

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 14 March 2011

**TRIAL CHAMBER I**

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

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

**Public redacted**

**Decision on the Prosecution's Request for the Non-Disclosure of Information, a  
Request to Lift a Rule 81(4) Redaction and the Application of Protective Measures  
pursuant to Regulation 42**

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

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**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*, issues the following Decision on the Prosecution’s Request for the Non-Disclosure of Information, a Request to Lift a Rule 81(4) Redaction and the Application of Protective Measures pursuant to Regulation 42.

## I. Background and Submissions

1. On 27 October 2010, the Chamber issued its Decision on the Prosecution’s Requests for Non-Disclosure of Information in Witness-Related Documents (“Decision of 27 October”).<sup>1</sup>

### *The prosecution’s request*

2. On 15 November 2010, the Prosecution filed its “Request for Non-Disclosure of Information, Request for Lifting of a Rule 81(4) Redaction and Application of Protective Measures pursuant to Regulation 42”.<sup>2</sup>
3. In its application, the prosecution indicates that as part of its ongoing disclosure obligations vis-à-vis information acquired in the course of its investigations, it has disclosed a number of documents to the defence, some of which have been disclosed with redactions implemented pursuant to Rule 81(2) or 81(4) of the Rules of Evidence and Procedure (“Rules”).<sup>3</sup> The prosecution seeks to maintain the redactions to certain information in these documents, which are appended to the application as annexes 1 to 22.<sup>4</sup>

<sup>1</sup> ICC-01/04-01/06-2597-Conf-Exp, 27 October 2010; confidential redacted decision issued on 3 December 2010, ICC-01/04-01/06-2597-Conf-Red and public redacted decision issued on the same day, ICC-01/04-01/06-2597-Red.

<sup>2</sup> ICC-01/04-01/06-2627-Conf-Exp, with 24 confidential *ex parte* annexes, 15 November 2010. Confidential redacted version filed 7 December 2010, notified on 8 December 2010, ICC-01/04-01/06-2627-Conf-Red; public redacted version filed on 23 December 2010, ICC-01/04-01/06-2627-Red2.

<sup>3</sup> ICC-01/04-01/06-2627-Red2, paragraph 1.

<sup>4</sup> ICC-01/04-01/06-2627-Red2, paragraph 2 and ICC-01/04-01/06-2627-Conf-Exp-AnxA and confidential *ex parte* annexes.

4. The proposed redactions are to (i) the locations where witnesses were interviewed and where they stayed, pursuant to Rule 81(2); (ii) leads and sources relevant to the conduct of further investigations, pursuant to Rules 81(2) and 81(4); (iii) the names and whereabouts of various witnesses and members of their families, pursuant to Rule 81(4); (iv) the whereabouts of witnesses who are in the International Criminal Court Protection Programme (“ICCPP”), pursuant to Rule 81(4); and (v) the whereabouts of, and personal contact information for, various witnesses, intermediaries DRC-OTP-WWWW-316 (“intermediary 316”) and DRC-OTP-WWWW-321 (“intermediary 321”), and members of the Operational Support Unit (“OSU”) staff, who are said to be at risk on account of activities of the Court, pursuant to Rule 81(4).<sup>5</sup> The prosecution sets out in Annex A that additional redactions have been applied to the “internal work product” contained in documents DRC-OTP-0231-0267 and DRC-OTP-0231-0323, pursuant to Rule 81(1).<sup>6</sup>
5. It is submitted that the proposed redactions do not affect the value of the relevant documents or hinder the ability of the defence to assess them. The redacted information is said to be irrelevant to the known issues in the case, and, accordingly, it is argued they are not prejudicial to, or inconsistent with, the rights of the accused.<sup>7</sup>
6. As regards the request to lift a particular Rule 81(4) redaction, the prosecution suggests that intermediary 321 revealed part of his address during the course of his testimony, and, as a result, redactions to this information are no longer justified.<sup>8</sup> As a result, leave is requested to lift the redactions to the part of the address given during his evidence.

<sup>5</sup> ICC-01/04-01/06-2627-Red2, paragraphs 7 – 26 and Conf-Exp-AnxA.

<sup>6</sup> ICC-01/04-01/06-2627-Conf-Exp-AnxA, entries 15 and 16 on page 5.

<sup>7</sup> ICC-01/04-01/06-2627-Red2, paragraph 6.

<sup>8</sup> ICC-01/04-01/06-2627-Red2, paragraph 27. In its Decision on the Prosecution’s Request for Non-Disclosure of Information in Witness-Related Documents, the Chamber granted the Prosecution’s request for non-disclosure of the address of intermediary 321 in one expense document, ICC-01/04-01/06-2597-Red, paragraphs 36 – 38.

7. Finally, the prosecution notifies the Chamber that it has disclosed the witness statement of DRC-OTP-WWWW-0183, with the same redactions authorised by Trial Chamber II pursuant to Regulation 42 of the Regulations of the Court (“Regulations”).<sup>9</sup>

*The defence observations*

8. On 17 December 2010, the defence filed its response to the prosecution’s request.<sup>10</sup>
9. The defence does not oppose the proposed redactions to the locations where witnesses were interviewed and where they stayed, the whereabouts of witnesses who are in the ICCCP, or the whereabouts of, and personal contact information for, various witnesses, intermediaries and members of the OSU staff.<sup>11</sup> No objection is raised as regards the prosecution’s request to lift a Rule 81(4) redaction or the proposed Regulation 42 redactions.<sup>12</sup>
10. However, the defence objects to the prosecution’s request for non-disclosure of certain information contained in two transcripts of an interview with DRC-OTP-WWWW-0213 (“witness 213”), along with the source of that information.<sup>13</sup> The defence contends that the information is relevant to its application for a permanent stay of the proceedings and the preparation of the defence.<sup>14</sup> The accused also opposes the request to withhold the name of the father of two prospective witnesses whom the prosecution did not meet.<sup>15</sup>

<sup>9</sup> ICC-01/04-01/06-2627-Red2, paragraph 28.

<sup>10</sup> Réponse de la Défense à la «*Prosecution’s Request for Non-Disclosure of Information, Request for Lifting of a Rule 81(4) Redaction and Application of Protective Measures pursuant to Regulation 42*», daté du 8 décembre 2010, 17 December 2010, ICC-01/04-01/06-2663-Conf.

<sup>11</sup> ICC-01/04-01/06-2663-Conf, paragraphs 3 and 14 – 15.

<sup>12</sup> ICC-01/04-01/06-2663-Conf, paragraph 16.

<sup>13</sup> ICC-01/04-01/06-2663-Conf, paragraphs 4 – 10.

<sup>14</sup> ICC-01/04-01/06-2663-Conf, paragraphs 7 – 10.

<sup>15</sup> ICC-01/04-01/06-2663-Conf, paragraphs 11 – 12.

## II. Applicable law

11. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Trial Chamber has considered the following provisions:

### **Article 54 of the Statute**

#### **Duties and powers of the Prosecutor with respect to investigations**

[...]

3. The Prosecutor may:

[...]

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

### **Article 64 of the Statute**

#### **Functions and powers of the Trial Chamber**

[...]

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.

[...]

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.

[...]

### **Article 68 of the Statute**

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

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not 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 of the Rules**

#### **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 authorising the non-disclosure of their identity prior to the commencement of the trial.

[...]

#### **Regulation 42**

1. Protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court and shall continue after proceedings have been concluded, subject to revision by a Chamber.

2. When the Prosecutor discharges disclosure obligations in subsequent proceedings, he or she shall respect the protective measures as previously ordered by a Chamber and shall inform the defence to whom the disclosure is being made of the nature of these protective measures.

3. Any application to vary a protective measure shall first be made to the Chamber which issued the order. If that Chamber is no longer seized of the proceedings in which the protective measure was ordered, application may be made to the Chamber before which a variation of the protective measure is being requested. That Chamber shall obtain all relevant information from the proceedings in which the protective measure was first ordered.

4. Before making a determination under sub-regulation 3, the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made.

12. The Appeals Chamber in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ("Katanga case") held that Rule 81(4) of the Rules "should be read to include the words 'persons at risk on account of the activities of the Court' so as to reflect the intention of the States that adopted the Rome Statute and the Rules [...], as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect that category of persons."<sup>16</sup>

13. Although Rule 81(4) refers to the Chamber's ability to authorise non-disclosure prior to the commencement of trial, the Trial Chamber has

<sup>16</sup> Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, paragraph 1.

determined that its responsibility under Article 64(6)(e) to “[p]rovide for the protection of the accused, witnesses and victims” includes providing protection for all those at risk in the context of the trial on account of the activities of the Court.<sup>17</sup>

### III. Analysis and Conclusions

14. The Chamber, consistently with its previous decisions, has applied a case-by-case approach to the present applications. It has followed the Court’s jurisprudence, including this Chamber’s Decision of 27 October 2010<sup>18</sup> and it has borne in mind any relevant developments in the trial that may affect an assessment of the rights of the accused and the need for protective measures. The Chamber has addressed the prosecution’s requests by way of the following categories.

#### **(1) The locations where witnesses were interviewed and where they stayed**

15. The prosecution seeks to redact the names and location of two hotels, in three documents, that have been used to accommodate and interview witnesses, along with the address of a house where a meeting took place between a witness, an intermediary, and members of the prosecution staff.<sup>19</sup> The redactions are requested pursuant to Rule 81(2) of the Rules, on the basis that the prosecution seeks to protect ongoing and future investigations.<sup>20</sup> In support of this application, the prosecution relies on this Chamber’s Decision

<sup>17</sup> 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, 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; public redacted version: ICC-01/04-01/06-1924-Anx2.

<sup>18</sup> ICC-01/04-01/06-2597-Red.

<sup>19</sup> ICC-01/04-01/06-2627-Red2, paragraphs 8 – 9 and Conf-Exp-AnxA, page 2 (DRC-OTP-0215-0040 in Annex 3 and DRC-OTP-0222-0363 in Annex 4) and page 5 (DRC-OTP-0231-0323 in Annex 16).

<sup>20</sup> ICC-01/04-01/06-2627-Red2, paragraph 8 and Conf-Exp-AnxA, pages 2 and 5.



of 27 October 2010, in which the prosecution was permitted to withhold the address where witnesses were interviewed and stayed.<sup>21</sup>

16. The defence does not object to the proposed redactions for the locations used to interview and accommodate witnesses.<sup>22</sup>
17. Disclosure of this information has the potential to prejudice further or ongoing investigations, given these locations are still used by the prosecution to interview witnesses in this case or for the purposes of other investigations. This material is wholly irrelevant to the issues in the current trial and non-disclosure will not cause any prejudice to the accused. No lesser protective measures are feasible. Thus, these redactions are granted pursuant to Rule 81(2).

**(2) Leads and sources relevant to the conduct of further investigations**

18. Leave is sought to redact the name of the [REDACTED] of witness 213 in two transcripts of an interview with the latter, and to the fact that the [REDACTED] provided certain information to the witness, under Rules 81(2) and 81(4) of the Rules.<sup>23</sup> The prosecution submits that withholding the information provided to the witness by his [REDACTED], [REDACTED], as well as several references to [REDACTED] (another [REDACTED] of witness 213), is necessary to protect the security of [REDACTED], pursuant to Rule 81(4) of the Rules. The prosecution argues that as the source of the information provided to witness 213, [REDACTED] is at risk of being perceived as having collaborated with the Court – particularly with the prosecution – [REDACTED].<sup>24</sup> The prosecution suggests it is unable to contact

<sup>21</sup> ICC-01/04-01/06-2627-Red2, paragraph 10.

<sup>22</sup> ICC-01/04-01/06-2663-Conf, paragraph 3.

<sup>23</sup> ICC-01/04-01/06-2627-Conf-Exp, paragraph 11 and Conf-Exp-AnxA, pages 6 – 7 (DRC-OTP-0231-0284 in Annex 21 and DRC-OTP-0231-0307 in Annex 22).

<sup>24</sup> ICC-01/04-01/06-2627-Conf-Red, paragraph 14.

this individual, and that witness 213 has not provided his [REDACTED] contact details.<sup>25</sup>

19. When interviewed by the prosecution, witness 213 indicated that [REDACTED] had ordered him not to give evidence about Thomas Lubanga. He further alleges that [REDACTED] and two men called [REDACTED] and [REDACTED] were inciting people in his former neighbourhood, [REDACTED], to turn against him as a result of his evidence, in this case, against Thomas Lubanga.<sup>26</sup>

20. Redactions to the transcripts have been applied to the part of the interview where the witness was asked by the prosecution where he obtained this information, and his reply, “[t]he person who told me is one of my [REDACTED] [...] All of my information comes from him.”<sup>27</sup> The witness was later asked whether his source of information was his [REDACTED], and he responded “[REDACTED] is my [REDACTED], but he is already against me. The [REDACTED] who told me this is the one who came here. [REDACTED], the one I was in Beni with.”<sup>28</sup> Redactions are similarly proposed to further details concerning the witness’s conversations with his [REDACTED], and the prosecution’s request for his [REDACTED] telephone number.<sup>29</sup>

21. The prosecution submits that although it has not previously requested redactions to information or leads relating to the defence abuse of process application, non-disclosure of material concerning witness 213’s [REDACTED] is necessary to ensure that further investigations into the abuse

<sup>25</sup> ICC-01/04-01/06-2627-Conf-Exp, paragraph 14 and footnote 6.

<sup>26</sup> ICC-01/04-01/06-2627-Conf-Exp-Anx21 and Conf-Exp-Anx22.

<sup>27</sup> ICC-01/04-01/06-2627-Conf-Exp-Anx21, page DRC-OTP-0231-0298, lines 509 – 512.

<sup>28</sup> ICC-01/04-01/06-2627-Conf-Exp-Anx22, page DRC-OTP-0231-0313, lines 182 – 213.

<sup>29</sup> ICC-01/04-01/06-2627-Conf-Exp-Anx22.

of process application are not prejudiced.<sup>30</sup> The prosecution argues that the proposed redactions do not affect “substantive information in relation to the [] ongoing investigation against [Mr Lubanga] in relation to the current case against him as set out in the warrant of arrest issued for him on 10 February 2006 or information that could be disclosable under Article 67(2) or Rule 77.”<sup>31</sup>

22. The defence observes that the redacted portions of the statement of witness 213 appear to concern, amongst others, the individual named [REDACTED], whom the prosecution has alleged pressured witnesses and prompted one witness to give false testimony.<sup>32</sup> The defence thus opposes all of the redactions requested by the prosecution to this information and its source, as contained in interview transcripts DRC-OTP-0231-0284 and DRC-OTP-0231-0307, on the basis that the material is relevant to the defence application for a permanent stay of the proceedings and material to the preparation of the defence.<sup>33</sup>

23. The defence argues that the Court’s obligation pursuant to Article 68 to take appropriate measures to protect victims and witnesses does not extend to a third party who is neither a victim nor a witness but a source.<sup>34</sup> In any event, it is suggested that the prosecution has not demonstrated that the security of this individual would be threatened if his identity is disclosed to the defence.<sup>35</sup>

24. During questioning by the defence, witness 213 gave extensive evidence about his [REDACTED],<sup>36</sup> including the fact that [REDACTED] accompanied

<sup>30</sup> ICC-01/04-01/06-2627-Conf-Exp, paragraphs 11 – 13.

<sup>31</sup> ICC-01/04-01/06-2627-Conf-Exp, paragraph 12 (internal quotation marks omitted).

<sup>32</sup> ICC-01/04-01/06-2663-Conf, paragraph 8.

<sup>33</sup> ICC-01/04-01/06-2663-Conf, paragraphs 6 – 10.

<sup>34</sup> ICC-01/04-01/06-2663-Conf, paragraph 4.

<sup>35</sup> ICC-01/04-01/06-2663-Conf, paragraph 5.

<sup>36</sup> Transcript of hearing on 23 February 2009, ICC-01/04-01/06-T-133-CONF-ENG CT, page 23, line 21 to page 25, line 2.

him to Kinshasa to meet with OTP investigators.<sup>37</sup> Witness 213 also testified that in 2007 [REDACTED] left Kinshasa to return to [REDACTED], in part because one of his brothers in the UPC became angry, having learnt that [REDACTED] was with witness 213 in Kinshasa.<sup>38</sup>

25. Therefore, given the identity of [REDACTED], and his contact with the prosecution, has already been disclosed to the defence, the present question is whether disclosure to the defence that [REDACTED] creates an additional risk.

26. The prosecution relies on Rule 81(2) to justify redactions to information in the interview transcripts. The Chamber has previously authorised non-disclosure of the identities of prosecution sources pursuant to Rule 81(2), when the information was irrelevant to any known issue in the case and did not come within Article 67(2) of the Statute or Rule 77 of the Rules.<sup>39</sup> However, the identity of the [REDACTED] of witness 213, who was apparently the sole source of his information concerning the threats made against him following his involvement with the ICC, is relevant to the abuse of process application, to the extent that the prosecution wishes to rely on this material to demonstrate that improper pressure has been placed on prosecution witnesses not to cooperate with the Court. Moreover, it is relevant to the defence, as it concerns the credibility of witness 213 on the issue of the threats directed at him.

27. Rule 81(2) of the Rules permits redactions to otherwise disclosable material where prejudice may be caused to ongoing investigations, but in those circumstances the prosecution is unable to rely on the information at trial,

<sup>37</sup> Transcript of hearing on 23 February 2009, ICC-01/04-01/06-T-133-CONF-ENG CT, page 49, line 9 to page 50, line 11 and page 54, lines 2 – 4.

<sup>38</sup> Transcript of hearing on 23 February 2009, ICC-01/04-01/06-T-133-CONF-ENG CT, page 54, lines 13 – 17.

<sup>39</sup> ICC-01/04-01/06-1924-Anx2, paragraphs 32 – 35.

absent adequate prior disclosure to the defence. However, for the reasons set out above, this information is relevant to the defence abuse of process application,<sup>40</sup> and the preparation of the defence case generally, and, subject to a security assessment, it should be disclosed to the accused. The VWU is instructed to review the consequences of disclosure, and to report to the Chamber at the earliest opportunity.

### (3) Witnesses and members of their families

28. The prosecution has proposed redactions to the name of non-trial witness DRC-OTP-WWWW-0037 ("witness 37")<sup>41</sup> and to the names and whereabouts of the members of the families of various trial and non-trial witnesses, pursuant to Rule 81(4).<sup>42</sup>

29. The requested redaction to the name of witness 37 is within an email from intermediary 316 to Nicolas Sebire, (DRC-OTP-WWWW-0583) in which it is mentioned that this intermediary was in contact with witness 37 in or around June 2006.<sup>43</sup> The prosecution relies on the Chamber's previous order withholding the identity of witness 37.<sup>44</sup> The prosecution also notes that the

<sup>40</sup> The defence filed its abuse of process application on 10 December 2010, *Requête de la Défense aux fins d'arrêt définitif des procédures*, ICC-01/04-01/06-2657-Conf. The prosecution and the legal representatives filed their responses on 31 January 2010, *Prosecution's Response to the Defence's « Requête de la Défense aux fins d'arrêt définitif des procédures »*, with four confidential annexes and one confidential *ex parte* annex, ICC-01/04-01/06-2678-Conf; *Observations du représentant légal des victimes a-0225-06, a-0229-06 et a-0270-07 sur la requête de la Défense aux fins d'arrêt définitif du process*, ICC-01/04-01/06-2677-Conf; *Réponse des représentants légaux des victimes a/0001/06, a/0002/06, a/0003/06, a/0007/06 a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, et a/0398/09 à la requête de la Défense en abus de procédure*, ICC-01/04-01/06-2676-Conf; *Réponse du Représentant légal des victimes a/0047/06, a/0048/06, a/0050/06 et a/0052/06 à la « Requête de la Défense aux fins d'arrêt définitif des procédures »* datée du 10 décembre 2010, ICC-01/04-01/06-2675-Conf; and *Observations des représentants légaux de la victime a-0051-06 sur la requête de la Défense aux fins d'arrêt définitif du process*, ICC-01/04-01/06-2679-Conf. The defence has until 11 February 2011 to reply. Transcript of hearing on 25 November 2010, ICC-01/04-01/06-T-337-Red-ENG WT, page 3, lines 10 – 22.

<sup>41</sup> ICC-01/04-01/06-2627-Conf-Exp-AnxA, page 4 (DRC-OTP-0231-0257 in Annex 13).

<sup>42</sup> ICC-01/04-01/06-2627-Conf-Exp, paragraphs 15 – 16 and Conf-Exp-AnxA, pages 3 – 4 (DRC-OTP-0216-0300 in Annex 8, DRC-OTP-0231-0002 in Annex 10); page 5 (DRC-OTP-0231-0267 in Annex 15).

<sup>43</sup> ICC-01/04-01/06-2627-Red2, paragraph 16 and DRC-OTP-0231-0257 in Annex 13.

<sup>44</sup> ICC-01/04-01/06-2627-Red2, paragraph 17 and Conf-Exp-AnxA, page 4 (DRC-OTP-0231-0257 in Annex 13), referring to 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, 12 June 2009, ICC-

connection between intermediary 316 and this witness is known to the defence through the chart detailing contacts between witnesses and intermediaries.<sup>45</sup>

30. The prosecution submits that the reason for the contact between intermediary 316 and witness 37 in June 2006 was [REDACTED].<sup>46</sup> It is further submitted that the prosecution has no other record of contact between these two individuals, and that it has not been in contact with witness 37 “for any discussions (substantive or otherwise)” since an interview in February 2005.<sup>47</sup> According to the prosecution, this chronology demonstrates that there can be no credible suggestion that intermediary 316 influenced the information provided to the prosecution by witness 37.<sup>48</sup> Therefore, it is argued that the identity of witness 37 is irrelevant to the abuse of process application or any other live issue in the case.<sup>49</sup>

31. The defence does not object to the proposed redaction to the identity of witness 37.<sup>50</sup>

32. In its decision authorising non-disclosure of the identity of witness 37, the Chamber noted that protective measures were appropriate despite the fact that the prosecution was unable to contact the witness, rendering a final determination of the potential risk impossible.<sup>51</sup> In light of the prosecution’s submissions concerning the timing and extremely limited nature of the contact between witness 37 and intermediary 316, it is not realistic to suggest that intermediary 316 influenced the information provided by witness 37 in

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01/04-01/06-1965-Conf-Exp, paragraphs 26 – 27, 85 and 91(i); public redacted version filed on 24 June 2009, ICC-01/04-01/06-1980-Anx2.

<sup>45</sup> ICC-01/04-01/06-2627-Red2, paragraph 16.

<sup>46</sup> ICC-01/04-01/06-2627-Conf-Red, paragraph 19.

<sup>47</sup> ICC-01/04-01/06-2627-Red2, paragraph 18.

<sup>48</sup> ICC-01/04-01/06-2627-Red2, paragraph 18.

<sup>49</sup> ICC-01/04-01/06-2627-Red2, paragraphs 17 – 18 and ICC-01/04-01/06-2627-Conf-Red, paragraph 19.

<sup>50</sup> ICC-01/04-01/06-2663, paragraph 13.

<sup>51</sup> ICC-01/04-01/06-1980-Anx2, paragraph 85.

an interview almost a year and a half earlier. Accordingly, the Chamber authorises the prosecution to maintain the redaction in document DRC-OTP-0231-0257 to the name of witness 37 pursuant to Rule 81(4), to protect the safety of the individual concerned: this information is irrelevant to the abuse of process application and the defence case generally, and no lesser measures are feasible.

33. As regards the names of family members of non-trial and trial witnesses, the proposed redactions concern (i) the wife of intermediary 316; (ii) the parents of intermediary 321; (iii) the location of a member of the family of non-trial witness DRC-OTP-WWWW-0314; and (iv) the name of the father of two potential child witnesses whom the prosecution did not meet.<sup>52</sup>
34. The prosecution relies on the Decision of 27 October 2010, in which the Chamber authorised non-disclosure of the names and whereabouts of certain family members, including, *inter alia*, the wife of intermediary 316.<sup>53</sup>
35. The defence does not oppose the proposed redactions to the names of family members of non-trial and trial witnesses, with the exception of the request for redactions to the identity of the father of the two children on the list bearing ERN number DRC-OTP-0231-0267.<sup>54</sup> It is submitted that this document is a list that was transmitted to witness DRC-OTP-WWWW-0581 (“witness 581”) by his superiors, and it contains the names of the children who were to be presented by intermediary 321.<sup>55</sup> The document was admitted into evidence during the testimony of witness 581 and it has been referred to in the defence application seeking a permanent stay of the proceedings.<sup>56</sup> The defence contends that the name of the father of the two children mentioned on this list

<sup>52</sup> ICC-01/04-01/06-2627-Red2, paragraph 20.

<sup>53</sup> ICC-01/04-01/06-2627-Conf-Exp, paragraph 20, referring to ICC-01/04-01/06-2597-Conf-Exp, paragraph 75.

<sup>54</sup> ICC-01/04-01/06-2663-Conf, paragraphs 11 and 13 – 14.

<sup>55</sup> ICC-01/04-01/06-2663-Conf, paragraph 11.

<sup>56</sup> ICC-01/04-01/06-2663-Conf, paragraph 11.

is material to the preparation of the defence pursuant to Rule 77, as it could be used to complete investigations into the list of children who should have been presented to the prosecution by intermediary 321.<sup>57</sup>

36. The Chamber has previously authorised non-disclosure of the identities of family members of witnesses pursuant to Rule 81(4), when i) the information was irrelevant to any known issue in the case, ii) less restrictive measures were not feasible, and iii) the redactions did not undermine the rights of the accused.<sup>58</sup> Redactions to the name of the wife of intermediary 316 were authorised in the Decision of 27 October 2010 on this basis, and there has been no material change in circumstances justifying a variation of this decision.<sup>59</sup>

37. As to the names of the parents of intermediary 321 set out in document DRC-OTP-0231-0002, this information is irrelevant to any of the live issues in the case, and the redactions do not render the document (a curriculum vitae) unintelligible or unusable. This material does not fall within either Article 67(2) or Rule 77 of the Rules. For these reasons, this information may be withheld in order to protect the safety of the individuals concerned, pursuant to Rule 81(4).

38. The location of a family member of non-trial witness DRC-OTP-WWWW-0314 has been redacted from document DRC-OTP-0231-0323.<sup>60</sup> As the identity of family members of DRC-OTP-WWWW-0314 is not an issue in this case, this information is irrelevant, and the redaction does not affect the intelligibility or usefulness of the document. The material is not subject to disclosure under Article 67(2) or Rule 77. The redaction to the name of the family member does

<sup>57</sup> ICC-01/04-01/06-2663-Conf, paragraph 12.

<sup>58</sup> See ICC-01/04-01/06-2597-Conf-Exp, paragraphs 72 and 73.

<sup>59</sup> ICC-01/04-01/06-2597-Conf-Exp, paragraph 75.

<sup>60</sup> ICC-01/04-01/06-2627-Conf-Exp-AnxA, page 5 (DRC-OTP-0231-0323 in Annex 16).



not adversely affect the rights of the accused, and it is granted in order to protect the safety of the individual concerned, pursuant to Rule 81(4).

39. The name of the father of two prospective child witnesses appears on a list of witnesses who it was proposed should be screened, and the document is accordingly relevant to intermediary 321 and witness DRC-OTP-WWWW-0031.<sup>61</sup> However, the prosecution submits that these two potential witnesses were not part of the group of children screened in [REDACTED] or interviewed in [REDACTED].<sup>62</sup> It is submitted that the redaction to the father's name is necessary to protect his safety, [REDACTED].<sup>63</sup>

40. The defence is in possession of the names of the two prospective child witnesses on the list, and thus it has sufficient information to allow any necessary further investigations into the potential relevance of two children who were not met by the prosecution. Therefore, the redaction to the name of the father will not cause any prejudice to the accused. No lesser measures are feasible, given the prosecution is unable to contact the person concerned, and accordingly in order to protect the safety of this individual, the prosecution is authorised to maintain the redaction to his name and telephone number, pursuant to Rule 81(4).

#### **(4) Location of witnesses in the ICCPP**

41. Redactions pursuant to Rule 81(4) of the Rules are requested for [REDACTED] with witness 213, which is also where the witness is currently located within the ICCPP.<sup>64</sup> In support, the prosecution refers to the Decision of 27 October 2010, in which redactions were granted to the whereabouts of witnesses who are in the ICCPP, on the basis that this information is

<sup>61</sup> ICC-01/04-01/06-2627-Conf-ExpAnxA, page 5 (DRC-OTP-0231-0267 in Annex 15).

<sup>62</sup> ICC-01/04-01/06-2627-Conf-Red, paragraph 21.

<sup>63</sup> ICC-01/04-01/06-2627-Conf-Red, paragraph 21 and ICC-01/04-01/06-2627-Conf-Exp, footnote 12.

<sup>64</sup> ICC-01/04-01/06-2627-Conf-Red, paragraph 22.

irrelevant to the defence (the information does not fall within Article 67(2) of the Statute or Rule 77 of the Rules), and the redactions are necessary and fair, given that disclosure will put the witnesses or others at risk.<sup>65</sup>

42. The defence does not oppose the proposed redactions to [REDACTED] with protected witnesses.<sup>66</sup>

43. The Chamber has previously granted redactions to [REDACTED] when, as here, the information is wholly irrelevant to the issues in the current trial, and non-disclosure will not cause any prejudice to the accused.<sup>67</sup> On this basis, the redaction to the current ICCPP location of witness 213 is authorised in order to protect his safety, pursuant to Rule 81(4).

**(5) The whereabouts of, and personal contact information for, various witnesses, intermediaries and Operational Support Unit staff**

44. The prosecution seeks to redact in sixteen documents, the locations of, and personal information for, witnesses, intermediaries 316 and 321, and OSU staff, pursuant to Rule 81(4) of the Rules. These include the current locations, residential addresses, phone numbers, email addresses, and passport numbers for these individuals.<sup>68</sup> In support, the prosecution relies on the Decision of 27 October 2010, in which the Chamber approved redactions to personal information that was similar in nature.<sup>69</sup>

<sup>65</sup> ICC-01/04-01/06-2627-Conf-Red, paragraph 23, referring to ICC-01/04-01/06-2597-Conf-Red, paragraphs 29 – 33.

<sup>66</sup> ICC-01/04-01/06-2663-Conf, paragraph 14.

<sup>67</sup> See Redacted Decision on the prosecution's application for non-disclosure of information filed on 17 July 2009, 10 December 2009, ICC-01/04-01/06-2186-Red, paragraph 23 and ICC-01/04-01/06-2597-Conf-Red, paragraph 28.

<sup>68</sup> ICC-01/04-01/06-2627-Red2, paragraphs 24 – 25 and Conf-Exp-AnxA, page 2 (DRC-0215-0037 in Annex 1 and DRC-OTP-0215-0038 in Annex 2); pages 3 – 4 (DRC-OTP-0216-0290 in Annex 5, DRC-OTP-0216-0291 in Annex 6, DRC-OTP-0216-0293 in Annex 7, DRC-OTP-0229-0058 in Annex 9, DRC-OTP-0231-0002 in Annex 10, DRC-OTP-0231-0061 in Annex 11, DRC-OTP-0231-0250 in Annex 12, DRC-OTP-0231-0257 in Annex 13, and DRC-OTP-0231-0261 in Annex 14); pages 5 – 6 (DRC-OTP-0231-0323 in Annex 16, DRC-OTP-1024-0098 in Annex 17, DRC-OTP-1024-0101 in Annex 18, DRC-OTP-1035-0061 in Annex 19, and DRC-OTP-0230-0173 in Annex 20).

<sup>69</sup> ICC-01/04-01/06-2627-Red2, paragraph 26, referring to ICC-01/04-01/06-2597-Red, paragraphs 34 – 38.

45. The defence does not object to the proposed redactions to the location of and personal contact information for various witnesses, intermediaries, and OSU staff.<sup>70</sup>
46. The Chamber has previously approved redactions to the whereabouts of protected witnesses, together with the personal information and contact details for a range of individuals,<sup>71</sup> when the material was irrelevant to the known issues in the case, provided this step does not render the document in question in any way unintelligible or unusable, and the redactions are necessary to ensure the continued safety of those concerned. The redactions requested as regards these sixteen documents fulfil these criteria, and they are granted pursuant to Article 68(1) and Article 64(6)(e) of the Statute and Rule 81(4) of the Rules. This step causes no unfairness to the accused, and no lesser measures are feasible.
47. In addition, redactions are sought in witness 581's contract with the ICC, as regards his annual salary.<sup>72</sup> The prosecution notes that when the Chamber previously ordered disclosure of this contract, witness 581 agreed to this step on the condition that certain private information is redacted in the version provided to the defence and the legal representatives of victims.<sup>73</sup> Given the employment status of witness 581 is not at issue, this information is irrelevant to any known issue in the case and non-disclosure does not render the document unintelligible or unusable. No prejudice to the defence is caused, and therefore the proposed redaction in document DRC-OTP-0230-0173 is granted.

<sup>70</sup> ICC-01/04-01/06-2663-Conf, paragraph 15.

<sup>71</sup> See for example ICC-01/04-01/06-2597-Red, paragraph 38, referring to ICC-01/04-01/06-1924-Conf-Anx1 and ICC-01/04-01/06-1924-Anx2 (issuing corrected and redacted versions of ICC-01/04-01/06-1814-Conf of 9 April 2009); Decision on the Prosecution's Request for Non-Disclosure of Information of 19 December 2008, and the Prosecution's Request for Non-Disclosure of Information of 4 February 2009, 10 December 2009, ICC-01/04-01/06-2208-Conf-Exp, public redacted version issued on 12 March 2010, ICC-01/04-01/06-2208-Red-Corr.

<sup>72</sup> ICC-01/04-01/06-2627-Conf-ExpAnxA, pages 5 – 6 (DRC-OTP-0230-0173 in Annex 20).

<sup>73</sup> ICC-01/04-01/06-2627-Conf-Exp-AnxA, pages 5 – 6 (DRC-OTP-0230-0173 in Annex 20).

### **(6) Request to lift a Rule 81(4) redaction**

48. On 27 October 2010, the Chamber granted the prosecution's request for non-disclosure of the address of intermediary 321.<sup>74</sup> The prosecution now seeks to lift the redaction to "[REDACTED]", on the basis that intermediary 321 revealed this part of his address in the course of his evidence before the Court on 6 July 2010, and it is submitted that in those circumstances the redaction is now unjustified.<sup>75</sup> This request is not opposed by the defence.<sup>76</sup> The Chamber agrees, in these circumstances, that the words "[REDACTED]" in document DRC-OTP-0196-0534 should no longer be withheld.

### **(7) Notification of an application to implement redactions pursuant to Regulation 42**

49. The prosecution disclosed the statement of witness 183 to the defence with the same redactions authorised by Trial Chamber II. Regulation 42(1) stipulates that protective measures, once granted, shall continue to have full force and effect in relation any other proceedings before the Court, subject to revision by the Chamber. In a previous decision the Chamber has observed that if protective measures ordered by a Trial Chamber in one case affect the proceedings in a case before a different Trial Chamber, in the context of an application for variation of protective measures pursuant to Regulation 42, each Chamber will make its own independent decision, reflecting the needs of the case before it.<sup>77</sup> The prosecution, in this instance, has not applied for a variation of the protective measures authorised by Trial Chamber II. The Chamber has nonetheless reviewed the redactions to ensure that they do not result in prejudice to the rights of the accused. As the redactions to the

<sup>74</sup> ICC-01/04-01/06-2597-Red paragraphs 36 – 38.

<sup>75</sup> ICC-01/04-01/06-2627-Red2, paragraph 27, referring to transcript of hearing on 6 July 2010, ICC-01/04-01/06-T-310-CONF-ENG-CT, page 27, lines 6 – 7.

<sup>76</sup> ICC-01/04-01/06-2663-Conf, paragraph 16.

<sup>77</sup> Decision on the application to disclose the identity of intermediary 143, 18 November 2009, ICC-01/04-01/06-2190-Conf-Exp, paragraph 30. A confidential redacted version (ICC-01/04-01/06-2190-Conf-Red) and a public redacted version (ICC-01/04-01/06-2190-Red) were issued on 10 December 2009.

statement are limited to the names of the witness's parents, which are irrelevant to any known issue in the case, the redactions to the statement of witness 183 are to be maintained under Regulation 42.

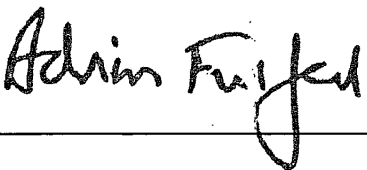
#### **IV. Orders of the Chamber**


50. The Trial Chamber hereby:

- a. Grants the redactions to [REDACTED] in documents DRC-OTP-0215-0040, DRC-OTP-0222-0363 and DRC-OTP-0231-0323.
- b. Orders the VWU to review the consequences of disclosure of the name of, and information provided by the source mentioned in interview transcripts DRC-OTP-0231-0284 and DRC-OTP-0231-0307, and to report to the Chamber as soon as possible.
- c. Grants the redactions in interview transcripts DRC-OTP-0231-0284 and DRC-OTP-0231-0307 to the interview location of witness 213.
- d. Grants the redaction in document DRC-OTP-0231-0257 to the name of witness 37.
- e. Grants the redaction in document DRC-OTP-0216-0300 to the name of the wife of intermediary 316.
- f. Grants the redactions in document DRC-OTP-0231-0002 to the names of the parents of intermediary 321.
- g. Grants the redaction to the location of a family member of non-trial witness DRC-OTP-WWWW-0314 in document DRC-OTP-0231-0323.
- h. Grants the redactions in document DRC-OTP-0231-0267 to the name and phone number of the father of two potential witnesses.

- i. Grants the redactions in the sixteen documents referred to in paragraphs 44 – 46 to the whereabouts of, and personal information for, various witnesses, intermediaries 316 and 321, and OSU field staff.
- j. Grants the redaction to the salary of witness 581 in document DRC-OTP-0230-0173.
- k. Sanctions disclosure of “[REDACTED]” in document DRC-OTP-0196-0534 to the defence.
- l. Concurs with the protective measures authorised by Trial Chamber II for the statement of witness 183.

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

  
\_\_\_\_\_  
Judge Adrian Fulford

  
\_\_\_\_\_  
Judge Elizabeth Odio Benito

  
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Judge René Blattmann

Dated this 14 March 2011

At The Hague, The Netherlands