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**TRIAL CHAMBER III**

**Before:** Judge Adrian Fulford, Presiding Judge  
Judge Elizabeth Odio-Benito  
Judge Joyce Aluoch

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC  
IN THE CASE OF  
THE PROSECUTOR  
*v. JEAN-PIERRE BEMBA GOMBO***

**Public**

**Prosecution's request for restriction on the use of confidential material for  
Defence investigations**

**Source:** Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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## **REGISTRY**

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**Detention Section**

**Victims Participation and Reparations Section**

**Other**

## I. Introduction

1. On 27 May 2010, Trial Chamber III ordered the Office of the Prosecutor ("Prosecution") to file written submissions in support of its request that the Chamber impose restrictions on the circumstances and the manner in which the Defence may use non-confidential information during its investigations.<sup>1</sup>

2. The Prosecution's proposal is based on the principles established by Trial Chambers ("TC") I and II, that any disclosure of non-public information by the Defence must be guided by the twin requirements of necessity and witness-security in order to fully implement the Court's duty of protection. The Prosecution proposes that the Court (either the Victims and Witnesses Unit ("VWU") or the Chamber) has a duty to decide on the instances and the manner in which non-public information is disclosed. If the Defence wishes to disclose non-public information it must liaise with the VWU, which will make an assessment of the risk linked to the disclosure. The VWU must consult with the Prosecution on any risk to persons connected with the Prosecution activities.

3. In some instances, the VWU may direct the Defence to take measures during its investigation to prevent foreseeable risks. The Defence is bound to comply with these directions. If it disagrees, it must bring the matter before the Court. If the VWU determines that the proposed disclosure causes a significant increase of the risk and additional protective measures must be taken to manage that risk, then the Defence can only proceed with disclosure with the leave of the Chamber.

4. The mechanism proposed by the Prosecution is consistent with the fairness of the proceedings and the rights of the Accused, including his right to an expeditious trial. Although its implementation may involve additional work for the Defence, the

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<sup>1</sup> Email from the Legal Officer to the Senior Trial Lawyer, 27 May 2010, at 12:07 hours.

Prosecution, the VWU and the Chamber, this is justified by the need to maintain the level of protection required by the Rome Statute ("Statute").

## II. Submissions

### *(a) Principles established by TC I and II*

5. TC I in the *Lubanga* case issued a decision which governs, among others, disclosure of non-public information to members of the public ("*Lubanga* Decision"),<sup>2</sup> which reads as follows:

8. The provision of information, inter partes, of a non-public nature is governed by the twin requirements of necessity and witness-security. When the distribution of information to the public has been limited - for whatever reason - it is appropriate that its use should be carefully regulated so as to ensure compliance with those requirements.

9. Once information has been characterised as being non-public (whether it is characterised as "confidential", "ex parte" or "under seal"), its use should be limited to the strict purposes of the disclosure and members of the public should only be shown those parts of it that are truly necessary for the preparation and presentation of the case of a party or participant.

[...]

12. The Chamber hereby orders that whenever information, which is characterised in manner more restrictive than "public", is provided to a party or participant by another party or participant, the party or participant receiving the material should make its content available to the public only to the extent that is truly necessary for the preparation of its case. Whenever information protected by this principle is made available to a member of the public, the party making the disclosure must keep a detailed record thereof. The information shall be made available to only identified members of the public, who shall give a written and signed undertaking not to reproduce or publicise its content, in whole or in part, or to show or disclose it to any other person. If written material covered by this principle is made available to a member of the public, it must be returned to the party or participant who disclosed it once that person no longer needs it for case-preparation.

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<sup>2</sup> ICC-01/04-01/06-1372.

6. The key principles arising from the *Lubanga* Decision are: a) non-public information (which necessarily includes the identity or identifying information of any witness who will testify under a pseudonym *vis-à-vis* the public) can only be revealed to third parties in compliance with the principles of necessity and witness security; b) non-public information shall only be disclosed when, and to the extent, that it is truly necessary for the preparation of the case; and c) a detailed record must be kept of any such disclosure, which includes identifying the persons to whom disclosure is made, and the identified members of the public who are made available of this confidential information shall give a written undertaking of confidentiality.

7. TC II established similar principles in the *Katanga* case. It found that disclosure of the identity of a protected witness shall only be allowed in “exceptional circumstances, where there is a “genuine and specific need for the preparation of the Defence case”.<sup>3</sup> TC II subsequently endorsed a protocol stipulating that the Defence must “strictly avoid [...] the risk of exposing the identity of protected witnesses to a third party to the extent possible” and only if it is “necessary and no alternatives are available”, then the Defence may use the information “in a careful and focused manner”.<sup>4</sup> Moreover, TC II also ruled that the Defence “shall not disclose that the person is a witness or involved with the Court”.<sup>5</sup>

8. In its initial formulation, TC II left the assessment to the discretionary judgment of the Defence.<sup>6</sup> It has, however, recently refined its position. It now requires the prior intervention of the Chamber when the Defence seeks to disclose to third parties certain forms of identifying information (namely photographs). In such instances, the Defence must make a specific application to the Chamber before revealing this information to a third party,<sup>7</sup> consistent with the VWU’s strong advice

<sup>3</sup> ICC-01/04-01/07-1734, paras. 11 and 15.

<sup>4</sup> See, decision ICC-01/04-01/07-2047, endorsing the Protocol set out in ICC-01/04-01/07-2007-Anx1 (“Protocol”), p. 1 second paragraph and item (a).

<sup>5</sup> Protocol, item (b).

<sup>6</sup> The Prosecution sought leave to appeal the underlying decision on the issue of whether this is “consistent with the obligations of witness protection which the Statute places upon the Court” (see ICC-01/04-01/07-2047-2062).

<sup>7</sup> ICC-01/04-01/07-2148, para. 9.

against a “blanket” approach to authorising the use of such information.<sup>8</sup> Accordingly, the Chamber denied authorisation in relation to one witness because, upon review, it considered that the Defence should first explore alternative means of investigation.<sup>9</sup> The Chamber also ruled that the Defence must keep a detailed register of each time the information is revealed and the circumstances.<sup>10</sup>

9. The Prosecution agrees with the underlying principles established by both TC I and II, especially on the need to respect both witness security and the rights of the Defence in considering whether to authorise the disclosure of protected information to third parties. The Prosecution considers that it is important to implement these principles in an effective manner, consistent with the Court’s overarching obligations. In this regard, it considers that the approach taken in the previous *Lubanga* decision should be further developed, consistent with the most recent approach in the *Katanga* case, and that the approach should be applied to *all* protected identifying information. Only with a practical implementation of this model will the statutory obligations and agreed principles be fully and effectively enforced.

(b) Need for further development of the principles established in the *Lubanga* Decision

10. Protecting the safety of witnesses is an *obligation* imposed by the Statute, not a matter of discretion. It is central to the Court’s operations<sup>11</sup> and to the integrity and viability of its mission and proceedings: as the Appeals Chamber stated, “ensur[ing], as a matter of the highest priority, that witnesses are appropriately protected [...] is, pursuant to Article 68 of the Statute, a responsibility of the Court as a whole”.<sup>12</sup> The

<sup>8</sup> *Ibid*, para. 3, quoting ICC-01/04-01/07-2092-Conf.

<sup>9</sup> *Ibid*, para. 13. It did, however, grant authorisation as to one witness.

<sup>10</sup> *Ibid*, para. 11.

<sup>11</sup> A range of provisions of the Statute and Rules “are indicative of an overarching concern to ensure that persons are not unjustifiably exposed to risk through the activities of the Court.” - ICC-01/04-01/07-475 OA, para. 54 (setting out the other provisions in paras. 43-53).

<sup>12</sup> ICC-01/04-01/07-776 OA7, para. 101. The Strategic Plan of the Court similarly considers “put[ting] in place a system to address all security risks, striving for maximum security of all participants consistent with the Rome Statute” to be a “priority objective” relating to the quality of justice - Strategic Plan of the Court, ICC-ASP/5/6, 4 August 2006, paragraph 31 and Annex, page 14; see also Revised strategic goals and objectives of the

protection of witnesses under the Statute requires that the Court primarily avoid foreseeable risks to their safety (preventive measures), and, where avoidance is impossible, the Court must adequately manage risks which are created (reactive measures).

11. The Prosecution submits that in order to implement its duty of protection, as well as to comply with the standard set in the *Lubanga* Decision concerning the twin requirements of necessity and witness security, the Court itself must assess any risk that disclosure of confidential information may cause to victims and witnesses and balance that risk against the necessity of disclosure to the Defence to ensure the fairness of the proceedings. The most recent decision in the *Katanga* case, for example, requires the Defence to make a prior application to the Chamber before it can use photographs of protected witnesses; the Chamber will assess the request, consider the risks, and may propose alternative measures.<sup>13</sup>

12. The approach advocated herein thus differs in degree from the *Lubanga* Decision and some of the previous decisions in the *Katanga* case that leave it entirely to the Defence to determine whether disclosure of non-public information is “truly necessary for the preparation of its case” and whether “no alternatives [to disclosure] are available”. Once the Defence has made that determination, it may freely disclose non-public information without having to consider the impact that the investigation will have on the security of protected person and without judicial scrutiny of its discretion. The *Lubanga* Decision does also not require the Defence to “actively exercise all care” to ensure the protection of witnesses, consistent with its duty under Code of Professional Conduct for Counsel (“Code of Conduct”).<sup>14</sup>

13. The currently-advocated approach also is consistent with the Appeals Chamber, which recognizes that the protection of information in order to ensure the

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International Criminal Court 2009-2012 in the Report on the activities of the Court, ICC-ASP/7/25, Annex, 29 October 2008, p. 18.

<sup>13</sup> ICC-01/04-01/07-2148.

<sup>14</sup> Resolution ICC-ASP/4/Res.1, Articles 8(1) and (2).

security of witnesses or victims requires that the interests involved must be balanced.<sup>15</sup> This has largely been addressed in the context of withholding information from the Defence, where the Appeals Chamber emphasized that the Court shall scrutinize the Prosecution's assessment of the necessity of protection and of the existence and sufficiency of alternatives, subject to established criteria.<sup>16</sup> The same principle – that the need for protection and efficacy of processes are determined by the Court, not the parties -- must apply equally in the context of Defence investigations: before the Defence may deviate from an order by a Chamber pertaining to the protection of a witness and the confidentiality of any information about him or her, the Chamber must verify the Defence's assessment of the necessity and availability of alternatives.<sup>17</sup> The importance of review of a party's assessment is underscored by the recent decision in the *Katanga* case, where TC II refused authorization to disclose protected information about a witness because the Defence had failed to exhaust alternative means of investigation.<sup>18</sup> Indeed, the need for independent scrutiny and control is even greater where the issue is disclosure of protected identifying information to external persons over whom the Court has no control.

14. The Prosecution appreciates that the Defence may not be in a position to conduct a quasi-judicial balancing exercise of its own investigative interests against the need for protection of Prosecution witnesses. This, however, does not mean that confidential information may be disclosed without consideration by any entity of the

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<sup>15</sup> See in particular ICC-01/04-01/07-475 OA, paras. 62, 66 (non-disclosure requires careful balancing of the various interests at stake), and 67-69; ICC-01/04-01/06-568 OA3, para. 36 (the Statute does not establish a rigid system favoring one competing interest over the other).

<sup>16</sup> ICC-01/04-01/06-2209-Red, para. 9 referring to ICC-01/04-01/06-773 OA5, para. 33. In particular, the danger to the witness or his or her family members that disclosure may entail; the necessity for the protective measures; an assessment of whether the measures will be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial; an investigation into the sufficiency and feasibility of less restrictive protective measures. The Trial Chamber found that “[a]lthough these criteria were established in the course of pre-trial proceedings [...] they are equally applicable to the trial stage of the case”.

<sup>17</sup> A range of factors could be considered and balanced by the Court in such a situation. For example, in relation to alternatives, it may be relevant whether this is the only line of inquiry regarding the credibility of the particular protected witness. Furthermore, there may be other counter-balancing measures that the Court could take: e.g. the Chamber could if necessary take into consideration in its ultimate determination the inability of the Defence to fully investigate (and thus challenge) the credibility of the witness (see e.g. ICC-01/04-01/06-1924-Anx2, para. 17, citing jurisprudence of the ECHR).

<sup>18</sup> ICC-01/04-01/07-2148, para. 13.



impact that disclosure will have on the security of persons. On the contrary, in light of the necessity of supervision and balancing established by the Appeals Chamber, is that the Court must exercise the necessary oversight. This principle, the Prosecution reiterates, has been endorsed in the recent *Katanga* decision on the use of photographs.

15. In this regard, while it is not disputed that the Defence has a right to investigate and prepare its case, this right is not absolute.<sup>19</sup> In particular, it does not nullify the obligation of the Court to ensure that witnesses are adequately protected. Respecting the rights of the Defence does not require or permit the Court to assign to the Defence the assessments of a risk and the choice of the appropriate actions to prevent and manage that risk, beyond any judicial review.

16. The Code of Conduct itself contemplates that the Defence counsel's use of confidential information could be subject to restrictions and recognizes that the Court must retain control of such use. The Code of Conduct provides that counsel may not disclose protected information unless "such disclosure is provided for by a particular provision of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court or [the Code of Conduct], or where such disclosure is ordered by the Court".<sup>20</sup> There is no generic exception for investigations. To the contrary, when addressing the identity of protected witnesses (which will often be a component of such Defence investigations), the Code of Conduct specifies that "[i]n particular, Counsel *shall not reveal* the identity of protected witnesses, or any confidential information that may reveal their identity or whereabouts, unless *he or she has been authorized to do so by an order of the Chamber*".<sup>21</sup>

17. The Prosecution additionally notes that the *Lubanga* Decision also does not require the Defence to consult or cooperate with the VWU prior to the disclosure.

<sup>19</sup> ICC-01/04-01/07-475 OA, 13 May 2008, para. 62; ICC-01/04-01/06-1486 OA13, 21 October 2008, paras. 46-47.

<sup>20</sup> Code of Professional Conduct for counsel, Article 8(4).

<sup>21</sup> Code of Professional Conduct for Counsel, Article 8(4) (emphasis added).

The rationale for locating the VWU in the Registry was that it be impartial, providing assistance regardless of the party or affiliation of the witness.<sup>22</sup> The Appeals Chamber has ruled on the need for co-operation between the VWU and the parties on issues related to witness protection,<sup>23</sup> being always the Chamber the ultimate arbiter to solve any disagreement between the VWU and a party.<sup>24</sup>

18. Consistent with this jurisprudence, in an order regulating the manner in which the Defence may disclose confidential identifying information to members of the public, TC II decided that, prior to disclosing, the Defence liaise with the VWU and provide maximum information on the witness involved, the objectives it aims to achieve and the persons or entities that it intends to contact.<sup>25</sup> It further ruled that the VWU must then evaluate the real and concrete risks that the witnesses would encounter if their identity is disclosed.<sup>26</sup> When a protocol developed by the Defence teams and VWU relaxed this requirement, the Prosecution sought leave to appeal the Chamber's decision accepting that protocol on this very issue.<sup>27</sup> The undisputed part of this protocol provides that "all investigating parties must be alert to the possible danger that their inquiries may have for witnesses. The investigating party should bring to the attention of the VWU [...] any reasonable suspicion that a witness may have been placed at risk for any reasons [...] as soon as possible".<sup>28</sup> It also states that "[t]he VWU remains available to provide advice and guidance in relation to any questions or concerns [the defence] may have in respect to any specific matter or a

<sup>22</sup> See for instance ICC-01/04-01/07-776 OA7, para. 92: "the function of the VWU is to provide, *inter alia*, appropriate protective measures and security arrangements, respecting the interests of the witness and acting impartially," and "at the same time, the VWU must recognise the specific interests of, and cooperate with, the parties."

<sup>23</sup> ICC-01/04-01/07-776 OA7, para. 92, 98, 101.

<sup>24</sup> ICC-01/04-01/07-776 OA7, paras. 93, 97.

<sup>25</sup> ICC-01/04-01/07-1734, para. 17.

<sup>26</sup> ICC-01/04-01/07-1734, paras. 15 and 17.

<sup>27</sup> While this decision of Trial Chamber II set out a provisional mechanism to be followed by the defence, the final decision regulating the manner in which protected identifying information may be disclosed during investigations departs from the prior decision on this aspect (see ICC-01/04-01/07-2047, endorsing the Protocol set out in ICC-01/04-01/07-2007-Anx1). As a result, the Prosecution sought leave to appeal the final decision on the issue of whether it is "consistent with the obligations of witness protection which the Statutes place upon the Court" (see ICC-01/04-01/07-2047-2062).

<sup>28</sup> See ICC-01/04-01/07-2007-Anx1, item (e), endorsed by decision ICC-01/04-01/07-2047. For instance, the defence has a duty to inform the VWU if it becomes aware that the protected location of a witness or the witness' participation in the proceedings has become known (protocol, item (e)).

particular witness”.<sup>29</sup> The most recent decision in the *Katanga* case on the use of photographs also foresees the possibility that the Chamber consults VWU when deciding on the defence application.<sup>30</sup>

(c) Mechanism proposed by the Prosecution

19. As stated above, any mechanism regulating the manner in which the Defence may use non-public information for the purposes of its investigations must be governed by the requirements of necessity and witness security. It must be consistent with the fairness of the proceeding and the rights of the Accused, including the right to an expeditious trial, and it must take “due regard for the protection of victims and witnesses”.<sup>31</sup>

20. The Prosecution is aware that any such mechanism must be practicable and enable the Court as a whole to effectively maintain the level of protection mandated by the Statute. For the Court to exercise its duty under the Statute to provide for the protection of victims, witnesses and other persons, it is not necessary that the Chamber intervene and decide on each instance where the Defence wishes to use non-public information for the purposes of its investigations. A significant function in that context can be allocated to the VWU, which is an integral part of the Court and has a duty under the Statute to “advise [a Chamber] on appropriate protective measures, security arrangements, counseling and assistance”.<sup>32</sup> As such, it can provide significant support to the Chamber in fulfilling its protective mandate. Under the Statute, the Chamber must however retain the ability to monitor the manner in which the Defence conducts its investigations and to intervene whenever this is necessary to provide for the protection of victims and witnesses by balancing this need against the rights of the Accused to a fair trial.<sup>33</sup>

<sup>29</sup> ICC-01/04-01/07-2007-Anx1, item (f), endorsed by decision ICC-01/04-01/07-2047.

<sup>30</sup> ICC-01/04-01/07-2148, para. 9.

<sup>31</sup> Article 64(2).

<sup>32</sup> Article 68(4).

<sup>33</sup> A clear example of this is the recent *Katanga* decision on the use of photographs (ICC-01/04-01/07-2148).

21. The mechanism proposed by the Prosecution is efficient and is required to maintain the level of protection of persons co-operating with the Court as mandated by the Statute. Moreover, a process that is intended to avoid or minimize foreseeable risk from the outset will limit the Court's work to be performed to manage risks that have been created as a result of the Defence investigations. The below process will enable the Court to put in place any protective measures in a timely manner.

- A) The Defence must be alert to the possible dangers that their inquiries may have for third persons,<sup>34</sup> and it must actively exercise all care to ensure the protection of victims, witnesses or any other person at risk on account of the activities of the Defence.<sup>35</sup> The Defence shall not disclose non-public information unless it considers that a particular line of inquiry is truly necessary for the preparation and presentation of its case and that alternative means of investigation are not available.<sup>36</sup>
- B) In advance of each investigative mission, the Defence must inform the VWU of the non-public information that it wishes to disclose. It also must provide the VWU maximum detail on a) person(s) to whom it wishes to disclose the non-public information; and b) victims, witness or third persons who may be at risk as a result of the Defence investigations.<sup>37</sup>
- C) The VWU shall assess the risk which would be caused by the proposed disclosure. In so doing, the VWU has to consult the Prosecution on any risk to persons connected with the Prosecution activities. In addition, the VWU shall provide advice and guidance to the Defence in relation to each instance where disclosure of non-public information may cause or increase a risk to victims or witnesses or third persons.<sup>38</sup> In particular, the VWU shall alert the Defence to any security risk that disclosure of non-public

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<sup>34</sup> Protocol, item (e).

<sup>35</sup> Resolution ICC-ASP/4/Res.1, Code of Professional Conduct for Counsel, Articles 8(1) and (2).

<sup>36</sup> ICC-01/04-01/07-2007-Anx1, second introductory paragraph and item (a).

<sup>37</sup> ICC-01/04-01/07-1734, para. 17; Protocol, item (e). In the Katanga case, the Defence argued in open session that its field missions must be planned at least one month in advance and that there are "a lot of formalities which have to be carried out" in preparation of such missions (see open session portion of ICC-01/04-01/07-T-110-Conf-Eng, p. 31, lines 8-15).

<sup>38</sup> Protocol, item (f).

information is likely to cause, and it shall provide direction on measures that the Defence shall take to prevent or significantly reduce any such risks. The VWU will not provide an opinion or suggestions regarding the necessity of any proposed investigative steps; neither would the VWU purport to balance the Accused's right against the need for protection. A detailed record of any such guidance and advice shall be kept by the VWU. A copy shall be provided to the Defence.

- D) If the VWU determines that the Defence can avoid an increase in risk by taking preventive measures, the Defence must follow the direction provided by the VWU and take all measures identified by the VWU to prevent or minimize security risk prior to proceeding with disclosure of non-public information during its investigations.
- E) If the Defence disagrees with the VWU measures, it must seek permission from the Court, before the investigative mission, to depart from those measures. In an *ex parte* (Defence and VWU only) filing, the Defence shall provide the following information: a) the non-public information that the Defence seeks to disclose; b) the identity and details regarding the person(s) to whom it wishes to disclose the non-public information; c) the relevant assessment and the advice of the VWU; d) the forensic purpose that the Defence aims to achieve by disclosing non-public information; and e) an explanation as to why no alternative means of investigation, that would not require the disclosure of non-public information, are available.
- F) If the VWU assesses that the contemplated Defence disclosure would lead to a significant increase of risk and would require additional protective measures by the Court itself, the Defence must seek permission from the Chamber before it proceeds with disclosure. In such a case, the Defence must make a request to the Chamber providing all the information outlined under item E) above.
- G) Being seized with a request from the Defence under either E) or F) above, the Chamber will decide on the instances and the manner in which the

Defence may disclose non-public information. In so doing, the Chamber will balance the necessity of disclosure (including the availability of alternative means of investigation and the importance or forensic purpose of the proposed investigative step) against the need to protect persons at risk on account of the activities of the Court.

- H) If during an investigative mission, an unforeseen instance arises during which the Defence determines it is necessary to disclose non-public information, it must liaise with the VWU from the field and proceed as outlined in C) and D) above. If, in such an instance, the Defence wishes to deviate from the measures directed by the VWU, or if the VWU has determined that disclosure increases the risk which requires additional measures, the Defence cannot disclose non-public information without leave of the Court. Exigency is not a justification for departing from these procedures.
- I) In the event that disclosure by the Defence of non-public information creates any security risk, the VWU must take necessary measures to adequately manage that risk. For witnesses who are in the care of the Prosecution, the implementation of such measures shall be coordinated with the Prosecution.<sup>39</sup>
- J) In each case of disclosure of non-public information, the Defence must adopt the following additional measures:
  - a. The Defence must record the identity of every person to whom non-public information was disclosed and the circumstances under which it was disclosed.<sup>40</sup>
  - b. If written non-public material is made available to a member of the public, it must be returned to the Defence once that person no longer needs it for case-preparation.<sup>41</sup>

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<sup>39</sup> ICC-01/04-01/07-776 OA7, para. 92, 98, 101.

<sup>40</sup> *Lubanga* Decision, para. 12.

<sup>41</sup> *Ibid.*

- c. The Defence is strictly forbidden from disclosing the fact that a person is a witness. If the third party becomes aware of the fact that the witness is involved with the Court, the Defence shall inform the third party that this must be kept confidential and must obtain a written and signed undertaking from the third party not to reproduce or publicise that information. The Defence also must inform the VWU.<sup>42</sup>

### **III. Relief Sought**

22. The Prosecution requests that Trial Chamber III impose restrictions on the use of confidential material for Defence investigations as outlined above.



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**Luis Moreno-Ocampo, Prosecutor**

Dated this 1<sup>st</sup> Day of June, 2010

At The Hague, The Netherlands

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<sup>42</sup> Protocol, items b) and c).