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**International
Criminal
Court**

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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

Decision on the prosecution and defence applications for leave to appeal the Trial Chamber's "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters"

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

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Trial Chamber 1 (“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 requests for leave to appeal the “Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters”, advanced by the prosecution and the defence:

I. Background and Submissions

1. On 24 April 2008 the Trial Chamber issued its “Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters” (“Decision”) with a Separate and Dissenting Opinion of Judge Blattmann issued on 28 April 2008.¹
2. The Decision addressed, *inter alia*, the respective responsibilities of the Victims and Witnesses Unit (“VWU”) and the Office of the Prosecutor (“prosecution”) for providing protective measures for witnesses; the prosecution’s obligation of disclosure; certain redactions to evidence requested by the prosecution; and the disclosure of potentially exculpatory material.

The application by the prosecution

3. On 2 May 2008, the prosecution filed an *ex parte* application for leave to appeal the Decision.² In its decision of 8 May 2008, which issued a confidential and public version of the Decision and the Separate and

¹ ICC-01/04-01/06-1295-US-Exp and ICC-01/04-01/06-1295-US-Exp-Anx1, Decision issuing a confidential and a public redacted version of “Decision on disclosure issues, responsibilities for protective measures and other procedural matters”, 8 May 2008, ICC-01/04-01/06-1311 (with confidential Annex 1, and public Annexes 2 and 3)

² Prosecution’s Application for Leave to Appeal the Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, 2 May 2008, ICC-01/04-01/06-1304-US-Exp

Dissenting Opinion, the Chamber ordered the prosecution to re-file its application for leave to appeal, which had been filed *ex parte*, within 2 days.³ The prosecution filed the request publicly on 15 May 2008, explaining that it was filed late “due to technical problems in the internal distribution of the document”.⁴ The Chamber notes the prosecution’s explanation and accepts the application as validly filed in accordance with Regulation 35 of the Regulations of the Court.

4. In summary, the prosecution’s application asserts that the Chamber misinterpreted the system established in the Rome Statute (“Statute”) for witness protection, thereby compromising the Court’s ability to discharge its protective duties effectively, exposing the witnesses to the risk of harm and undermining the prosecution’s ability to discharge its responsibility of conducting investigations and prosecuting cases. In particular, it argues that the Chamber has, without a proper legal foundation, endorsed a threshold for “triggering” protective measures which is excessively high. The prosecution contends that the Chamber has rejected an approach that had been agreed “by the entire Court” – that the starting point for protective measures is that all foreseeable security risks should be eliminated; this, it is said, enables the Court to strive for the maximum security of all participants. Any lesser approach will prevent the Court, and including the prosecution, from discharging its obligations to victims and witnesses pursuant to Article 68(1). It is submitted that the approach taken by the Chamber will affect the security of the witnesses; it may seriously impede the prosecution’s ability to establish the truth and the ability of both parties

³ ICC-01/04-01/06-1311, paragraph 5.

⁴ Prosecution’s submission of a public redacted version of its 2 May 2003 (sic) “Application for Leave to Appeal the Decision on Disclosure Issues, Responsibilities for Protective Measures and Other Procedural Matters”, 15 May 2008, ICC-01/04-01/06-1332, paragraph 5. The public redacted application was attached as Annex I

to present their cases; and it adversely affects the integrity of the trial proceedings.⁵

5. On the basis of those arguments, the prosecution seeks leave to appeal on two issues:

First Prosecution Issue

- a) Whether the Decision endorses a level of risk and a restrictive standard in contravention of the relevant provisions of the Rome Statute framework, citing particularly Articles 68(1), 54(3)(f) and 43(6) of the Statute and Regulation 96 of the Regulations of the Registry; and

Second Prosecution Issue

- b) Whether the Chamber's interpretation of the system of witness protection, established by the Rome Statute Framework, properly reflects the authority of the prosecution to assess and determine the need for witness protection, to enable it to prepare for and efficiently prosecute its case at trial.

First Prosecution Issue

6. In support of its application on the first issue, the prosecution submits that the standards established or approved in the Decision of "high likelihood of harm", "established danger of harm or death" or "more than 'high likelihood of harm or death'" were inappropriate, and that a threshold of "likelihood of harm" was more apposite for triggering the Court's protection programme.⁶ It suggests that the approach of the Chamber unfairly denies protection to those who have been subjected to serious psychological pressure and intimidation, because the need for protection as

⁵ ICC-01/04-01/06-1332-AnxI, paragraph 14

⁶ *Ibid*, paragraphs 7 and 8

established in the decision only relates to those who face a high risk of harm in a “physical sense”.⁷

7. The prosecution submits that the threshold of risk established or approved in the Decision by the Chamber has unfairly impaired the prosecution’s ability:
 - i) to discharge its duties of protection under Article 68 of the Statute adequately;
 - ii) to conduct its own investigation respecting the interests of victims and witnesses and to exercise its power under Article 54(3)(f) of the Statute; and
 - iii) to prepare for and present cases at trial.⁸
8. Similarly, it submits that by adopting a high threshold of risk, the Chamber has reduced the extent of the protection that will be provided, and unfairly and improperly increased the need for the prosecution to make alternative protective arrangements.⁹
9. The prosecution argues that this decision will impact adversely on its ability to conduct expeditious investigations and prosecutions. Once the existence of this test is known, it will reduce the extent to which individuals will cooperate with the court (particularly if someone in due course is harmed),¹⁰ and that if a witness refuses to testify at a late stage in the proceedings (due, presumably, to the high level of risk) the party intending to call the witness

⁷ *Ibid*, paragraphs 12 and 13.

⁸ *Ibid*, paragraph 15.

⁹ *Ibid*, paragraph 15

¹⁰ *Ibid*, paragraph 16.

may need to find, and seek leave to introduce, alternative evidence at short notice, thus undermining the advantages of early disclosure of evidence.¹¹

Second Prosecution Issue

10. The prosecution asserts that it has been left without a role in:

- a) “determining the standard to be applied for the assessment of risk of witnesses” and
- b) “effectively deciding on the actual need for protective measures of such witnesses through the Court’s central protective scheme.”¹²

11. The prosecution argues that the decision of the Chamber improperly removes its ability to make decisions in an important area, and in the result it will be unable to “take measures or request measures” for the protection of any person (Article 54(3)(f)).¹³ Moreover, the prosecution is unable to give undertakings as to protective measures to victims because the decision is to be made by the Victims and Witnesses Unit.¹⁴

The criteria for an appeal

12. The prosecution submits that it was necessary to resolve these issues in advance of the trial for various reasons relating to expeditiousness and fairness. It argues that an immediate resolution is necessary to ensure fairness to the witnesses;¹⁵ to enable the prosecution to participate appropriately in establishing a protective regime for its witnesses;¹⁶ to ensure that witnesses were not improperly discouraged from participating (thereby, *inter alia*, leading to applications to introduce further evidence or

¹¹ *Ibid*, paragraph 18

¹² *Ibid*, paragraph 20

¹³ *Ibid*, paragraphs 21 and 22.

¹⁴ *Ibid*, paragraph 22.

¹⁵ *Ibid*, paragraph 22.

¹⁶ *Ibid*, paragraph 20

redactions);¹⁷ to enable the prosecution to call all necessary evidence;¹⁸ and generally ensuring the proceedings follow “the right course”.¹⁹ It is submitted, particularly, that appellate guidance will ensure that proper bases for protection are established and consistently applied in this trial, and in those to come hereafter.²⁰ The prosecution submits that if it is forced to rely on the authorities of the State, this may delay the proceedings.²¹ The defence did not file a response to the prosecution’s application.

The application by the defence

13. On 14 May 2008, the defence filed a request²² seeking leave to appeal as regards two issues, as follows:

First Defence Issue

- a) Whether the Decision contravenes the principle of full disclosure of exculpatory material, as set out in Article 67(2) of the Statute; and

Second Defence Issue

- b) Whether the alternative measures to full disclosure of exculpatory materials proposed by the Chamber sufficiently respect the rights of the accused, pursuant to Article 67(2).²³

14. As regards the first issue, in support of its application, the defence submits that anything short of the non-redacted disclosure of exculpatory material impairs the defence ability to make proper use of it during the proceedings

¹⁷ *Ibid.*, paragraphs 18 and 26.

¹⁸ *Ibid.*, paragraph 29

¹⁹ *Ibid.*, paragraph 30

²⁰ *Ibid.*, paragraphs 33 and 38.

²¹ *Ibid.*, paragraph 26.

²² Defence Request for leave to Appeal the *Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters* issued on 8 May 2008 (Rule 155 of the *Rules of Procedure and Evidence*), 14 May 2008, ICC-01/04-01/06-1326

²³ *Ibid.*, paragraph 2.

and so may affect the outcome of the trial. Similarly, in addressing the rights enshrined in Article 67(2), the defence submits the Decision may generally prejudice the accused's preparation for trial and so affect the fairness of the hearing.²⁴

15. In relation to the second issue, the defence submits that:

- a) the admission by the prosecutor of facts which tend to show the innocence of the accused or which affect the credibility of the incriminatory evidence cannot provide a valid substitute for full disclosure of the underlying exculpatory evidence;
- b) redactions to exculpatory material prevent the defence from making full use of it;
- c) the fact that certain exculpatory materials have already been disclosed to the defence does not justify the non-disclosure of other material containing information of the same nature; and
- d) disclosure of exculpatory material cannot be made subject to the consent of witnesses cooperating with the Court.

16. The defence submits that the matters dealt with by the Decision directly affect the fundamental rights of the defence and should not have been dealt with in an *ex parte* procedure. It argues that the Decision is excessively restrictive, in that it does not take into consideration evidence which tends to mitigate the guilt of the accused, as provided in Article 67(2) of the Statute. The disclosure of exculpatory material must, in the submission of

²⁴ *Ibid* , paragraphs 6-7

the defence, allow it to conduct its own investigations and to prepare for trial, and to achieve this result, it must be made in full.²⁵

17. Additionally, it submits that the expeditiousness of the trial is affected by the extent of disclosure of exculpatory evidence, as full disclosure will assist the defence in preparing its lines of defence and in limiting cross examination.²⁶ Finally, the defence argues that all matters relating to disclosure should be resolved prior to the commencement of trial and an immediate resolution by the Appeals Chamber is appropriate.²⁷

Prosecution response to the defence application

18. On 19 May 2008 the prosecution filed its observations on the defence application for leave to appeal.²⁸ In its observations, the prosecution submits that the defence application in respect of the principle of full or complete disclosure of exculpatory evidence is unclear, having been made in general terms only.²⁹ In respect of the defence arguments regarding the appropriateness of alternative measures, the prosecution submits that this was only raised as a theoretical possibility in the decision, and a possibility of this kind, by itself, cannot affect the outcome of the proceedings; therefore, it submitted the defence has failed to demonstrate how the expeditiousness of the proceedings was affected.³⁰

II. Relevant provisions

19. The following statutory provisions are relevant to this Decision:

²⁵ *Ibid*, paragraphs 3-5

²⁶ *Ibid*, paragraph 8

²⁷ *Ibid*, paragraphs 9-10

²⁸ Prosecution's Response to Defence Application for Leave to Appeal the Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, 19 May 2008, ICC-01/04-01/06-1336

²⁹ *Ibid*, paragraph 5

³⁰ *Ibid*, paragraphs 6-10, 13-14.

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.

20. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered Article 82(l)(d) of the Statute:

Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

21. As to other relevant provisions:

Rule 81 of the Rules of Procedure and Evidence (“Rules”):

Restrictions on Disclosure

(4) The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or the State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.

III. Analysis and Conclusions

A. General remarks

22. In reaching its conclusions on the requests, the Trial Chamber has followed the approach set out in its "Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008"³¹ and its "Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008"³² which, in turn, applied Article 82(1)(d) of the Statute and the Appeals Chamber's "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" of 13 July 2006.³³

23. Accordingly, it has examined the individual applications for leave to appeal against the following criteria:

- a) Whether the matter is an "appealable issue";
- b) Whether the issue at hand could significantly affect:
 - i) the fair and expeditious conduct of the proceedings, or
 - ii) the outcome of the trial, and
- c) Whether in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings.

³¹ Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, 6 March 2008, ICC-01/04-01/06-1210.

³² Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191

³³ ICC-01/04-168, paragraphs 9-14

24. The requirements a), b) and c) above are cumulative and therefore failure to fulfil one or more of them is fatal to an application for leave to appeal. Indeed, the cumulative nature of this test means that if one criterion is not satisfied, it is unnecessary for the Chamber to consider whether the other criteria for granting leave are met.
25. As has been emphasised elsewhere,³⁴ it is irrelevant for these purposes that the issue for which leave is sought is of general interest or that it may arise in future pre-trial or trial proceedings. Further, it is insufficient that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order materially to advance the proceedings.³⁵ Interlocutory appeals should be regarded as exceptional, not least because they have the capacity significantly to delay the trial. As set out by Pre-Trial Chamber II, "[the] case-law shows that in striking the balance between the convenience of deciding certain issues at an early stage of the proceedings, and the need to avoid possible delays and disruptions caused by recourse to interlocutory appeals, the provisions enshrined in the relevant rules of the *ad hoc* Tribunals, and in the Statute, favour as a principle the deferral of appellate proceedings until final judgment, and limit interlocutory appeals to a few, strictly defined, exceptions."³⁶
26. Applying its now established approach on applications for leave to appeal, where arguments have been raised by the parties which relate to the merits of a substantive issue rather than the test for leave to appeal, the substantive arguments have not been addressed by the Chamber but instead there has

³⁴ ICC-01/04-01/06-1191, paragraph 11

³⁵ ICC-01/04-01/06-1191, paragraph 12.

³⁶ Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest Under Article 58, 19 August 2005, ICC-02/04-01/05-20-US-Exp, paragraph 19 This decision was unsealed pursuant to the Appeals Chamber's Decision on the prosecutor's application for unsealing of the warrants of arrest, 13 October 2005, ICC-02/04-01/05-52

been focus solely on the submissions that are directed at the test to be applied for applications of this kind.³⁷

B. The applications for leave to appeal

The prosecution application

First Prosecution Issue

27. The prosecution has misstated the conclusions reached in the Decision as to the test that is to be applied by the VWU to applications for protective measures. At paragraph 79 it was stated by the majority that regardless of whether the approach applied by the VWU is expressed as either a “high likelihood of harm” or as a “likelihood of harm”, **the test that the Unit should apply** is as follows: it is to ensure there is proper protection for any witness who, following careful investigation, **faces an established danger of harm or death**. The Chamber expressly eschewed a judicial analysis as to what, precisely, the word “high” adds to the expression “likelihood of harm”. Instead, contrary to the prosecution’s submissions, it follows the Chamber has laid down that irrespective of the precise description of the test that has been applied hitherto, protection shall be afforded to any witness, following careful investigation, if he or she is exposed to (“faces”) an evidence-based (“established”) danger of harm **or** death.
28. As the majority decision stressed, the test should be interpreted in a sufficiently flexible and purposive manner to ensure proper protection for any witness who, following careful investigation, faces an established danger of harm or death.³⁸

³⁷ ICC-01/04-01/06-1191, paragraph 19

³⁸ ICC-01/04-01/06-1311-Anx2, paragraph 79

29. As regards the relevant witnesses in the case, the Chamber – having described the approach set out in the preceding paragraph – reviewed each of the decisions of the VWU and decided that they conformed to it. It is to be observed that at no stage in undertaking that analysis did the Chamber suggest in Annex A, as alleged, that the VWU should apply the formula “more than a ‘high likelihood’ of harm or death”. Additionally, the Chamber at no stage limited the concept of harm to “harm in a physical sense”. This latter suggestion is a gloss that has been attributed to the Decision, without justification. For the avoidance of doubt, an established danger of harm can include physical as well as psychological harm, and evidence of intimidation – depending on the circumstances – may be powerful evidence of the existence of a danger of harm.

30. It follows that the basis of the proposed appeal under the prosecution’s **First Issue** is misconceived: paragraph 79 of the Decision establishes the test that is to be applied, and the Decision did not endorse an “inappropriate and overly restrictive” approach to the provision of protective measures taken by the VWU. The fact that the prosecution disagrees and advocates an alternative approach, does not, of itself, mean that the “issue” identified necessarily forms the proper subject-matter of an appeal. Indeed, on analysis, the first “issue” raised by the prosecution simply does not arise out of the Decision.

31. For these reasons, leave is refused on the prosecution’s **First Issue**.

The Second Issue

32. The Chamber’s Decision, which affirmed the VWU’s discretion to assess the applications for protective measures, cannot significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The

difference in approach between the prosecution and the Registry, relevant to this second issue, is confined to the issue of **which** organ of the Court is empowered to **take decisions on protective measures**, rather than **whether or not protection will be provided by the VWU or the prosecution**. In its application on this Second Issue the prosecution raised two points, namely that it had been left without a role, first, in determining the standard to be applied for the assessment of risk to witnesses, and, second, in deciding on the need for protective measures of witnesses through the Court's central protective scheme. The Appeals Chamber has recently determined that "[t]he function of the VWU is to provide, *inter alia*, appropriate protective measures and security arrangements, respecting the interests of the witness and acting impartially".³⁹ Furthermore, the Appeals Chamber determined that if the Prosecutor disagrees with a decision of the VWU, the Chamber is to resolve the issue.⁴⁰ Given that the majority opinion found that the approach taken by the VWU had been correct ("faultless"), and given the Appeals Chamber has affirmed the general "responsibility" of the VWU in this area,⁴¹ an interlocutory appeal on this issue will not at this stage significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

33. Therefore, for the reasons set out above, leave is refused on the prosecution's **Second Issue**.

The defence application

First Defence Issue

³⁹ Judgment on the appeal of the Prosecutor against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I, 26 November 2008, ICC-01/04-01/07-776, paragraph 92.

⁴⁰ *Ibid*, paragraph 94.

⁴¹ *Ibid*, paragraph 92

34. It is not realistically arguable that a piece of evidence which includes exculpatory elements must be disclosed in its entirety, regardless of its content, in order to meet the requirements of a fair trial. In this regard, it was recognised in both the Majority Decision and the Dissenting Opinion that in some instances necessary measures will need to be taken to protect individuals.⁴²

35. In its Judgment of 21 October 2008, the Appeals Chamber dealt with the interpretation of Article 67(2) and the prosecution's obligations of disclosure in the context of its use of confidentiality agreements concluded under Article 54(3)(e).⁴³ The Appeals Chamber expressly endorsed the role of the Trial Chamber as the final arbiter of disclosure obligations.⁴⁴ The Judgment sets out a procedure wherein if the Trial Chamber is unable to order full disclosure of potentially exculpatory materials, it is authorized to determine "whether and, if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of non-disclosure of the information."⁴⁵ There is no logical reason for suggesting that this approach is confined to issues arising out of Article 54(3)(e), and in the context of this application for leave to appeal, it is to be observed that the protection of individuals or organisations lay at the heart of the agreements reached under that article. Accordingly, the broad defence contention on this issue is unarguable.

36. It is relevant to observe that the Judgment of the Appeals Chamber, set out above, has the effect of amending the general guidance on redactions which

⁴² Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, ICC-01/04-01/06-1311-Anx2, for instance at paragraphs 90, 91, 95 and Separate and Dissenting Opinion of Judge Blattmann attached to the Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, ICC-01/04-01/06-1311-Anx3, paragraphs 25-27

⁴³ Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486

⁴⁴ *Ibid*, paragraph 46

⁴⁵ *Ibid*, paragraph 48

the Trial Chamber gave in its oral decision of 13 December 2007,⁴⁶ which it affirmed and summarised on 18 January 2008,⁴⁷ as follows:

[...] it is of value to summarise the conclusions of general applicability that the Chamber reached in (its) decision (of 13 December 2007) [...] They are as follows:

(i) The Prosecution will not be permitted to maintain or to impose on a permanent basis any redactions in documents that relate to the issues in the current case against the accused if they are potentially of assistance to the accused (transcript page 2). It follows that any permanent redactions that the Chamber maintains or imposes will relate to material that is irrelevant to the charges Mr. Thomas Lubanga Dyilo faces, in the sense that they neither tend to undermine the Prosecution case on the charges confirmed by the Pre-Trial Chamber nor give any support for the Defence case, namely that the accused is innocent of the charges.

(ii) All material relevant to the charges against the accused shall be disclosed prior to the trial, in accordance with the detailed timetable that the Chamber has established

(iii) The Prosecution shall disclose all information that is potentially exonerating pursuant to [Article] 67(2)⁴⁸ [...] or any material that falls for inspection under Rule 77

37. In light of the Appeals Chamber's Judgment, if it is impossible to order disclosure of items of evidence which are potentially exculpatory, it may be possible for the proceedings to continue by ensuring that appropriate counter-balancing measures are taken.

38. The Court is enjoined to protect victims and witnesses (and, by logical extension, those who are at risk of harm as a result of the activities of the Court). This will arise, *inter alia*, in two particular circumstances, with different consequences. First, if redactions are necessary to afford individuals proper protection and if the material is potentially exculpatory, the Court will need to decide if alternative means are available to fill the evidential "gap". Second, if the material excised is irrelevant to the charges Mr Thomas Lubanga Dyilo faces and his defence, then less than complete

⁴⁶ ICC-01/04-01/06-T-65-ENG.

⁴⁷ ICC-01/04-01/06-T-71-ENG, page 4.

⁴⁸ This was referred to in error in the Oral Decision as Rule 67(2)

material can be provided to the accused, although the Chamber will need to ensure that any redactions that are imposed do not render the statements or documents in any way unintelligible or markedly difficult to deal with,⁴⁹ and that the trial is not rendered unfair.

39. It follows, particularly in light of the Appeals Chamber's Judgment, set out above, that an interlocutory appeal on this issue will not at this stage significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

40. For these reasons, leave is refused on the **First Defence Issue**.

Second Defence Issue

41. As regards the issue raised by the defence as to whether alternative measures (i.e. admissions by the prosecution) can, in any circumstances, provide a valid substitute for full disclosure of exculpatory evidence, the Judgment of the Appeals Chamber, set out above, has sufficiently determined this issue for the purpose of this application. The judgment set out that "the provision of purported alternative exculpatory evidence"⁵⁰ is one of the available "counterbalancing measures".⁵¹ The Appeals Chamber did not seek to limit the other possible measures that can be implemented in appropriate circumstances, always provided that fairness can be ensured.

42. As regards admissions, in the majority Decision it was underlined that:

It will be necessary to ensure that the admissions fully reveal to the defence all the potentially exculpatory facts. The Chamber will keep the underlying materials under

⁴⁹ ICC-01/04-01/06-T-65-ENG, page 3.

⁵⁰ ICC-01/04-01/06-1486, paragraph 95.

⁵¹ *Ibid*, paragraph 48

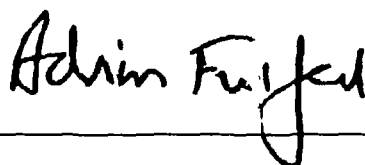
review during the trial to ensure that as the evidence emerges and the issues crystallize, this approach at all times meets the requirements of Article 67.⁵²

43. It is clear that this approach conforms with the Judgment of the Appeals Chamber, and an interlocutory appeal on this issue will not at this stage significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

44. For all of these reasons, leave to appeal is generally refused.

⁵² ICC-01/04-01/06-1311-Anx2, paragraph 90.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 16 December 2008

At The Hague, The Netherlands