

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original. English

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

Date: 25 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 version of "Preliminary and Final Decisions on the group of
potential court witnesses"**

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, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

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 Paola 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

Mr Simo Vaatainen

Detention Section

Victims Participation and Reparations Section

Ms Fiona McKay

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"):

I. INTRODUCTION

1. In its Decision of 24 April 2008,¹ the Chamber addressed certain disclosure issues relevant to a group of individuals who provide potentially exculpatory evidence but who, for a variety of reasons connected with their personal security, were at that stage seemingly at risk if their identities were revealed. The Chamber dealt with the issue, as follows:

96 Amongst this group of witnesses, there is a subgroup who provide potentially exculpatory evidence, which the prosecution is unable to concede, and who may be at risk if their identity and involvement with the court is revealed but who either refused offers of protection or have declined to cooperate further with the court, or both. These witnesses, along with any who cannot be traced, are considered generally in the analysis below and they are the subject of individual consideration in Annex C.

97 For this particular group of witnesses, the Chamber is confronted with a dual problem: the need to ensure that all relevant exculpatory evidence is served on the accused and the need to ensure that victims and witnesses are properly protected. The Court's twin duties are set out in Article 68(1), which imposes the obligations on the Chamber to take "appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses" whilst ensuring that such measures "shall not be

¹ Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, 24 April 2008, ICC-01/04-01/06-1295-US-Exp, public redacted version issued 8 May 2008, ICC-01/04-01/06-1311-Anx2, paragraphs 96-103

prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial "

98 The Chamber must select a solution from the range of possibilities for dealing with this problem that satisfies both obligations. If, following further discussion with individual witnesses, he or she decides to cooperate with the judicial process, the options, which largely depend on an assessment of the requirements of fairness and the need to protect those at risk of harm, include full disclosure of witness's identity and evidence to all parties, participants and the public, and giving evidence publicly in open court without Special Measures (Rule 88), through to serving redacted evidence and permitting varying levels of anonymity (including the use of a pseudonym vis-à-vis the public), together with the witness testifying behind a screen or remotely, either via video-link from the Democratic Republic of Congo or by way of pre-recorded testimony (Rules 67 and 68). Individual, fact-sensitive decisions for these witnesses will be taken once the relevant details have been assembled, and following submissions, in accordance with the procedure set out hereafter (see paragraphs 100-102)

99 Should a witness indicate a settled intention not to cooperate further with the Court, or if he cannot be traced, the Chamber must consider whether it is sufficient, in order to secure fairness, to disclose to the accused a redacted version of his or her statement and any other relevant material on an anonymous basis. It will have to decide whether, given the witness is not available to testify, the evidential value of his or her statement and the need to disclose his or her identity are significantly reduced, and as regards the latter, effectively eliminated. Consideration will be given to the extent to which, in these particular circumstances, the exculpatory elements have been sufficiently dealt with by other witnesses who apparently are available to give evidence, and whether what remains of evidential or "spring-board" value can be provided by service of statements from which the witness's identity and whereabouts have been redacted.

100 However, as a first stage, it is necessary to explore further with each relevant witness whether he or she will cooperate with the Court, whilst affording the witness a proper level of protection. To this end, the Chamber will send, *proprio motu*, a suitably qualified and independent representative of the Registry to speak in person with each of them [] Accordingly, prior to the Status Conference when these issues are to be fully discussed it is necessary for the Chamber to investigate whether cooperation is achievable, through a neutral representative of the Registrar, in the interests of the defence and to assist the Chamber in requesting all evidence that it considers necessary for the determination of the truth.

101 As set out in the preceding paragraph, once the views of the witnesses have been collected, the Chamber will further consider how to proceed with this category of witness, following submissions at a Status Conference. The Chamber will address, *inter alia*, the proper limits of its power "to request the submission of all evidence it considers necessary for the determination of the truth" pursuant to Article 69(3) and specifically the circumstances in which the Chamber should call witnesses.

102 [] in order to provide the defence with the fullest and earliest opportunity of access to potentially exculpatory material, the prosecution is ordered to serve the defence no later than 6 May 2008 with copies of the statements of these witnesses and other relevant materials from these witnesses (if any), with redactions that are necessary to protect their identities and whereabouts. If the prosecution considers that more substantial redactions are necessary, it must request a hearing so that the issue can be considered, having first provided the Chamber with the statements or materials, setting out any suggested additional redactions.

- 2 In summary, as set out above, on 24 April 2008 the Chamber instructed the Registry to contact each of the relevant witnesses, to establish whether he or she is prepared to give evidence. Pending the results of that enquiry, the Chamber ordered the Office of the Prosecutor ("prosecution") to serve

the defence with copies of the statements of each witness, along with any other relevant materials, by 9 May 2008, with redactions limited to those that are necessary to protect their identity and whereabouts.²

- 3 The Registry has undertaken a thorough investigation of these issues, and various reports were submitted to the Chamber between [REDACTED] 2008 and [REDACTED] 2009,³ which are considered (where relevant) below. It was vital to investigate the individual circumstances of these witnesses with great care, because of the difficult security situation for each of them, this has taken a considerable amount of time, because, *inter alia*, it was necessary to contact some individuals on a number of different occasions, at the request of the Chamber. Prior to a final resolution of this issue by the Chamber, it is necessary to set out the up-to-date position as regards each of these potential witnesses (save for those who have indicated they will not cooperate with the Court), and to indicate the Chamber's preliminary views in order to assist the parties and participants in formulating any final submissions that they may wish to advance on the proposed approach. For those individuals who have stated they will not cooperate, the Chamber has reached final decisions

² ICC-01/04-01/06-1295-US-Exp, public redacted version, ICC-01/04-01/06-1311-Anx2, paragraph 100

³ Rapport du Greffe sur la question de la coopération de certains témoins avec la Cour conformément à la décision de la Chambre en date du 24 avril 2008, 6 June 2008, ICC-01/04-01/06-1382-US-Exp, Rapport du Greffe sur la question de la coopération de certains témoins avec la Cour conformément à l'ordre oral de la Chambre en date du 25 novembre 2008, 19 December 2008, ICC-01/04-01/06-1568-US-Exp, Rapport du Greffe sur l'évaluation des mesures de protection nécessaires pour les témoins désignés dans la Décision du 24 Avril 2008, 6 March 2009, ICC-01/04-01/06-1766-US-Exp

II. PRELIMINARY VIEWS ON THE POTENTIAL WITNESSES

WWWW-0020

4. In its report of [REDACTED] 2008, the Registrar informed the Chamber that 0020 has agreed to cooperate with the Court⁴ Thereafter, on [REDACTED] 2008, the Registry indicated that 0020 had been interviewed, leading to a signed witness statement that revealed that he or she does not have any particular security concerns The witness expressed an interest in participating in the proceedings, as well as in receiving reparations as a victim, and this information has been transmitted to the Victims Participation and Reparations Section (“VPRS”) 0020 indicated that he or she preferred to participate via a video link.⁵ On 9 January 2009, the Chamber was informed that this individual does not need the assistance of the ICC Protection Programme (“ICCPP”) and that he or she has been in contact with the VPRS⁶ This was confirmed on 15 January 2009 during an *ex parte* status conference⁷

5 In a further report of 6 March 2009,⁸ the Registry informed the Chamber that the witness lives in [REDACTED] where it is assessed that the prevailing stability is very fragile, and it is to be noted that [REDACTED] The Victims and Witnesses Unit (“VWU”) assessed the need for protective measures. Although potentially readily identifiable, the witness has never been threatened and, moreover, does not wish to be relocated or required to leave home for an extended period of time In consequence, the Registry

⁴ ICC-01/04-01/06-1382-US-Exp. paragraph 9

⁵ ICC-01/04-01/06-1568-US-Exp, paragraph 13

⁶ Email communication from the Registry to the Trial Chamber through the Legal Advisor to the Trial Division on 9 January 2009

⁷ Transcript of hearing on 15 January 2009, ICC-01/04-01/06-T-102-CONF-EXP-ENG. page 8, line 25 to page 9, line 2

⁸ ICC-01/04-01/06-1766-US-Exp-Anx3

recommends the following measures, namely that the witness is assisted in court by:

- a) a video link,
- b) face and voice distortion,
- c) a pseudonym; and
- d) discussing certain distinguishing aspects of his or her life only in closed session.

6. Additionally, the Registry recommends that:

- a) the [REDACTED] provides support in [REDACTED];
- b) [REDACTED] if the witness is required to travel to The Hague;
- c) there is regular contact between the witness and the staff of the Registry,
- d) he or she is assisted by the VWU in preparing to testify;
- e) there is a [REDACTED] to ensure the safety of the witness upon his or her return to [REDACTED].⁹

7 During the *ex parte* status conference on 2 April 2009, the Registry confirmed that 0020 is willing to cooperate as a witness, with the in-court protective measures set out above, testifying (if called) via a video link. The witness agrees that his or her identity is disclosed to the defence.¹⁰

8 In light of the above, the preliminary view of the Chamber is that this individual shall be treated consistently with the other potentially

⁹ *Ibid*, pages 3 to 4

¹⁰ Transcript of hearing on 2 April 2009, ICC-01/04-01/06-T-163-CONF-EXP-ENG, page 3, lines 10 to 22

exculpatory witnesses whose identities can be provided to the accused. The prosecution is to disclose to the defence the relevant materials forthwith, in a suitably non-redacted form (including his or her identity and current whereabouts), pursuant to Article 67(2) of the Rome Statute ("Statute") If the Prosecutor suggests that any redactions vis-à-vis the defence should be maintained, these are to be notified to the Chamber, appropriately highlighted on a copy of the relevant document or documents, for its decision Any relevant statement taken by the Registry shall be similarly treated, although it should also be provided in identical form to the prosecution Since this individual is now available to the prosecution and the defence, the Chamber will only consider calling the witness if in due course it considers this step is necessary, pursuant to Article 64(6)(b) of the Statute If the parties or the participants have any observations on this preliminary proposal, they are to file written submissions within two weeks of the notification of the redacted version of this Decision The Chamber will hold a status conference (if necessary) shortly thereafter. The precise manner and timing of any testimony from this witness will only be addressed if the issue becomes relevant.

WWW-0005

- 9 On 7 May 2008, the prosecution requested, pending the Registry's investigation, non-disclosure of seven documents and seven photos relating to this individual, which the Chamber granted on 9 May 2008, on a temporary basis¹¹ The defence filed observations on the public version of the prosecution's request on 26 May 2008.¹² In its Report of

¹¹ Order on "Prosecution's Application for Non-disclosure of Information" 9 May 2008. ICC-01/04-01/06-1316

¹² Réponse de la Défense à la « Prosecution's Application for Non-Disclosure of Information » datée du 13 mai 2008, 26 May 2008. ICC-01/04-01/06-1357

[REDACTED] 2008, the Registry informed the Chamber that this individual has agreed to cooperate with the Court, subject to measures being implemented that will protect him or her as regards the public¹³ In a further Report of [REDACTED] 2008, the Chamber was informed that he or she had been interviewed on [REDACTED], resulting in a signed transcript of the questioning¹⁴ Therefore, this witness is willing to cooperate with the Court, and, furthermore, he or she [REDACTED]. He or she had been [REDACTED] in relation to certain previous activities within the UPC, [REDACTED], additionally, the witness has various [REDACTED].¹⁵

10 During the *ex parte* status conference held on 15 January 2009, the Registry recommended the individual should remain anonymous as regards the public¹⁶

11 In a further report of 6 March 2009, the Registry informed the Chamber that the witness lives in [REDACTED], where it is assessed that the prevailing stability is very fragile, [REDACTED]. He or she travels [REDACTED]¹⁷

12 The VWU assessed the need for protective measures for this individual and concluded that the majority of his or her security fears are “perception based” However, the witness has a [REDACTED] that requires [REDACTED] to travel often to a particular location [REDACTED]¹⁸

¹³ ICC-01/04-01/06-1382-US-Exp, paragraph 10

¹⁴ ICC-01/04-01/06-1568-US-Exp, paragraph 10

¹⁵ *Ibid*

¹⁶ ICC-01/04-01/06-T-102-CONF-EXP-ENG, page 9, lines 10 to 22

¹⁷ ICC-01/04-01/06-1766-US-Exp-Anx2, page 2

¹⁸ *Ibid*, pages 4 to 5

13. In consequence, the Registry recommends the following measures, namely that the witness is assisted in court by

- a) face and voice distortion, and
- b) a pseudonym¹⁹

14. Additionally, the Registry recommends that

- a) there is a [REDACTED] to testify;
- b) the [REDACTED] provides support in [REDACTED],
- c) [REDACTED] if the witness is required to travel to The Hague;
- d) there is regular contact between the witness and the staff of the Registry,
- e) he or she is assisted by the VWU in preparing to testify;
- f) there is a [REDACTED] to ensure the safety of the witness upon his or her return to [REDACTED].²⁰

15. During the *ex parte* status conference on 2 April 2009, the Registry confirmed that 0005 is willing to cooperate as a witness, with the protective measures set out above. The witness has agreed that his or her identity is disclosed to the defence. However, given this individual's [REDACTED], the Registry has raised the option of testimony being given via a video link, notwithstanding the witness's express preference [REDACTED].²¹

¹⁹ *Ibid.*, page 5

²⁰ *Ibid.*

²¹ ICC-01/04-01/06-T-163-CONF-EXP-ENG, page 2, lines 17 to 25 and page 3, lines 1 to 22

16 In light of the above, the preliminary view of the Chamber is that this individual shall be treated consistently with the other potentially exculpatory witnesses whose identities can be provided to the accused. The prosecution is to disclose to the defence the relevant materials forthwith, in a suitably non-redacted form (including his or her identity and current whereabouts), pursuant to Article 67(2) of the Statute. If the Prosecutor suggests that any redactions vis-à-vis the defence should be maintained, these are to be notified to the Chamber, appropriately highlighted on a copy of the relevant document or documents, for its decision. Any relevant statement taken by the Registry shall be similarly treated, although it should also be provided in identical form to the prosecution. Since this individual is now available to the prosecution and the defence, the Chamber will only consider calling the witness if in due course it considers this step is necessary, pursuant to Article 64(6)(b) of the Statute. If the parties or the participants have any observations on this preliminary proposal, they are to file written submissions within two weeks of the notification of the redacted version of this Decision. The Chamber will hold a status conference (if necessary) shortly thereafter. The precise manner and timing of any testimony from this witness will only be addressed if the issue becomes relevant.

WWW-0034

17. On 7 May 2008 the prosecution requested, pending the Registry's investigation, non-disclosure of the recording of this individual's interview (although it agreed that redacted versions should be provided to the defence), which the Chamber granted on a temporary basis on 9 May

2008²² The defence filed observations on the public version of the prosecution's request on 26 May 2008.²³

18 In its Report of [REDACTED] 2008, the Registry informed the Chamber that 0034 agrees to cooperate as regards these proceedings, subject to his or her [REDACTED] and [REDACTED].²⁴

19 In the Registry's Report of [REDACTED] 2008, the Chamber was informed that there had been a telephone interview during [REDACTED] with this witness (under Article 55).²⁵ As a result, a signed transcript of the questioning has been prepared, signed by the representatives of the Registry, rather than 0034. The witness continued to maintain his or her willingness to cooperate with the Court but expressed fears of retaliation from within the [REDACTED]. The witness expressed a preference for [REDACTED].²⁶

20. The Trial Chamber was informed on 9 January 2009 that 0034 continued to intimate his or her fear of certain people within the [REDACTED], and has requested [REDACTED].²⁷ During the *ex parte* status conference on 15 January 2009, it was repeated that this witness does not wish [REDACTED], instead, an agreement has been reached [REDACTED].²⁸

²² ICC-01/04-01/06-1316

²³ ICC-01/04-01/06-1357

²⁴ ICC-01/04-01/06-1382-US-Exp, paragraph 9

²⁵ ICC-01/04-01/06-1568-US-Exp, paragraph 3

²⁶ ICC-01/04-01/06-1568-US-Exp-Anx2

²⁷ Email communication from the Registry to the Trial Chamber through the Legal Advisor to the Trial Division on 9 January 2009

²⁸ ICC-01/04-01/06-1-102-CONF-EXP-ENG, page 7, lines 20 to 25 and page 8, lines 1 to 24

21 In its report of 6 March 2009, the Registry informed the Chamber that there is [REDACTED], and the [REDACTED] ²⁹

22 The VWU assessed the protective needs of this witness, bearing in mind his or her past role and present occupation, and the fears of 0034. In all the circumstances the Registry recommends the following measures, namely that the witness is assisted in court by.

- a) face and voice distortion,
- b) a pseudonym, and
- c) confidentiality is maintained as regards his or her current role and location (closed session) ³⁰

23 Additionally, the Registry recommends that:

- a) [REDACTED] is made available for the witness's immediate family;
- b) [REDACTED] if the witness is required to travel to The Hague,
- c) there is regular contact between the witness and the staff of the Registry,
- d) he or she is assisted by the VWU in preparing to testify,
- e) there is a [REDACTED] to ensure the safety of the witness upon his or her return to [REDACTED] ³¹

24 During a status conference on 2 April 2009, the Registry again confirmed that 0034 is willing to cooperate as a witness, with the protective measures

²⁹ ICC-01/04-01/06-1766-US-Exp-Anx5, page 3

³⁰ *Ibid*, page 4

³¹ *Ibid*

set out above, although it was suggested it might be [REDACTED]. The witness has agreed that his or her identity is disclosed to the defence ³²

25 In light of the above, the preliminary view of the Chamber is that this individual shall be treated consistently with the other potentially exculpatory witnesses whose identities can be provided to the accused. The prosecution is to disclose to the defence the relevant materials forthwith, in a suitably non-redacted form (including his or her identity and current whereabouts), pursuant to Article 67(2) of the Statute. If the Prosecutor suggests that any redactions vis-à-vis the defence should be maintained, these are to be notified to the Chamber, appropriately highlighted on a copy of the relevant document or documents, for its decision. Any relevant statement taken by the Registry shall be similarly treated, although it should also be provided in identical form to the prosecution. Since this individual is now available to the prosecution and the defence, the Chamber will only consider calling the witness if in due course it considers this step is necessary, pursuant to Article 64(6)(b) of the Statute. If the parties or the participants have any observations on this preliminary proposal, they are to file written submissions within two weeks of the notification of the redacted version of this Decision. The Chamber will hold a status conference (if necessary) shortly thereafter. The precise manner and timing of any testimony from this witness will only be addressed if the issue becomes relevant.

WWWW-0003

26 On 7 May 2008 the prosecution requested, pending the Registry's investigation, non-disclosure of the recordings of this individual's

³² ICC-01/04-01/06-T-163-CONF-EXP-ENG, page 4, lines 15 to 25 and page 5, lines 1 to 3

interview (although it agreed that redacted versions should be provided to the defence), which the Chamber granted on a temporary basis on 9 May 2008.³³ The defence filed observations on the public version of the prosecution's request on 26 May 2008.³⁴

27 Although the Registry informed the Chamber in its Report of [REDACTED] 2008 that it was unable to contact the witness, it interviewed 0003 in [REDACTED], when a signed transcript of the questioning was prepared. The witness indicated he or she was uncertain about cooperating with the Court (*viz* doubts as to its "credibility" were expressed), and if called as a witness, protective measures encompassing family members are sought.³⁵

28 On 9 January 2009, the Chamber was informed that there was to be referral to the VWU,³⁶ and during the *ex parte* status conference on 15 January 2008, the Registry indicated that that the Unit was in the process of assessing the risks to 0003. The Chamber instructed the Registry to expedite this process.³⁷

29 In its report of [REDACTED] 2009, the Registry informed the Chamber that the individual currently resides [REDACTED] and provided details of his or her work. The Registry indicated that [REDACTED] and is therefore available to the witness.³⁸

³³ ICC-01/04-01/06-1316

³⁴ ICC-01/04-01/06-1357

³⁵ ICC-01/04-01/06-1568-US-Exp-Anx6, pages 3 to 6

³⁶ Email communication from the Registry to the Trial Chamber through the Legal Advisor to the Trial Division on 9 January 2009

³⁷ ICC-01/04-01/06-T-102-CONF-EXP-ENG, page 6, lines 2 to 25 and page 7, lines 1 to 18

³⁸ ICC-01/04-01/06-1766-US-Exp-Anx1, page 4

30 The VWU assessed the protective needs of this witness and recommends the following measures, namely that the witness is assisted in court by.

- a) face and voice distortion, and
- b) a pseudonym ³⁹

31 Additionally, the Registry recommends that.

- a) [REDACTED] is made available for the witness and his or her immediate family;
- b) [REDACTED] if the witness is required to travel to The Hague,
- c) there is regular contact between the witness and the staff of the Registry,
- d) he or she is assisted by the VWU in preparing to testify,
- e) there is a [REDACTED] to ensure the safety of the witness upon his or her return to [REDACTED] ⁴¹

32. During status conference of 2 April 2009, the Registry indicated that the witness is willing to cooperate as a witness, subject to the protective measures set out above. The witness has agreed that his or her identity is disclosed to the defence (but not to the public) ⁴¹

33. In light of the above, the preliminary view of the Chamber is that this individual shall be treated consistently with the other potentially exculpatory witnesses whose identities can be provided to the accused. The prosecution is to disclose to the defence the relevant materials

³⁹ *Ibid*

⁴⁰ *Ibid*

⁴¹ ICC-01/04-01/06-T-163-CONF-EXP-ENG, page 2, lines 1 to 16

forthwith, in a suitably non-redacted form (including his or her identity and current whereabouts), pursuant to Article 67(2) of the Statute. If the Prosecutor suggests that any redactions vis-à-vis the defence should be maintained, these are to be notified to the Chamber, appropriately highlighted on a copy of the relevant document or documents, for its decision. Any relevant statement taken by the Registry shall be similarly treated, although it should also be provided in identical form to the prosecution. Since this individual is now available to the prosecution and the defence, the Chamber will only consider calling the witness if in due course it considers this step is necessary, pursuant to Article 64(6)(b) of the Statute. If the parties or the participants have any observations on this preliminary proposal, they are to file written submissions within two weeks of the notification of the redacted version of this Decision. The Chamber will hold a status conference (if necessary) shortly thereafter. The precise manner and timing of any testimony from this witness will only be addressed if the issue becomes relevant.

WWW-0021

34 On 23 April 2008 the prosecution sought leave to lift redactions to one document relevant to this witness,⁴² and the defence filed its response on 13 May 2008.⁴³ The Chamber requested further information on 20 May 2008 explaining this apparent late request,⁴⁴ which the prosecution filed on

⁴² Prosecution's application for protective measures for documents relevant to trial witness DRC-OTP-WWW-0012, 23 April 2009, ICC-01/04-01/06-1825

⁴³ Réponse de la Défense à la « Prosecution's communication of original versions of 37 items disclosed to the Defence on 15 April 2008 and application for authorisation to add 19 further items of disclosed evidence to the evidence to be relied on at trial », 13 May 2008, ICC-01/04-01/06-1321

⁴⁴ Order authorising the lifting of redactions to, and seeking submissions on, one document, 20 May 2008, ICC-01/04-01/06-1340

26 May 2008, it indicated there had been an “oversight”.⁴⁵ On 4 June 2008, the Chamber authorized the re-service of this document, without redactions, as incriminatory evidence.⁴⁶

35 In May 2008 the Registry tried to arrange a meeting, but after several attempts this proved impossible.⁴⁷ However, the Registry managed to ask some questions over the phone (the transcript of this conversation is included in the report of the Registrar of [REDACTED] 2008⁴⁸) and on that occasion the witness indicated that [REDACTED]. In its Report of [REDACTED] 2008, the Registry indicated that the witness is willing to cooperate with the Court, subject to protective measures.⁴⁹ The witness was again contacted on [REDACTED], when he or she made apparently confusing statements, including that he or she “would have filed a request to the [REDACTED]”⁵⁰ On 27 November 2008, the prosecution informed the Registry that an investigator had mistakenly contacted the witness.⁵¹

36 In its Report of [REDACTED] 2008, the Registry informed the Chamber that it had been unable to contact 0021 during [REDACTED].⁵² Following unsuccessful attempts to contact the witness by phone, the [REDACTED], who stated he or she was out of town and could not be reached.⁵³

⁴⁵ Prosecution’s Response to the Trial Chamber’s Order dated 20 May 2008, 26 May 2008, ICC-01/04-01/06-1355

⁴⁶ Decision regarding the admissibility of a document disclosed by the prosecution, 4 June 2008, ICC-01/04-01/06-1378

⁴⁷ Internal memorandum communicated from the Division of Court Services to the Trial Division, 19 January 2009, Ref DCS/14/MD/ab, pages 1 to 2

⁴⁸ ICC-01/04-01/06-1382-US-Exp-Anx3

⁴⁹ ICC-01/04-01/06-1382, paragraph 9

⁵⁰ Internal memorandum communicated from the Division of Court Services to the Trial Chamber, 19 January 2009, Ref DCS/14/MD/ab, page 2

⁵¹ *Ibid*

⁵² ICC-01/04-01/06-1568-US-Exp, paragraph 6

⁵³ Internal memorandum communicated from the Division of Court Services to the Trial Chamber, 19 January 2009, Ref DCS/14/MD/ab, page 2

37. The Registry noted that on 17 December 2008, it was informed by the prosecution that the witness had been [REDACTED]⁵⁴ [REDACTED] of the witness was later verified by the Registry⁵⁵
- 38 The Registry unsuccessfully tried to contact the witness in January 2009⁵⁶ The Chamber was informed of the [REDACTED] of the witness during an *ex parte* status conference on 15 January 2009.⁵⁷ In its report to the Chamber of 19 January 2009, the Registry set out reasons why attempts to contact this witness should not be pursued.⁵⁸ It is to be noted that the representatives of the Registry never met with 0021
- 39 In its report of [REDACTED] 2009, the Registry informed the Chamber that 0021 lives in [REDACTED], where the stability is uncertain and security is still very fragile, [REDACTED] The witness also travels [REDACTED]⁵⁹
40. The VWU assessed the need for protective measures 0021 formerly held [REDACTED] 0021 has expressed a preference for being called as a “defence witness” The witness has indicated there have never been threats and, in June 2008, that he or she is prepared to testify [REDACTED].⁶⁰ Additionally, the witness indicated he or she wished to give testimony for the accused⁶¹

⁵⁴ ICC-01/04-01/06-1568-US-Exp, paragraph 6

⁵⁵ Internal memorandum communicated from the Division of Court Services to the Trial Chamber, 19 January 2009, Ref DCS/14/MD/ab, page 2

⁵⁶ *Ibid*

⁵⁷ ICC-01/04-01/06-T-102-CONF-EXP-ENG, page 2, lines 18 to 25 and page 3, lines 1 to 18

⁵⁸ Internal memorandum communicated from the Division of Court Services to the Trial Chamber, 19 January 2009, Ref DCS/14/MD/ab, page 2

⁵⁹ ICC-01/04-01/06-1766-US-Exp-Anx4, pages 2-4

⁶⁰ *Ibid*, pages 1 and 4

⁶¹ *Ibid*, page 4

41 The VWU recommends the following measures, namely that the witness is assisted in court by.

- a) face and voice distortion,
- b) a pseudonym; and

42 Additionally, the Registry recommends that.

- a) [REDACTED] is made available for the witness,
- b) [REDACTED] if the witness is required to travel to The Hague;
- c) there is regular contact between the witness and the staff of the Registry,
- d) he or she is assisted by the VWU in preparing to testify,
- e) there is a [REDACTED] to ensure the safety of the witness upon his or her return to [REDACTED] ⁶²

43 During a status conference on 2 April 2009, the Registry confirmed 0021's wish to testify as a defence witness, although it undertook to establish if this is still the position ⁶³ However, on [REDACTED], the witness, when contacted, stressed the fact that [REDACTED] unable to give evidence for either party. The Registry explained the option of giving evidence for the Court, the available protective measures and the necessity of effecting disclosure to the defence if a witness is called. The witness requested more time to reflect on, and to discuss, this suggestion ⁶⁴ The Registry contacted 0021 again on [REDACTED] On 29 April 2009, the Registry indicated that

⁶² *Ibid*, pages 4 to 5

⁶³ ICC-01/04-01/06-T-163-CONF-EXP-ENG, page 4, lines 6-7

⁶⁴ Email communication from the Registry to the Trial Chamber through the Legal Advisor to the Trial Division on 3 April 2009

it had recently called Witness 0021, who said that he or she was in an area where the "network" does not work well. The witness stated that he or she would be back [REDACTED]. Furthermore, the witness indicated that he or she had spoken to someone who explained that he or she could not testify as a [REDACTED] witness in [REDACTED] but it might be very different at the ICC. The Registry explained that his or her status would be very "specific" as a Chamber witness and that he or she would need to speak the truth, whether the evidence was incriminatory or exculpatory. The witness requested to re-read his or her statements and to meet someone from the Court upon his or her return. The witness requested Registry to telephone again on [REDACTED]. However, 0021 stated that he or she would be willing to come to The Hague if it was considered necessary but for security reasons (for the witness or his or her family), the individual did not want his or her identity disclosed to the defence because his or her name would be given to the accused.⁶⁵ The Registry again contacted 0021 on [REDACTED]. 0021 stated that he or she is able to testify if the judges deem it useful or indispensable in order for the truth to emerge. The witness has requested that his or her identity is not disclosed, even though his or her testimony includes both incriminating and exonerating information. The witness is currently [REDACTED], and his or her security and the security of his or her family may be endangered if his or her identity is revealed. Following the request of the witness to re-read his or her statements, it was explained to the individual that he or she will be informed when the judges have made a decision on whether his or her presence is required and will be contacted by the Registry regarding the modalities of testimony and re-reading of statements in due course.⁶⁶

⁶⁵ Email from the Registry to the Trial Chamber through the Legal Advisor to the Trial Division on 29 April 2009

⁶⁶ Email from the Registry to the Trial Chamber through the Legal Advisor to the Trial Division on 12 May 2009

44. In its filing of 22 February 2008⁶⁷ the prosecution confirmed that a summary of all potentially exonerating or material information provided by witness 0021 had been disclosed to the defence⁶⁸ The prosecution provided the Chamber with a summary of the exonerating evidence, together with excerpts in an additional annex⁶⁹

45. In its decision on 24 April 2008,⁷⁰ the Trial Chamber rehearsed the potentially exculpatory information provided by witness 0021⁷¹ and ordered the prosecution to "serve on the defence no later than 6 May 2008 with copies of the statements of (this witness) and other relevant materials (if any), only with such redactions that are necessary to protect his or her identity and whereabouts"⁷² No alternative evidence had been identified at that stage for witness 0021, and the Chamber concluded that:

If this witness cannot be found, or if [he or she] will not cooperate, the evidential value of the material set out above may in consequence be considered very low because the witness would be unavailable to give evidence. The Chamber will consider the extent to which, in these particular circumstances, the exculpatory elements have been sufficiently dealt with by other witnesses who apparently are available to give evidence, and whether the remaining evidential or "spring-board" value can be provided by service of statements from which the witness's identity and whereabouts have been redacted⁷³

46. Individuals cannot be compelled to cooperate with the Court, and the identity and the testimony of this witness will only have evidential value of significance if he or she agrees to give evidence under oath, having lifted anonymity as regards the defence, so that the testimony can be

⁶⁷ Prosecution's Submission of Information on Certain Individuals pursuant to the *ex parte* Order of the Trial Chamber of 13 February 2008, 22 February 2008, ICC-01/04-01/06-1187-Conf-Exp

⁶⁸ *Ibid*, paragraph 6

⁶⁹ Prosecution's Submission of Information on Certain Individuals pursuant to the *ex parte* Order of the Trial Chamber of 13 February 2008, 22 February 2008, ICC-01/04-01/06-1187-Conf-Exp-Anx

⁷⁰ ICC-01/04-01/06-1295-US-Exp-AnxC

⁷¹ *Ibid*, paragraph 33

⁷² *Ibid*, paragraph 41

⁷³ *Ibid*, paragraph 42

realistically investigated by questioning. If the witness is to remain anonymous because of well-founded security concerns, the redacted materials (which exclude identifying details) already served on the defence constitutes the extent of the disclosure that is achievable.

47 The Chamber has carefully borne in mind its duty to protect witnesses who testify before the Court, and to ensure that the rights of the accused are not prejudiced and the proceedings are fair. In light of the specific security concerns of witness 0021, [REDACTED] unwillingness to provide [REDACTED] identity to the defence, and the unavailability of any protective measures that will effectively reduce these risks, the preliminary view of the Chamber is that the identity of this individual should not be disclosed to the defence. On the basis of the witness's account of the history of contacts [REDACTED], it is possible that he or she has [REDACTED], however, the evidence on this issue is not certain. Notwithstanding the conclusion in paragraph 46 above, the Chamber will consider calling the witness if in due course it determines this step is necessary, pursuant to Article 64(6)(b) of the Statute, once the issues in the case have emerged. If the parties or the participants have any observations on this preliminary proposal, they are to file written submissions within two weeks of the notification of the redacted version of this Decision. The Chamber will hold a status conference (if necessary) shortly thereafter. The precise manner and timing of any testimony from this witness will only be addressed if the issue becomes relevant.

WWW-0290

48 The witness can be categorized as a [REDACTED]. In [REDACTED], he or she left the UPC/FPLC and [REDACTED] from the UPC/FPLC. He or she

provides information on the [REDACTED] used by the UPC/FPLC. In addition, the witness gives information regarding the UPC/FPLC's alleged use of child soldiers, the structure of the movement, the procedure for ordering and reporting and the role of the accused. The witness is now [REDACTED].⁷⁴

49 It is to be noted that the prosecution interviewed this witness in [REDACTED], in accordance with the provisions of Article 55(2) and Rules 111 and 112 (a) and (b) of the Rules of Procedure and Evidence. The prosecution originally made contact with this witness through a third person, and in [REDACTED] the witness indicated he or she was [REDACTED] years old, and was living in [REDACTED]. He or she was married, with [REDACTED] children.⁷⁵

50. The prosecution has indicated that the witness repeatedly refused to agree to travel to the location identified by the VWU in order to undergo the assessment for protective measures. The prosecution submitted the referral to the VWU on [REDACTED], however, due to the witness's reluctance to engage in the process, the referral was withdrawn, when the witness failed to respond to the prosecution's attempts to contact him or her.⁷⁶

51 In its filing of 22 February 2008⁷⁷ the prosecution confirmed that a summary of all potentially exonerating or Rule 77 material from witness

⁷⁴ *Ibid.*, paragraph 33

⁷⁵ *Ibid.*, paragraph 32

⁷⁶ *Ibid.*, paragraph 34

⁷⁷ ICC-01/04-01/06-1187-Conf-Exp

0021 had been disclosed to the defence.⁷⁸ The prosecution provided the Chamber with a summary, together with excerpts, set out in an annex.⁷⁹

52. In its decision on 24 April 2008,⁸⁰ the Trial Chamber addressed this potentially exculpatory material⁸¹ and ordered the prosecution to “serve on the defence no later than 6 May 2008 with copies of the statements of (this witness) and other relevant materials (if any), only with such redactions that are necessary to protect his or her identity and whereabouts”⁸² No alternative evidence had been identified at that stage for witness 0290, and the Chamber concluded that.

If this witness cannot be found, or if [he or she] will not cooperate, the evidential value of the material set out above may in consequence be considered very low because the witness would be unavailable to give evidence. The Chamber will consider the extent to which, in these particular circumstances, the exculpatory elements have been sufficiently dealt with by other witnesses who apparently are available to give evidence, and whether the remaining evidential or “spring-board” value can be provided by service of statements from which the witness’s identity and whereabouts have been redacted.⁸³

53 On 10 and 15 April 2008 the prosecution filed alternative or supplementary evidence that has already been disclosed to the defence as regards the potentially exculpatory information contained in this witness’s statement⁸⁴

⁷⁸ *Ibid.*, paragraph 6

⁷⁹ ICC-01/04-01/06-1187-Conf-Exp-Anx

⁸⁰ ICC-01/04-01/06-1295-US-Exp-AnxC

⁸¹ *Ibid.*, paragraph 33

⁸² *Ibid.*, paragraph 41

⁸³ *Ibid.*, paragraph 42

⁸⁴ Prosecution’s Submission of Alternative Potentially Exonerating Evidence further to the Trial Chamber’s *Ex Parte* Order of 9 April 2008, 10 April 2008, ICC-01/04-01/06-1272-Conf-Exp, Prosecution’s additional information on the Undisclosed Evidence, 15 April 2008, ICC-01/04-01/06-1281

- 54 The Registry informed the Chamber in its Report of [REDACTED] 2008 that it had been unable to locate the witness ⁸⁵
- 55 On [REDACTED], 0290 contacted a representative from the Registry and said he or she was scared for his or her life. The Registry made contact at the end of [REDACTED] in order to propose and arrange an interview in [REDACTED] but the witness ultimately declined this offer. Attempts thereafter to make contact were unsuccessful, and the Registry recommended that they should not be repeated.⁸⁶
- 56 In its Report of [REDACTED] 2008 the Chamber was told that the witness had agreed by phone to meet with representatives of the Registry in [REDACTED].⁸⁷ However, during [REDACTED] 2008, when Registry officials were in [REDACTED], they were unable to talk to 0290, even by phone, and thus were unable to locate him or her ⁸⁸
57. During a status conference on 15 January 2009, the Registry informed the Chamber that the witness had failed to meet representatives of the Registrar during its last mission.⁸⁹ On 19 January 2009, the Registry explained that on 5 January 2008, the witness had failed to come to the meeting point for a protection assessment by the VWU ⁹⁰ Thereafter, on 9 January 2009, the Chamber was informed that this witness is apparently not willing to cooperate with the Court, given that he or she failed to attend at the designated meeting point during the Registry's last mission

⁸⁵ ICC-01/04-01/06-1382-US-Exp, paragraph 3

⁸⁶ Internal memorandum communicated from the Division of Court Services to the Trial Division, 19 January 2009, Ref DCS/14/MD/ab, pages 2 to 3

⁸⁷ ICC-01/04-01/06-1568-US-Exp, paragraph 5

⁸⁸ *Ibid*

⁸⁹ ICC-01/04-01/06-T-102-CONF-EXP-ENG, page 3

⁹⁰ Internal memorandum communicated from the Division of Court Services to the Trial Division, 19 January 2009, Ref DCS/14/MD/ab, pages 2 to 3 The January 2008 meeting followed the referral of the witness to the VWU by the prosecution

to [REDACTED]⁹¹ However, during an *ex parte* status conference on 15 January 2008 the Chamber instructed the Registry to provide additional details of contact with 0290.⁹²

58. In its report of 6 March 2009, the Registry informed the Chamber of the witness's current whereabouts and occupation. However, they have been unable to make an assessment or advance recommendations, based on up-to-date information, as regards protective measures for this witness.⁹³

59. The Registry informed the Chamber on [REDACTED] that it had spoken to 0290 (on the same day), who indicated he or she was then living in [REDACTED] (where he or she had been for at least 3 months), the witness then indicated a wish to cooperate with the judges, but without disclosure of his or her identity to the defence. The Registry indicated that further contact would be made on [REDACTED] to answer some of the witness's questions.⁹⁴ Contact was made by the Registry on [REDACTED] as scheduled, but this only concerned practical arrangements.⁹⁵ The issue of disclosure was not discussed further and there has been no indication that the approach of the witness has changed in this respect.

60. It follows that following a varied history, this witness currently will cooperate with the Court, but only if his or her anonymity is preserved vis-à-vis the defence and the public. Most importantly, he or she provides information to the effect that children under the age of 15 years may have

⁹¹ Email communication from the Registry to the Trial Chamber through the Legal Advisor to the Trial Division on 9 January 2009.

⁹² ICC-01/04-01/06-T-102-CONF-EXP-ENG, page 3, lines 19 to 25 and page 4, lines 1 to 7.

⁹³ ICC-01/04-01/06-1766-US-Exp-Anx6, pages 2 to 3.

⁹⁴ Email communication from the Registry to the Trial Chamber through the Legal Advisor to the Trial Division on 2 April 2009.

⁹⁵ Information provided by the Registry to the Trial Chamber through the Legal Advisor to the Trial Division on 4 May 2009.

been trained in the UPC/FPLC in order to protect their families and their territory (potentially raising issues of self-defence or necessity) The prosecution's submission is that the evidence of the witness in this regard is speculative, and is of low value as exonerating information⁹⁶

61. Individuals cannot be compelled to cooperate with the Court, and the identity and the testimony of this witness will only have evidential value of significance if he or she agrees to give evidence under oath, having lifted anonymity as regards the defence, so that the testimony can be realistically investigated by questioning. If the witness is to remain anonymous because of well-founded security concerns, the redacted materials (which exclude identifying details) already served on the defence constitutes the extent of the disclosure that is achievable

62 The Chamber has carefully borne in mind its duty to protect witnesses who testify before the Court and to ensure that the rights of the accused are not prejudiced and that the proceedings are fair. In light of the specific security concerns of witness 0290, and unwillingness to provide his or her identity to the defence, and the unavailability of any protective measures that will effectively reduce the risks, the preliminary view of the Chamber is that the identity of this individual should not be disclosed to the defence. In the view of the Chamber, the main issue arising out of the evidence of this witness which is of potential assistance to the defence (*viz* information that children under the age of 15 years may have been trained in the UPC/FPLC in order to protect their families and their territory) has been covered in significant detail in other material already disclosed to the defence. Notwithstanding the conclusion in paragraph 61 above, the Chamber will consider calling the witness if in due course it considers this

⁹⁶ ICC-01/04-01/06-1187-Conf-Exp. paragraph 31

step is necessary, pursuant to Article 64(6)(b) of the Statute, once the issues in the case have emerged

63 If the parties or the participants have any observations on this preliminary proposal, they are to file written submissions within two weeks of the notification of the redacted version of this Decision. The Chamber will hold a status conference (if necessary) shortly thereafter. The precise manner and timing of any testimony from this witness will only be addressed if the issue becomes relevant

III. FINAL VIEWS ON THE POTENTIAL WITNESSES

WWW-0040

64 On 7 May 2008, the prosecution requested redactions to protect one or more [REDACTED] staff members mentioned in the statement of this witness.⁹⁷ The Chamber granted the request on a temporary basis on 9 May 2008,⁹⁸ and the defence filed observations to the public version of the prosecution's request on 26 May 2008.⁹⁹

65 The Registry informed the Chamber in its [REDACTED] 2008 Report that the individual refuses to cooperate with the Court,¹⁰⁰ and this stance was confirmed by the Registry during the *ex parte* status conference on 15 January 2009.¹⁰¹

⁹⁷ Prosecution's Application for Non-disclosure of Information, 7 May 2008, ICC-01/04-01/06-1309-Conf-Exp

⁹⁸ ICC-01/04-01/06-1316

⁹⁹ ICC-01/04-01/06-1357

¹⁰⁰ ICC-01/04-01/06-1382-US-Exp, paragraph 9

¹⁰¹ ICC-01/04-01/06-T-102-CONF-EXP-ENG, page 4, lines 8 to 20

66. As set out above, in its Decision of 24 April 2008,¹⁰² the Chamber indicated as follows:

99 Should a witness indicate a settled intention not to cooperate further with the Court, or if [he or she] cannot be traced, the Chamber must consider whether it is sufficient, in order to secure fairness, to disclose to the accused a redacted version of his or her statement and any other relevant material on an anonymous basis. It will have to decide whether, given the witness is not available to testify, the evidential value of his or her statement and the need to disclose his or her identity are significantly reduced, and as regards the latter, effectively eliminated. Consideration will be given to the extent to which, in these particular circumstances, the exculpatory elements have been sufficiently dealt with by other witnesses who apparently are available to give evidence, and whether what remains of evidential or "spring-board" value can be provided by service of statements from which the witness's identity and whereabouts have been redacted.

67 The potentially exculpatory information, which the prosecution does not concede, relates to the ethnic composition of the UPC, the UPC's pacification efforts; the authority or control that Thomas Lubanga Dyilo held in the UPC/FPLC and the influence others exercised over him, the role of foreign powers, the alleged alcohol and substance abuse by, or mental illness of, the accused, and parents who voluntarily sent their children to join the UPC/FPLC.¹⁰³ He or she provides information on the historical background of the Hema/Lendu conflict, the takeover of Bunia by the UPC/FPLC in August 2002 and May 2003, the UPC/FPLC links to Uganda and Rwanda, that organisation's internal functioning and the role of the accused in its political and military wings. The witness further provides information on the UPC/FPLC's alleged use of child soldiers and

¹⁰² ICC-01/04-01/06-1295-US-Exp, public redacted version, ICC-01/04-01/06-1311-Anx2

¹⁰³ ICC-01/04-01/06-1187-Conf-Exp, paragraph 16

the attacks it reportedly carried out in Mongbwalu (late November 2002) and the Lendu villages of Lipri, Kobu, Bambu, Zumbe (February 2003) and Songolo (August 2002) ¹⁰⁴

68 The prosecution interviewed this witness in November 2005 and January/February 2006 during the course of the investigation into the DRC situation, having come into contact with this witness through an intermediary. The prosecution's information regarding the witness does not extend beyond December 2007 ¹⁰⁵

69. Individuals cannot be compelled to cooperate with the Court, and the identity and whereabouts of this witness are only of significant evidential value if he or she agrees to give evidence under oath, *inter alia*, so that the truth of the testimony can be investigated by questioning. Otherwise, nothing of significance turns on the name and present circumstances of the witness, and the redacted materials (excluding these details) have been served on the defence. Given the clear indication is that he or she will not cooperate in these proceedings, it is fair that this redacted material comprises the entirety of the relevant disclosure to the defence for this witness. Furthermore, the defence has received a very substantial body of evidence that covers the exculpatory value of this evidence. In the context of the proceedings relating to the disclosure of documents obtained by way of Article 54(3)(e) agreements, the prosecution provided the defence with numerous documents, including witness statements, official documents and reports from different sources relating to the UPC having been founded on the principles of equality, unity and democracy for all Congolese and its aim being to bring peace to Ituri, the insufficient

¹⁰⁴ *Ibid.*, paragraphs 17 and 18

¹⁰⁵ *Ibid.*, paragraph 17

command and control on the part of Thomas Lubanga Dyilo due to conflicts within the UPC; the influence of local and foreign actors; substance abuse by Thomas Lubanga and elements of voluntariness in the practice of enlisting children into the UPC/FPLC¹⁰⁶ Since the Trial Chamber's Decision of 24 April 2008,¹⁰⁷ the Appeals Chamber has approved an approach (in the context of non-disclosure of Article 54(3)(e) material and of undoubted wider application) that when a Chamber is prohibited from ordering disclosure of relevant material to the defence, it "will then have to determine whether, and if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and the trial is fair, in spite of the non-disclosure of the information".¹⁰⁸ The counter-balancing measures for this individual amply protect the rights of the accused and the integrity of the proceedings and, accordingly, in these very particular circumstances there is no prejudice to the accused if this limited information is withheld.

WWW-0110

70 The prosecution's application of 29 February 2008 seeking the temporary redaction of the name of this witness (recorded in a document attached in Annex 1 to the application) was granted¹⁰⁹ On 7 May 2008, the prosecution requested redactions to the witness's statement in order to protect third

¹⁰⁶ References to the relevant documents can be found in Attachment A to the Prosecution's Provision of Alternative Evidence further to the Trial Chamber's Confidential, *ex parte* Order dated 29 October 2008, 31 October 2008, ICC-01/04-01/06-1492-Conf-Exp-AnxA, and Annex 94 to Prosecution's submission of 93 documents highlighting the passages of potentially exculpatory value or falling within the parameters of Rule 77, 22 October 2008, ICC-01/04-01/06-1488-Conf-Exp-Anx94 See Prosecution's Notification of Disclosure of Exculpatory and Rule 77 Material to the Defence on 18 and 20 November 2008, 21 November 2008, ICC-01/04-01/06-1502

¹⁰⁷ ICC-01/04-01/06-1295-US-Exp, public redacted version, ICC-01/04-01/06-1311-Anx2

¹⁰⁸ ICC-01/04-01/06-1486, paragraph 48

¹⁰⁹ Prosecution's Submission of Information on the Status of One Witness and Request for Non-Disclosure of Information, 3 March 2008, ICC-01/04-01/06-1203-Conf-Exp, Anx1 and AnxA

parties (the [REDACTED] referred to in filing ICC-01/04-01/06-1081).¹¹⁰
 The Chamber granted the request on a temporary basis on 9 May 2008.¹¹¹
 The defence filed observations to the public version of the prosecution's
 request on 26 May 2008.¹¹²

71 The Registry informed the Chamber it was unable to locate the witness in
 its Report to the Chamber of [REDACTED] 2008.¹¹³ Thereafter, in a report
 of [REDACTED] 2008, the Chamber was informed that on [REDACTED]
 the Registry interviewed 0110, leading to a signed written statement. The
 witness did not have a telephone and although he or she was somewhat
 sceptical about giving testimony, he or she requested time to reflect on the
 matter. This individual indicated there would be difficulties with
 relocation, for his or her family and for professional reasons.¹¹⁴

72 In an email sent on 9 January 2009, the Registry informed the Chamber
 that 0110 had decided not to cooperate with the Court.¹¹⁵ The Registry
 confirmed this stance on the part of the witness during an *ex parte* status
 conference on 15 January 2009.¹¹⁶

73 As set out above, in its Decision of 24 April 2008,¹¹⁷ the Chamber indicated
 as follows.

99 Should a witness indicate a settled intention not to cooperate further with
 the Court, or if [he or she] cannot be traced, the Chamber must consider

¹¹⁰ Prosecution's Application for Lifting of Redactions, Non-Disclosure of Information and Disclosure of Summary Evidence, 12 December 2007, ICC-01/04-01/06-1081

¹¹¹ ICC-01/04-01/06-1316

¹¹² ICC-01/04-01/06-1357

¹¹³ ICC-01/04-01/06-1382-US-Exp, paragraph 2

¹¹⁴ ICC-01/04-01/06-1568-US-Exp, paragraph 11

¹¹⁵ Email communication from the Registry to the Trial Chamber through the Legal Advisor to the Trial Division on 9 January 2009

¹¹⁶ ICC-01/04-01/06-T-102-CONF-EXP-ENG, page 1, lines 20 to 25 and page 2, lines 1 to 17

¹¹⁷ ICC-01/04-01/06-1295-US-Exp, public redacted version, ICC-01/04-01/06-1311-Anx2

whether it is sufficient, in order to secure fairness, to disclose to the accused a redacted version of his or her statement and any other relevant material on an anonymous basis. It will have to decide whether, given the witness is not available to testify, the evidential value of his or her statement and the need to disclose his or her identity are significantly reduced, and as regards the latter, effectively eliminated. Consideration will be given to the extent to which, in these particular circumstances, the exculpatory elements have been sufficiently dealt with by other witnesses who apparently are available to give evidence, and whether what remains of evidential or "spring-board" value can be provided by service of statements from which the witness's identity and whereabouts have been redacted.

74 The potentially exculpatory material is, in summary, as follows. The witness provides information relating to (i) the UPC and Thomas Lubanga Dyilo's efforts to demobilize child soldiers, and (ii) whether or not children voluntarily joined the UPC/FPLC.¹¹⁸

75 Individuals cannot be compelled to cooperate with the Court, and the identity and whereabouts of this witness are only of significant evidential value if he or she agrees to give evidence under oath, *inter alia*, so that the truth of the testimony can be investigated by questioning. Otherwise, nothing of significance turns on the name and present circumstances of the witness, and the redacted materials (excluding these details) have been served on the defence. Given the clear indication is that he or she will not cooperate in these proceedings, it is fair that this edited version comprises the disclosure to the defence for this witness. Furthermore, the defence has received a very substantial body of evidence that covers the exculpatory value of this evidence. In the context of the proceedings relating to the disclosure of documents obtained by way of Article 54(3)(e) agreements,

¹¹⁸ Prosecution's submission of information on the status of one witness and request for non-disclosure of information, 29 February 2008, ICC-01/04-01/06-1203-Conf, Anx A, paragraph 7

the prosecution provided the defence with numerous documents, including witness statements and reports from different sources, relating to the demobilization efforts by the UPC and Thomas Lubanga, as well as the voluntary enlistment of children in the UPC/FPLC¹¹⁹ Since the Trial Chamber's Decision of 24 April 2008,¹²⁰ the Appeals Chamber has approved an approach (in the context of non-disclosure of Article 54(3)(e) material and of undoubted wider application) that when a Chamber is prohibited from ordering disclosure of relevant material to the defence, it "will then have to determine whether, and if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and the trial is fair, in spite of the non-disclosure of the information"¹²¹ The counter-balancing measures here amply protect the rights of the accused and the integrity of the proceedings and, accordingly, in these very particular circumstances there is no prejudice to the accused if this limited information is withheld.

IV. MISCELLANEOUS MATTERS

76. During the *ex parte* status conference on 2 April 2009, the Registry submitted that witnesses called by the Chamber, in order to avoid the perception that they are associated with either party, should testify after the prosecution and defence have called their evidence¹²² The Chamber has not followed this suggestion, and the witnesses called by the Chamber have given evidence at times convenient to them, the parties and the bench In the view of the Chamber it is clear that they are not associated with either party, and the Registry's fears are unfounded

¹¹⁹ References to the relevant documents can be found in ICC-01/04-01/06-1492-Conf-Exp-AnxA and ICC-01/04-01/06-1488-Conf-Exp-Anx94 See ICC-01/04-01/06-1502

¹²⁰ ICC-01/04-01/06-1295-US-Exp, public redacted version, ICC-01/04-01/06-1311-Anx2

¹²¹ ICC-01/04-01/06-1486, paragraph 48

¹²² ICC-01/04-01/06-T-163-CONF-EXP-ENG, page 6, lines 1 to 9

77. The Registry has sought clarification as to how the "examination-in-chief" of witnesses called by the Court shall be conducted. Without seeking to resolve the issue finally, it is likely that the judges will conduct the initial questioning of any witness called in these circumstances.

78. Any relevant statement provided to the prosecution should be shown to witnesses in this category during the familiarization process.

79. As regards whether the witnesses should be shown unsigned witness statements, the Chamber previously held in an oral decision of 16 January 2009¹²³ that "[c]ritically, the witness should refresh his or her memory from documents that they have expressly agreed as reflecting their recollection of the relevant events. The presumption will be that unsigned statements are not shown to witnesses, because the lack of a signature casts doubt over whether the witness accepted the contents as accurate. Discrete applications may be made to the Chamber if there are exceptional reasons for showing an unsigned statement to a witness, for instance, if the witness clearly agreed with its content but for some good reason did not add a signature." The Chamber repeats that guidance.

80. Any other issues relevant to witnesses in this category will only be considered if the need arises.

¹²³ Transcript of hearing on 16 January 2009, ICC-01/04-01/06-T-104-ENG, page 24, line 25 to page 25, line 9.

V. DISPOSITION

81 For the above reasons the Chamber makes the following orders:

- a) The prosecution is to disclose forthwith to the defence the relevant materials relating to witnesses 0020, 0005, 0034, 0003 forthwith, in a suitably non-redacted form. Any suggested redactions should be notified to the Chamber.
- b) The identities of witnesses 0021, 0290, 0040 and 110 are not to be disclosed to the defence.
- c) Any relevant statement provided to the prosecution shall be shown to the witnesses called by the Court during the familiarisation process.
- d) Unsigned witness statements shall not be shown to a witness unless discrete applications are made to the Chamber outlining the suggested exceptional reasons for adopting this course.
- e) The Registry is to inform those witnesses who will or may be called to give evidence of the relevant decision in their individual cases.
- f) The Victims and Witnesses Unit is instructed to implement the measures which are relevant at this stage.

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

Judge Adrian Fulford

Judge Elizabeth Odio Benito

Judge René Blattmann

Dated this 25 June 2009

At The Hague, The Netherlands