, this material is wholly irrelevant to the issues in the case. The Chamber, therefore, has authorized these redactions following a case-by-case examination.
34. The same approach applies to intermediaries, anyone present during interviews, and prosecution sources. If their identities are disclosed, ongoing investigations may be prejudiced, not least because the prosecution may have difficulty securing qualified personnel to assist in these various ways in the future, and it may experience problems identifying and contacting potential and current witnesses. Moreover, the Appeals Chamber (once again in the context of pre-trial proceedings) decided that the protective umbrella of Rule 81(4) of the Rules extends to anyone who is put at risk on account of the activities of the Court.⁹⁵ In the Chamber's assessment, the decision of the

⁹⁴ See paragraph 19 above.

⁹⁵ See paragraph 18 above

Appeals Chamber extending protection for the groups expressly provided for in Rule 81(4) – 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.⁹⁶ Therefore, the Trial Chamber’s responsibility under Article 64(6)(e) 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. For instance, any individual still living or working in the DRC who assists during interviews, or who acts as an intermediary or a source, may well be affected if his or her cooperation with, or assistance to, the Court is revealed, and such people would therefore be at risk on account of the activities of the Court. For the purposes of the present application, in each instance this information was not relevant to any issue in the case, and the intelligibility and usability of the relevant documents was not affected. Therefore, implementing these redactions does not impact adversely on the rights of the accused.

35. Depending always on the circumstances, particular family members and guardians, as well as victims, may also be at risk on account of the activities of the Court. To the extent that redactions are proposed for individuals in this category, the Chamber has made detailed, fact-specific decisions on whether the identity of those who have provided information to the Court or who are referred to in the relevant material, come within the scope of Article 67(2) or Rule 77 material, and whether or not protective measures are available that will protect them, whilst ensuring there is no prejudice to the accused, particularly if it is proposed that the person’s identity should not be disclosed. In each instance, in this application, the proposed redactions relate to material that is irrelevant to the trial, and the essential integrity of the disclosed documentation remains intact.

⁹⁶ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-475, paragraphs 36 et seq.

36. The Chamber has carefully borne in mind that there may be instances when some particular factor means that an individual's name is in itself important, for instance because the defence may wish to speak with the person, or to call him or her as a witness, the name may help to prove, or otherwise may assist on, a particular point, or it may lead to other evidence of real assistance. Bearing factors such as these in mind, the Chamber has made decisions addressing the facts relevant to the identity of these individuals, to ensure the accused is not prejudiced and the proceedings remain fair.

37. The Chamber emphasizes that it has taken into account the particular risks to the relevant individuals, and it has analysed the different options that are available to protect their safety and security, only permitting non-disclosure of their identities and other identifying information when no lesser measure is available. It follows that the Chamber assessed the evidential "value" of the material that it is proposed should not be disclosed, and decided in each instance either that the redactions did not affect the Article 67(2) or Rule 77 material, or, alternatively, the available counter-balancing measures are sufficient to ensure that the trial remains fair.

Summaries

38. In relation to witnesses DRC-OTP-WWWW-0267, DRC-OTP-WWWW-0219 and DRC-OTP-WWWW-0292, the prosecution seeks authorization to submit summaries (as opposed to redacted documents). To the extent that the Chamber was not initially satisfied that the relevant *tu quoque* and Rule 77 material was sufficiently set out, the Chamber required the prosecution to consider including additional information.

39. One summary in particular was amended considerably. In its final analysis the Chamber concluded service of these documents in their final form was the

least restrictive measure available and, critically, all the relevant information had been made available to the defence. Accordingly, the accused is not prejudiced by this measure.

Admissions of fact

40. The prosecution's admissions of fact generally assist in ensuring the fairness and impartiality of the trial of the accused. The Chamber has assessed the evidential "value" of the proposed admissions, given the identities of certain individuals who have provided relevant information will not be disclosed. In each instance, it has concluded that they are a sufficient alternative, because they reflect the Article 67(2) or Rule 77 evidence in question (when considered with the other relevant material). Accordingly, the defence will be able to rely on the prosecution's admissions concerning the relevant facts and events rather than having to seek to establish them through the currently unidentified sources. Indeed, arguably the defence is put in a more favorable evidential position than it otherwise would have been because of the "certainty" provided by the admissions (which are not in themselves binding on the Chamber).

41. In their final version – on the suggestion of the Chamber – the admissions, where appropriate, include the relevant dates or time frames, and the wording "It has been said" has been excluded, in most instances. They are precise and each adequately reflects the information provided by the witnesses. Furthermore, they are extensive in their scope, and reflect, *inter alia*, the recruitment and use of child soldiers by armed groups other than the UPC/FPLC. They cover incidents of voluntary and forced recruitment carried out by the RCD, the APC, the FNI, the FRPI, the Lendu militia, and the Ngiti militia. They include references to the military training of children (including providing them with arms) and their use in combat. They address the position of boys and girls under the age of fifteen, and some relate to incidents falling

within the time span of the charges brought against Thomas Lubanga.

42. Viewed in their entirety, the Chamber is satisfied that the admissions of fact proposed by the prosecution cover all the aspects of the non-disclosed evidence of relevance to the defence on the recruitment and use of children under the age of fifteen in armed hostilities. Accordingly, the defence will be able to rely on the prosecution's admissions concerning these events rather than seeking to prove them. 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 admissions (which are not in themselves binding on the Chamber).

Alternative Evidence

43. In its review of the alternative evidence submitted by the prosecution, the Chamber focussed, *inter alia*, on the submissions of the defence on the advantages of receiving all the extant relevant evidence, so as to secure the maximum possible corroboration. The Chamber has carefully investigated each and every instance where the prosecution has suggested proceeding by way of alternative evidence, and it has assessed the weight and sufficiency - the "replacement value" - of this material as compared to the non-disclosed information.
44. The 145 documents disclosed by the prosecution are relevant to the conscription, enlistment, and/or use of children to participate actively in hostilities in the DRC. The sources of this information include, *inter alia*, the UN (both MONUC and other UN agencies), various NGOs, statements from witnesses, notes from investigators, press releases from militias, together with press articles.
45. Much of this material tends to indicate that all of the militias operating in the

DRC,⁹⁷ particularly in Ituri, made use of children as combatants.⁹⁸ Many of the estimates placed the overall proportion of children in militias at between 30 and 50 percent.⁹⁹ A report from the UN, entitled, “Interim report of the Special Rapporteur on the situation on Human Rights in the Democratic Republic of Congo” stated, in relation to the recruitment and use of children in the Democratic Republic of Congo, that “[i]t is estimated that 30 to 40 per cent of the military personal used by the armed groups are children”.¹⁰⁰ Another UN report, “Thirteenth report of the Secretary-General of the United Nations Organization Mission in the Democratic Republic of Congo” suggested that “[c]hild soldiers are still present in all armed groups in the Democratic Republic of the Congo, in some cases representing up to 35 per cent of the troops, and are being sent to the front lines.”¹⁰¹ The “Report of the Secretary-General on children and armed conflict in the Democratic Republic of Congo” set out that between mid-2003 and December 2006, “an estimated 30,000 children were released from armed forces and groups in the Democratic Republic of Congo”.¹⁰²

46. Various documents describe how ethnicity divided the population within Ituri, and affected the allegiance given to militias. Some of the Lendu militias were known to have children in their ranks. For example, a MONUC Military Daily Report states that:

[a] Recce conducted by Sector 6 commander in Katoto 26 Km northeast of Bunia this Afternoon confirms a group of 150 Lendu militias including women and children from

⁹⁷ See for instance: ICC-01/04-01/06-1545-Conf-Anx60, page 19, paragraph 90 (DRC-OTP-00130-290); ICC-01/04-01/06-1545-Conf-Anx62, page 3 (DRC-OTP-00131-371); ICC-01/04-01/06-1545-Conf-Anx136, page 4 (DRC-OTP-1010-0148); ICC-01/04-01/06-1545-Conf-Anx36, page 4 (DRC-OTP-0074-0047).

⁹⁸ ICC-01/04-01/06-1545-Conf-Anx32, page 4, paragraph 9 (DRC-OTP-0065-0355); ICC-01/04-01/06-1545-Conf-Anx19, page 30, paragraph f (DRC.00019.181); ICC-01/04-01/06-1545-Conf-Anx32, page 4, paragraph 9 (DRC.00065.355).

⁹⁹ See for example: ICC-01/04-01/06-1545-Conf-Anx59, page 18, paragraph 89 (DRC.00130.269); ICC-01/04-01/06-1545-Conf-Anx102, page 4, first paragraph (DRC-OTP-0172-0187).

¹⁰⁰ ICC-01/04-01/06-1545-Conf-Anx59, page 18, paragraph 89 (DRC.00130.269).

¹⁰¹ ICC-01/04-01/06-1545-Conf-Anx61, page 12, paragraph 36 (DRC.00131.055).

¹⁰² ICC-01/04-01/06-1545-Conf-Anx121, page 13, paragraph 54 (DRC-OTP-0185-1863).

LOGA 22 KM North east of Bunia raided NADRA village 3 Kms south of Katoto, killing 9 people among three children and one baby.¹⁰³

47. The report entitled “Bunia Daily Consolidated Report” sets out, in regards of the region of Nyankunde, that: “the majority of Lendu-Ngiti controlling the area are children hardly controlled by few adults commanders often on drugs/alcohol”.¹⁰⁴ As set out in a report of the “UN Office for the Coordination of Humanitarian Affairs” Lendu Ngiti leaders indicated, in communications with Save the Children, that they had approximately 5000 child soldiers in their ranks.¹⁰⁵ With reference to the children within the Lendu militias, Amnesty International noted that they were often below the age of 15.¹⁰⁶
48. During the relevant period of time, there were a number of armed militias operating in the Democratic Republic of Congo, and within Ituri in particular. Of these, three groups feature prominently in the *tu quoque* documents: the FNI/FRPI, the PUSIC, and the FAPC.
49. The documents describe a number of instances where children were linked to groups of the FNI/FRPI, or their presence was acknowledged by FNI/FRPI commanders and leaders. A report by MONUC Child Protection in September 2003 indicated that 50 children under the age of ten were sighted with an FNI Commander during a reconnaissance mission¹⁰⁷ and a further report in November 2003 noted 80 minors under the command of an FNI group in Marabo.¹⁰⁸ A MONUC weekly report in December 2003 noted that in the area of Kwandrumba, an estimated 30% of FNI and FRPI troops were children.¹⁰⁹ According to the information contained in two investigator’s

¹⁰³ ICC-01/04-01/06-1545-Conf-Anx10, page 2, paragraph 2(b) (DRC.00005-353).

¹⁰⁴ ICC-01/04-01/06-1545-Conf-Anx127, page 3, second paragraph (DRC-OTP-0202-0797).

See also ICC-01/04-01/06-1545-Conf-Anx33 (DRC-OTP-0070-0396) and ICC-01/04-01/06-1545-Conf Anx98 (DRC-OTP-0165-1046).

¹⁰⁵ ICC-01/04-01/06-1545-Conf-Anx101, page 6, first paragraph (DRC-OTP-0172-0156).

¹⁰⁶ ICC-01/04-01/06-1545-Conf-Anx141, page 2 (DRC-OTP-1013-0299).

¹⁰⁷ ICC-01/04-01/06-1545-Conf-Anx1, page 4 (DRC.00001.069).

¹⁰⁸ ICC-01/04-01/06-1545-Conf-Anx4, page 4, paragraph II.4 (DRC.00001.078).

¹⁰⁹ ICC-01/04-01/06-1545 Conf-Anx12, page 5, paragraph 6(d)(i) (DRC.00009.018).

notes, there were both boys and girls in FNI/FRPI groups, ranging in age between 8 and 18.¹¹⁰ A MONUC report from April 2004 reported that in Nyankunde mothers said that the FNI took girls by force, while boys were forced to work in mines.¹¹¹ A 2004 MONUC Child Protection report indicated that some children who attempted to secure their demobilisation from FNI/FRPI were instead put in jail.¹¹²

50. In September 2003, PUSIC claimed to have 400-500 children among its ranks of 3000 soldiers in Ituri, although the author of the MONUC Child Protection report considered this underestimated the number.¹¹³ An October 2003 MONUC report by the same author discussed a PUSIC request for assistance in demobilizing 600 children.¹¹⁴ In 2003, MONUC estimated that there were approximately 1000 children in PUSIC.¹¹⁵ [REDACTED] pointed to PUSIC's use of children in protecting its headquarters.¹¹⁶ Multiple sources refer to PUSIC sending children to Uganda for training, including a MONUC "Bunia Daily Consolidated Report" from July 2003¹¹⁷ and a MONUC Child Protection report from the same month.¹¹⁸ Children as young as ten are listed as having been involved with PUSIC.¹¹⁹

51. A MONUC Report cites a source from the FAPC, claiming it had a "high proportion of minors" amongst its 7000 soldiers, although this may have been an overestimate.¹²⁰ In 2003, MONUC estimated approximately 1000 children were linked to the FAPC as soldiers.¹²¹ In the area around Kandoi in

¹¹⁰ ICC-01/04-01/06-1545-Conf-Anx74, page 3, paragraph 8 (DRC.00150.155) and ICC-01/04-01/06-1545-Conf-Anx75, page 3, paragraph 7 (DRC.00150.160).

¹¹¹ ICC-01/04-01/06-1545-Conf-Anx13, page 4, paragraph 11 (DRC.00009.273).

¹¹² ICC-01/04-01/06-1545-Conf-Anx104, page 4, paragraph II.4 (DRC-OTP-0172-0217).

¹¹³ ICC-01/04-01/06-1545-Conf-Anx2, page 3, paragraph II.4 (DRC.00001.059).

¹¹⁴ ICC-01/04-01/06-1545-Conf-Anx3, page 4, paragraph III.1 (DRC.00001.074).

¹¹⁵ ICC-01/04-01/06-1545-Conf-Anx9, page 4, paragraph 2 (DRC.00004.087).

¹¹⁶ ICC-01/04-01/06-1545-Conf-Anx24, page 14 (DRC.00043.098).

¹¹⁷ ICC-01/04-01/06-1545-Conf-Anx49, page 5, paragraph 6 (DRC-00111-719).

¹¹⁸ ICC-01/04-01/06-1545-Conf-Anx114, page 4 (DRC-OTP-0184-0122).

¹¹⁹ See for instance: ICC-01/04-01/06-1545-Conf-Anx42, page 2 (DRC.00105.209).

¹²⁰ ICC-01/04-01/06-1545-Conf-Anx2, page 3, paragraph II.4 (DRC.00001.059).

¹²¹ ICC-01/04-01/06-1545-Conf-Anx9, page 4, paragraph 2 (DRC.00004.087).

December 2003, MONUC reported that approximately 35% of the two FAPC battalions were made up of children.¹²² Three MONUC “Daily Consolidated Reports” suggest that the FAPC also participated in the demobilization of children, especially in Aru.¹²³

52. The documents contain specific references to children associated with other armed groups.¹²⁴ A Code Cable dated August 2003 from MONUC to UN Headquarters contains allegations that former APC and Mayi Mayi child soldiers had been re-enrolled in the APC in June of that year.¹²⁵ Witness interview notes made by the prosecution in 2005 refer to a photograph, taken in the second half of 2003 in Beni, of demobilisation of children from the ranks of RCD-K-ML/APC.¹²⁶ A Congolese newspaper report describes the demobilization of Mayi Mayi child soldiers aged 13 and 14.¹²⁷ Two reports noted that child soldiers were “very numerous” in the APC/RCD-ML, the RCD-N, and the MLC.¹²⁸ MONUC reported, in a coded cable to UN Headquarters, that children, some as young as 10 and 12, were sighted with the APC in September 2003.¹²⁹ Notes from a meeting with the UNICEF Representative in DRC noted that “L-D. Kabila and then RCD-Goma, RCD-Kisangani and MLC” had all “enrolled and used child soldiers.”¹³⁰ A MONUC Daily Report from May 2002 reported on a group of child soldiers who joined the MLC after defecting from RCD-G.¹³¹ Finally, a UN investigative mission on Ituri revealed that in July 2003 there were children in a UPDF military

¹²² ICC-01/04-01/06-1545-Conf-Anx125, page 33, paragraph c (DRC-OTP-0202-0732).

¹²³ ICC-01/04-01/06-1545-Conf-Anx50, page 5, paragraph 4 (DRC-00111-728); ICC-01/04-01/06-1545-Conf-Anx51, page 8, paragraph 5 (DRC-000111-736); ICC-01/04-01/06-1545-Conf-Anx55, page 3, paragraph 10 (DRC-00112-195).

¹²⁴ See generally for instance: ICC-01/04-01/06-1545-Conf-Anx41 discussing DDR processes in Section 7; ICC-01/04-01/06-1545-Conf-Anx87 and ICC-01/04-01/06-1545-Conf Anx 88 discussing the general use of child soldiers in the Democratic Republic of Congo.

¹²⁵ ICC-01/04-01/06-1545-Conf-Anx30, page 6, paragraph 16 (DRC.00061.233).

¹²⁶ ICC-01/04-01/06-1545-Conf-Anx92, page 13 (DRC-OTP-0160-0373). On demobilization from this same group, see also: ICC-01/04-01/06-1545-Conf-Anx78, page 2, paragraph 7 (DRC.00150.272).

¹²⁷ ICC-01/04-01/06-1545-Conf-Anx64, page 13 (DRC-001340233).

¹²⁸ ICC-01/04-01/06-1545-Conf-Anx80, page 4 (DRC-OTP-0152-0743) and ICC-01/04-01/06-1545-Conf-Anx81, page 2 (DRC-OTP-0152-0751).

¹²⁹ ICC-01/04-01/06-1545-Conf-Anx27, page 6, paragraph 10 (DRC.00061.034)

¹³⁰ ICC-01/04-01/06-1545-Conf-Anx26, page 3, paragraph 4 (DRC.000058.587).

¹³¹ ICC-01/04-01/06-1545-Conf-Anx128, page 3, paragraph 3 (DRC-OTP-0202-0872).

training camp, although their role was unclear.¹³²

53. The Chamber is satisfied that this information covers all the *tu quoque* evidence provided by the relevant witnesses, sometimes supplying far greater detail than that covered in the witness statements or the investigators' notes that are the subject of this decision. The sum of the alternative evidence offers a sufficient general overview of the recruitment and use of child soldiers in the conflict in the DRC.

Conclusion

54. Given the extent of the documents provided, and the ambit of the admissions of fact proposed by the prosecution, the Chamber is of the view that the defence will not suffer prejudice due to this potential *lacuna* in the corroborative material. Furthermore, it is not necessary in a criminal trial for every piece of available evidence on an issue to be introduced in order to establish, or dispute, a relevant fact. In reality, the testimony relied on in criminal proceedings is often selected from a wider corpus of *prima facie* relevant information. The Chamber has borne in mind that it is often not the "amount" of evidence in a case that matters, but rather its quality and, when relevant, the extent to which it is undisputed or agreed. In the Chamber's view, nothing has been redacted that has not been amply replaced by the admissions or the alternative evidence. Nonetheless, in due course when the Chamber comes to make its findings of fact (where necessary) on the issues in the case, it will make due allowance for the suggested restrictions on the defence, namely that the accused has not received every piece of potentially corroborative material.

55. On the basis of the analysis set out above, together with the reasoning contained in the annex, the Chamber:

¹³² ICC-01/04-01/06-1545-Conf-Anx130, page 10, paragraph 30 (DRC-OTP-0203-0335).

- a. grants the extension to the page limit;
- b. authorizes the non-disclosure of the identities of 22 witnesses, and the disclosure to the defence of the redacted or summarized documents, together with the proposed alternative evidence, relating to:

DRC-OTP-WWWW-0064, DRC-OTP-WWWW-0137, DRC-OTP-WWWW-0169, DRC-OTP-WWWW-0170, DRC-OTP-WWWW-0175, DRC-OTP-WWWW-0177, DRC-OTP-WWWW-0178, DRC-OTP-WWWW-0179, DRC-OTP-WWWW-0216, DRC-OTP-WWWW-0256, DRC-OTP-WWWW-0278, DRC-OTP-WWWW-0282, DRC-OTP-WWWW-0243, DRC-OTP-WWWW-0271, DRC-OTP-WWWW-0288, DRC-OTP-WWWW-0267, DRC-OTP-WWWW-0219, DRC-OTP-WWWW-0114, DRC-OTP-WWWW-0122, DRC-OTP-WWWW-0115, DRC-OTP-WWWW-0088, DRC-OTP-WWWW-0292;

- c. authorizes the disclosure to the defence of the redacted documents relating to Witnesses DRC-OTP-WWWW-0155, DRC-OTP-WWWW-0281, and DRC-OTP-WWWW-0176;
- d. finds that the following admissions of fact, along with the redacted documents, the summaries and the alternative evidence meet the prosecution's disclosure obligations:

1. A 12 or 13 year old boy was forcibly conscripted by the RCD of Mbusa Nyamwisi sometime between 1998 and 2001. He and about 165 other children were subsequently sent to Chakwanzi in Uganda to receive military training. Once repatriated, most of these children were re-recruited by the different militia operating in Bunia, inter alia the APC and RCD/K/ML.¹³³

¹³³ Relating to Witness DRC-OTP-WWWW-0064.

2. A 10 year old boy voluntarily and with his parents' consent in 2000 enlisted together with three other children into the APC in Bunia, Camp Ndroma. Many other children were in that camp. The 10 year old boy fought with the APC against the Ugandans.¹³⁴
3. FNI soldiers recruited by force many 10 to 11 year old boys in 2003 to 2004. These boys participated in hostilities¹³⁵
4. An 11 year old boy was forcibly recruited by the FRPI in 2000. In Medu camp he was regrouped with six other children from Bunia.¹³⁶
5. An 11 year old boy joined a militia in Zumbe in 2003. Ngudjolo was the chief of the camp. The same boy participated in various attacks against the UPC, together with many other child soldiers, in Kasenyi, in Tchomia and Bunia¹³⁷
6. In the Lendu military camp in Zumbe, Irumu territory, young boys aged between 12 and 17 years were militarily trained in 2003. The training included physical exercises, combat techniques and the use of weapons.¹³⁸
7. (i) A lot of girls were at the FNI camp in Lipri in 2001. They were partly enlisted and partly conscripted.
(ii) An 11 year old girl was used by the FNI in the battles of Nyangaray and Lipri in 2001/2002.¹³⁹
8. (i) A 13 year old girl voluntarily joined the FNI militia group in 2001, at the FNI camp at Kagave. A lot of children served in the camp, most of them were conscripted. Amongst them was a significant number of girls.
(ii) Every family had to have someone in the FNI militia to safeguard the family.¹⁴⁰
9. In the beginning of 2003, the FNI had a military camp in Zumbe, Irumu territory; at this camp, in the beginning of 2003, there was at least one child soldier under 15 years.¹⁴¹
10. (i) A girl was abducted by the FRPI in 2003 and taken to Camp Kagabe. She was given a weapon and tasked to guard the camp and the prisoners.
(ii) In the FRPI camp in Kagabe there were a significant number of children, boys and girls.¹⁴²
11. (i) FNI commander Kpadhole had three children between 11 and 14 years as his bodyguard.
(ii) A 14 year old boy participated in the FNI attack in 2003 against the UPC.
(iii) There were many child soldiers in the FNI camp at Zumbe; the same applied to other FNI camps. Other FNI camps were Mongbwalu, Loga, Mbau and Kpandroma.¹⁴³
12. A 13 year old boy together with a few other minors enlisted in the FNI military camp in Zumbe in 2001. He spent four months there.¹⁴⁴

¹³⁴ Relating to Witness DRC-OTP-WWWW-0137.

¹³⁵ Relating to Witness DRC-OTP-WWWW-0155.

¹³⁶ Relating to Witness DRC-OTP-WWWW-0169.

¹³⁷ Relating to Witness DRC-OTP-WWWW-0170.

¹³⁸ Relating to Witness DRC-OTP-WWWW-0175.

¹³⁹ Relating to Witness DRC-OTP-WWWW-0176.

¹⁴⁰ Relating to Witness DRC-OTP-WWWW-0177.

¹⁴¹ Relating to Witness DRC-OTP-WWWW-0178.

¹⁴² Relating to Witness DRC-OTP-WWWW-0179.

¹⁴³ Relating to Witness DRC-OTP-WWWW-0216.

13. A 14 year old boy was abducted by a Ngiti commander. In the camp in Golgota the boy was brought to, there were also other children, including younger ones; one was 11 years old. The children were militarily trained. Amongst the children, there were also some girls.¹⁴⁵
14. After August 2002, there were armed child soldiers between 12 and 14 years at the Lendu Zumba camp. The child soldiers were made to guard the positions around the camp, in the directions of Mandor, Bunia, Kasenyi and Bogoro.¹⁴⁶
15. A 12 year old girl/boy joined the military because the enemies, the Hema of the UPC, made her/his group suffer. There were many children in the FNI/FRPI Datule training camp: Bira, Lendu and Ngiti. The 12 year old girl/boy participated in hostilities.¹⁴⁷
16. In 2002 / 2003 there were many children between 10 and 15 years amongst the soldiers in the camp in Aveba, which was a Ngiti camp.¹⁴⁸
17. Around 2003 there were kadogo between 12 and 15 years in all FRPI camps. They killed and they took part in hostilities. In Kagaba, children were used as escorts.¹⁴⁹
18. Amongst the soldiers in the Ngiti Nyamalinga, Bolo, Bavi and Ttheydo camps were children also girls in the period between September 2002 and 2004. Amongst the Walendu Bindi, there were always children who participated in military attacks.¹⁵⁰
19. (i) From 2003 to 2004 (or from 2004 to 2005), 952 children who were mainly associated with the FRPI militia were demobilized from the Aveba camp.
(ii) The recruitment by Ngiti and Lendu started at the end of 2002. The children had no choice and had to respond to a community call.
(iii) The FRPI towards the end of 2002 started using child soldiers in a generalised way.¹⁵¹
20. (i) There were many children in the FNI-FRPI. For some of them, the weapons were too big. In respect of some of them, the gun was longer than they were tall.
(ii) Before March 2003, there were many child soldiers in the Aveba camp, including under 15 years. They had uniforms and weapons.
(iii) Sambidu of the FNI received money from Kinshasa.
(iv) Etienne, Sambidu and the coordinator Martin were involved in arrangements to get weapons through officers from the government in Kinshasa.
(v) Some of the Ugandans would not let the UPC come and re-inforce Bogoro.
(vi) The Ugandans created the FPRI for their support.
(vii) The Ugandans called together the FNI and FRPI to destroy the UPC.
(viii) After 6 March 2003 Ntumba Luaba gave 20,000 USD to feed the soldiers of FNI.
(ix) Sometime between 6 March and May 2003 a meeting was convened between FNI/FRPI and the FAPC and was chaired by the Ugandan General Kale Kahyiura.
(x) Master Kiza, of the FNI/FRPI, was in Uganda when the FNI took over Bunia, and the Ugandans brought him back by plane.
(xi) Museveni gave money to FNI/FRPI so that they could help defeat the UPC.¹⁵²

¹⁴⁴ Relating to Witness DRC-OTP-WWWW-0256.

¹⁴⁵ Relating to Witness DRC-OTP-WWWW-0278.

¹⁴⁶ Relating to Witness DRC-OTP-WWWW-0281.

¹⁴⁷ Relating to Witness DRC-OTP-WWWW-0282.

¹⁴⁸ Relating to Witness DRC-OTP-WWWW-0243.

¹⁴⁹ Relating to Witness DRC-OTP-WWWW-0271.

¹⁵⁰ Relating to Witness DRC-OTP-WWWW-0288.

¹⁵¹ Relating to Witness DRC-OTP-WWWW-0267.

¹⁵² Relating to Witness DRC-OTP-WWWW-0219.

21. In 2002, amongst the Ngiti combatants there were adolescents.¹⁵³
22. In 2002, amongst the Lendu combatants there were children of 14 to 16 years of age, boys and girls; they took part in fighting.¹⁵⁴
23. Amongst the Ngiti and Lendu milita, there were 11 to 19 year old children in 2002; it is said that they were not many. They had arms, AK-47. There was a forced recruitment system.¹⁵⁵
24. In September 2002, amongst the Ngiti soldiers, there were relatively young children, including 12 year old children.¹⁵⁶
25. (i) There were two kadogo in the group of Yuda; two participated in battle. Children were allowed to fight. They fought in Tchomia.
(ii) There was one kadogo in the Kute camp.
(iii) In March 2003 the FNI assisted the Ugandans when the UPC attacked Bunia.¹⁵⁷

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

Judge Adrian Fulford

Judge Elizabeth Odio Benito

Judge René Blattmann

Dated this 2 June 2009

At The Hague, The Netherlands

¹⁵³ Relating to Witness DRC-OTP-WWWW-0114.

¹⁵⁴ Relating to Witness DRC-OTP-WWWW-0122.

¹⁵⁵ Relating to Witness DRC-OTP-WWWW-0115.

¹⁵⁶ Relating to Witness DRC-OTP-WWWW-0088.

¹⁵⁷ Relating to Witness DRC-OTP-WWWW-0292.