

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 11 June 2010

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**

Confidential

**Decision on the request from the defence in the *Katanga and Ngdujolo* case for
disclosure of transcripts in the *Lubanga* case**

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda
Mr Eric Macdonald

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Katanga**

Mr David Hooper
Mr Andreas O'Shea

**Counsel for the Defence for Mathieu
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Ms Catherine Mabilie
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Legal Representatives of the Victims

Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
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States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other
Trial Chamber II

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of The Prosecutor v. Thomas Lubanga Dyilo (“*Lubanga* case”), issues the following Decision on the request from the defence in the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (“*Katanga and Ngudjolo* case”) for disclosure of transcripts in the *Lubanga* case:¹

I. Background and Submissions

1. Disclosure of certain trial transcripts from the *Lubanga* case to the defence teams for Mr Germain Katanga and Mr Mathieu Ngudjolo Chui (“*Katanga and Ngudjolo* defence teams”) was raised by the Office of the Prosecutor (“prosecution”) with Trial Chamber I on 16 March 2010, and the Chamber asked the prosecution to file a formal application;² additionally, on 18 March 2010 counsel for Mr Katanga informed Trial Chamber I of an urgent request for disclosure of material from the *Lubanga* case, made in Trial Chamber II.³
2. In the event, counsel for Mr Katanga requests disclosure of non-redacted transcripts from the *Lubanga* trial regarding (1) the village of Bogoro or the UPC presence in Bogoro, and in particular attacks on Bogoro; (2) incriminating witnesses in the *Katanga and Ngudjolo* case; and (3) allegations relevant to the alleged corruption or manipulation of prosecution witnesses by intermediaries.⁴ It also requests that the defence teams in the *Lubanga* and *Katanga and Ngudjolo* cases are permitted to discuss the testimony of witnesses

¹ Defence request for the disclosure of Lubanga transcripts, 18 March 2010, ICC-01/04-01/06-2361-Conf-Exp (notified on 19 March 2010). The filing was notified to Trial Chamber I, Trial Chamber II, the prosecution and the defence teams of Mr Lubanga, Mr Katanga and Mr Ngudjolo Chui. After the Chamber obtained consent from the prosecution and the defence (Email communication between the legal advisor to the Trial Division, the prosecution and the defence on 22 and 23 March 2010), the Office of Public Counsel for Victims (“OPCV”) and the legal representatives team V02 in the Lubanga case were notified of the request on 24 March 2010.

² Transcript of hearing on 16 March 2010, ICC-01/04-01/06-T-263-CONF-ENG ET, page 34, line 24 – page 37, line 2.

³ ICC-01/04-01/06-2361-Conf-Exp.

⁴ ICC-01/04-01/06-2361-Conf-Exp, paragraph 9.

common to both cases.⁵ As set out above, a similar request has been submitted to Trial Chamber II.⁶

3. On behalf of Mr Katanga it is submitted that certain material is necessary for the preparation of the defence case; that the prosecution's disclosure obligations are not dependent on prompting by the defence; and that generally there have been delays in disclosure.⁷
4. The Chamber ordered the parties and participants to respond within abridged deadlines.⁸
5. On 25 March 2010, counsel for Mr Lubanga informed the Chamber that it does not object to disclosure of transcripts to the defence teams in the *Katanga and Ngudjolo* case, as requested by counsel for Mr Katanga.⁹
6. On 25 March 2010, the prosecution filed its response to the defence request.¹⁰ It submits that transcripts for the following witnesses are relevant to the Katanga defence : (1) witness DRC-OTP-WWWW-0007 ("Witness 7"); (2) witnesses DRC-V02-WWWW-0001 ("Witness V02-0001") and DRC-V02-WWWW-0002 ("Witness V02-0002") (victims a/0270/07 and a/0225/06, called by their legal representative); (3) witness DRC-D01-WWWW-0003 ("Witness D01-0003"); (4) witness DRC-OTP-WWWW-0046 ("Witness 46"); and (5) witness DRC-D01-WWWW-0025 ("Witness D01-0025").¹¹

⁵ The exchange of information on common witnesses by the defence teams in both cases was dealt with by the Chamber in an oral decision of 18 March 2010 (Transcript of hearing on 18 March 2010, ICC-01/04-01/06-T-265-CONF-Red-ENG ET, page 59, line 20 – page 64, line 10). Accordingly, the submissions by the parties and participants on this discrete issue are not rehearsed in this decision.

⁶ ICC-01/04-01/06-2361-Conf-Exp, paragraphs 3 and 9.

⁷ ICC-01/04-01/06-2361-Conf-Exp, paragraphs 2-8.

⁸ Email communication to the parties and participants from the Legal Advisor to the Trial Division on 24 March.

⁹ Email communication to the Trial Chamber through the Legal Advisor to the Trial Division on 25 March 2010.

¹⁰ Prosecution's Response to "URGENT Defence Request for the disclosure of Lubanga transcripts" [ICC-01/04-01/06-2361-Conf-Exp], 25 March 2010, ICC-01/04-01/06-2377-Conf-Exp.

¹¹ ICC-01/04-01/06-2377-Conf-Exp, paragraph 3.

7. The prosecution rehearsed the history of the requests for disclosure of transcripts relating to Witness 46 and particularly that Trial Chamber I authorized transmission of the relevant transcripts during an *ex parte* hearing on 11 March 2010,¹² and that disclosure (at the time of the filing) was only made subject to a pending application for protective measures, along with the conditions identified by the United Nations before Trial Chamber II.¹³

8. The prosecution does not object to the disclosure of the transcripts for the additional witnesses rehearsed above, provided the same levels of confidentiality and in-court protective measures as ordered by Trial Chamber I are applied in the *Katanga and Ngudjolo* case.¹⁴ It submits, however, that the views of the legal representatives of witnesses 7, V02-0001 and V02-0002 and the defence for witnesses D01-0003 and D01-0025, should be sought, particularly as to whether the identities of these witnesses ought to be disclosed to the defence in the *Katanga and Ngudjolo* case.¹⁵ In footnote 20 of its filing, the prosecution suggests that the information provided by Witness V02-0001 does not fall within the ambit of Article 67(2) of the Rome Statute ("Statute") or Rule 77 of the Rules of Procedure and Evidence ("Rules").

9. Addressing the request for permission for the defence teams in Trial Chambers I and II to discuss relevant issues whenever there are witnesses in common between the two trials, the prosecution observes that the Chamber has granted a similar request by counsel for Mr Lubanga.¹⁶ On that basis, the prosecution does not oppose the application,¹⁷ although it requests that the

¹² Transcript of hearing on 11 March 2010, ICC-01/04-01/06-T-260-CONF-EXP ET. The oral ruling was provided to the defence teams in the *Katanga and Ngudjolo* case on 25 March 2010 and the transcript was reclassified as public on 27 April 2010.

¹³ ICC-01/04-01/06-2377-Conf-Exp, paragraphs 5-8.

¹⁴ ICC-01/04-01/06-2377-Conf-Exp, paragraph 11.

¹⁵ ICC-01/04-01/06-2377-Conf-Exp, paragraph 11.

¹⁶ ICC-01/04-01/06-2377-Conf-Exp, paragraph 12. The oral ruling was delivered confidentially on 18 March 2010 (Transcript of hearing on 18 March 2010, ICC-01/04-01/06-265-CONF-Red-ENG ET, page 59, line 20 – page 64, line 17). The decision was notified to the defence teams in the *Katanga and Ngudjolo* case on 23 March 2010 (Email communication to the defence from the Legal Advisor to the Trial Division on 23 March 2010).

¹⁷ ICC-01/04-01/06-2377-Conf-Exp, paragraph 12.

same protective measures are applied by Trial Chamber II and that the defence is reminded of its confidentiality obligations under Article 8 of the Code of Professional Conduct for counsel ("Code of Conduct").¹⁸ The scope of this obligation was dealt with by the Chamber in an oral ruling of 6 May 2010,¹⁹ and accordingly the submissions on this discrete issue are not rehearsed in this decision.

10. On 29 March 2010, in her capacity as legal representative of dual status Witness 7, principal counsel of the Office of Public Counsel for Victims ("OPCV") set out her opposition to the application.²⁰ It is suggested that there are restrictions to the prosecution's disclosure obligations,²¹ and that confidential information in one case should not be disclosed in another without review and, if necessary, the implementation of protective measures.²² Counsel relies on Trial Chamber I's approach to protective measures, along with jurisprudence from the Appeals Division, the *ad hoc* tribunals and the European Court of Human Rights.²³

11. In relation to prosecution Witness 7, principal counsel submits that the relevant information on Bogoro provided by this witness is available, effectively in its entirety, in the public transcripts of 17 and 18 March 2009.²⁴ Counsel notes that a single redaction, implemented to protect the identity of the witness, does not affect the usability of the information, particularly as regards the attacks on Bogoro. In any event, it is suggested the protected name is that of a UPC, as opposed to an FNI, commander.²⁵ Counsel complains that

¹⁸ ICC-01/04-01/06-2377-Conf-Exp, paragraph 13.

¹⁹ Transcript of hearing on 18 March 2010, ICC-01/04-01/06-T-265-CONF-Red-ENG ET, page 59, line 20 – page 64, line 10.

²⁰ Réponse du Bureau du conseil public pour les victimes en tant que Représentant légal à la "Defence Request for the disclosure of Lubanga transcripts" datée du 18 mars 2010, 29 March 2010, ICC-01/04-01/06-2380-Conf-Exp, paragraph 31.

²¹ ICC-01/04-01/06-2380-Conf-Exp, paragraph 7.

²² ICC-01/04-01/06-2380-Conf-Exp, paragraphs 17 - 19.

²³ ICC-01/04-01/06-2380-Conf-Exp, paragraphs 7 - 22.

²⁴ ICC-01/04-01/06-2380-Conf-Exp, paragraph 28.

²⁵ ICC-01/04-01/06-2380-Conf-Exp, paragraphs 28 and 29.

the defence is requesting disclosure of transcripts in their entirety as opposed to the relevant parts.²⁶

12. On 29 March 2010, the defence team for Mr Ngudjolo formally adopted the request submitted by his co-accused.²⁷

13. On 29 March 2010, the team of legal representatives V02, representing two dual status witnesses, indicated that it supports disclosure of transcripts relating to Bogoro to the accused in Trial Chamber II, subject to protective measures that include the non-disclosure of the identities of the prosecution witnesses, intermediaries, the victims and their respective addresses.²⁸ It is noted that the victims affected by this request are prosecution witnesses represented in the *Katanga and Ngudjolo* case by a common legal representative; they have not been included in the Court's protection program; and they indicated in their applications to participate that their identities and addresses should be withheld from the defence in Trial Chamber II.²⁹ It is suggested that the transcripts should be disclosed subject to strict confidentiality obligations that include the non-communication of the protected information to the accused (i.e. the prosecution's interpretation of Article 8 of the Code of Conduct, as set out above, is adopted).³⁰

14. The legal representatives express particular concerns about the security position of one victim: prosecution witness DRC-OTP-WWWW-166.³¹

²⁶ ICC-01/04-01/06-2380-Conf-Exp, paragraph 30.

²⁷ Adjonction de la Défense de Mathieu Ngudjolo à la Requête ICC-01/04-01/06-2361-Conf-Exp introduite par l'Equipe de Défense de Germain Katanga le 19 mars 2010, 29 March 2010, ICC-01/04-01/06-2381-Conf-Exp.

²⁸ Réponse des représentants légaux de victimes du groupe V02 à la demande de communicatoïn de transcriptions d'audiences du procès Lubanga à la Défense de M. Germain Katanga, 29 March 2010, ICC-01/04-01/06-2382-Conf-Exp, paragraphs 7 – 9.

²⁹ ICC-01/04-01/06-2382-Conf-Exp, paragraphs 9 and 10.

³⁰ ICC-01/04-01/06-2382-Conf-Exp, paragraphs 7, 8 and 14.

³¹ ICC-01/04-01/06-2382-Conf-Exp, paragraphs 12 and 13.

15. In summary, the legal representatives request that (1) the relevant victims are included in the protection program before disclosure of the transcripts is effected; (2) the defence does not disclose the identities or the addresses of any prosecution witnesses who are also victims in the *Katanga and Ngudjolo* case to the accused or to any third parties; and (3) that the defence respects the confidentiality provisions of Article 8 of the Code of Conduct.³²

16. Finally, counsel for Mr Lubanga requests that redacted versions of all the filings are submitted, as the issue in question is one that potentially has a fundamental impact on the rights of the accused before the Court and as a result it should be discussed in public.³³

17. On 1 April 2010, the Chamber issued the following interim order:³⁴

Interim Order of Trial Chamber I

1. This Order, transmitted on account of its urgency by the Legal Adviser to the Division via email to the parties and participants, addresses the **Urgent Defence Request for the disclosure of Lubanga transcripts, 18 March 2010, 2361-Conf-Exp**. The relevant related filings are 2377-Conf-Exp; 2378-Conf-Exp; 2380-Conf-Exp; 2381-Conf-Exp; and 2382-Conf-Exp/2386-Conf-Exp.
2. In essence Mr Katanga's defence team (supported by that of Mr Ngudjolo: 2381-Conf-Exp) (Trial Chamber II) requests disclosure of certain non-redacted transcripts from the Lubanga trial, namely those that contain references to (1) the village of Bogoro or to the UPC presence in Bogoro, and in particular to any attacks on Bogoro; (2) any of the "incriminating" witnesses in the Katanga case; and (3) allegations relating to the corruption or manipulation of prosecution witnesses by prosecution intermediaries. (2361-Conf-Exp, paragraph 9)
3. This order addresses (1) and (2) above; (3) (intermediaries) will be the subject of a separate order and a separate Decision.
4. The relevant transcripts for (1) and (2) are those that relate to:

³² ICC-01/04-01/06-2382-Conf-Exp, paragraph 15.

³³ ICC-01/04-01/06-2386-Conf-Exp, paragraph 10.

³⁴ Email communication to the parties and participants from the Trial Chamber through the Legal Advisor to the Trial Division on 1 April 2010. On instruction from the Chamber, the Victims and Witness Unit ("VWU") was granted access to filings ICC-01/04-01/06-2361-Conf-Exp, ICC-01/04-01/06-2377-Conf-Exp, ICC-01/04-01/06-2378-Conf-Exp, ICC-01/04-01/06-2378-Conf-Exp, ICC-01/04-01/06-2380-Conf-Exp, ICC-01/04-01/06-2381-Conf-Exp, ICC-01/04-01/06-2382-Conf-Exp, and ICC-01/04-01/06-2386-Conf-Exp on 16 April 2010.

1. Prosecution witnesses 7 and 46;
 2. Dual status witnesses V02-0001 and V02-0002 (also referred to by the numbers a/0270/07 and a/0225/06); and
 3. Defence witnesses D01-0003 and D01-0025.
-
5. The prosecution and the defence do not object to disclosure of any of this material, provided (in the submission of the prosecution) Trial Chamber II applies, at the minimum, the same confidentiality and protective measures for the relevant individuals affected as ordered by Trial Chamber I (2377-Conf-Exp from the prosecution and email communication from the defence to the Chamber through the legal adviser to the trial division, dated 25 March 2010).
 6. The victims' representatives for dual status witnesses concerned by this application (save for principal counsel for the OPCV), submit that the relevant victims should be included in the court's protection programme, and that in any event their identities and addresses should not be disclosed to the accused before Trial Chamber II or third parties (2382-Conf-Exp).
 7. Principal Counsel for the OPCV submits that [...] it suffices to disclose the redacted transcripts relevant for prosecution witness 7. (2380-Conf-Exp)
 8. The Chamber notes that it has already authorized disclosure of the closed session transcripts relating to prosecution witness 46 on 11 March 2010, subject to Trial Chamber II authorizing the protective measures as requested (T-260-CONF-EXP, pages 1-7).
 9. The **interim order** of Trial Chamber I is:
 - a) the relevant transcripts are to be provided in non-redacted form to the two accused before Trial Chamber II, save that the names and other identifying material of the dual status witnesses and any other individuals for whom there are sustainable security concerns are to be redacted, until:
 - i) the VWU has reported to Trial Chamber I on the security implications of disclosing the identities of these dual status witnesses and any other individual for whom there are sustainable security concerns to the accused before Trial Chamber II, and whether their safety can be sufficiently ensured by protective measures, such as inclusion in the Court's protection programme.
 - ii) Trial Chamber I has ruled, following receipt of the VWU's report, on whether it is appropriate to order disclosure of the non-redacted transcripts to the accused before Trial Chamber II.
 - b) The redacted transcripts are to be prepared for disclosure by the prosecution in consultation with the relevant legal representatives of victims, and the transcripts in their proposed form (the suggested redacted portions are to be

indicated by way of coloured "highlights") are to be submitted to the legal adviser to the Trial Division for the Chamber's approval, and to the VWU, no later than 16.00 on 7 April 2010.

- c) The VWU is to indicate to Trial Chamber I (by email directly to the legal adviser to the Trial Division) by 16.00 on 9 April 2010 as to the length of time it will take to complete the security review for those individuals whose identities have been redacted.

18. The deadlines for the submission of redaction proposals by the prosecution and the indication from the Victims and Witness Unit ("VWU") as to the length of time it will take to complete the security review were subsequently extended to 12 and 14 April 2010 respectively.³⁵

19. On 12 April 2010, after consultation with the legal representatives, the prosecution submitted its redaction proposals for the transcripts relating to witnesses 7, D01-0025, V02-0001 and V02-0002. The prosecution noted that the testimony of Witness D01-0003 does not fall within the ambit of the interim order as it does not contain references to Bogoro or the incriminating witnesses in the *Katanga and Ngudjolo* case.³⁶ The Chamber approved the redaction proposals on a preliminary basis and ordered disclosure to the *Katanga and Ngudjolo* defence teams, noting that the extent of the redactions will need to be reviewed in the course of the security assessment.³⁷

20. On 15 April 2010,³⁸ the VWU proposed a schedule for the security assessment that, following approval by the Chamber,³⁹ led to the submission of a detailed

³⁵ Email communication to the parties and participants from the Legal Advisor to the Trial Division on 1 April 2010.

³⁶ Email communication to the Trial Chamber through the Legal Advisor to the Trial Division on 12 April 2010.

³⁷ Email communication to the parties and participants from the Legal Advisor to the Trial Division on 15 April 2010.

³⁸ Email communication to the Trial Chamber through the Legal Advisor to the Trial Division on 15 April 2010. The original deadline of 14 April 2010 was extended by one day on request of the VWU (Email communication to the VWU through the Legal Advisor to the Trial Division on 14 April 2010).

³⁹ Email communication to the parties and participants from the Legal Advisor to the Trial Division on 15 April 2010.

security assessment for each affected individual on 4 May 2010.⁴⁰ The VWU notes that (save for the legal representative of Witness 7) notwithstanding a request, none of the parties or participants provided assistance.⁴¹ Information was, however, sought from the Detention Centre regarding the ability of the accused to access and share information relevant to the two sets of proceedings.⁴²

21. The VWU notes that for Witness 46, the disclosure of private session transcripts has already been effected, with protective measures as ordered by the Chamber. For Witness 7, the VWU submits that the current security arrangements are sufficient if his identity is disclosed in the *Katanga and Ngudjolo* case, and that the VWU will continue to monitor his security situation. The VWU submits that, in the absence of additional information, it would appear the current security arrangements in place for dual status witnesses V02-0001 (a/0270/07) and V02-0002 (A/0225/06) remain appropriate if their identities and evidence are disclosed in the *Katanga and Ngudjolo* case. The VWU maintains that the security situation should continue to be monitored by their legal representatives, and it is for them to draw any incidents or security concerns to the attention of the VWU. Similarly, the defence should continue to monitor the security situation of Witness D01-0003 and Witness D01-0025, for whom the current security arrangements also appear to be appropriate if their identities and testimonies are disclosed in the *Katanga and Ngudjolo* case.⁴³

II. Applicable Law

22. The Chamber has taken into consideration the following provisions:

⁴⁰ Email communication to the Trial Chamber through the Legal Advisor to the Trial Division on 4 May 2010. Initially, the deadline was set for 3 May 2010, but the Chamber granted an extension of one day on request of the VWU (Email communication to the VWU from the Legal Advisor to the Trial Division on 3 May 2010).

⁴¹ Email communication to the Trial Chamber through the Legal Advisor to the Trial Division on 4 May 2010.

⁴² Email communication to the Trial Chamber through the Legal Advisor to the Trial Division on 4 May 2010.

⁴³ Email communication to the Trial Chamber through the Legal Advisor to the Trial Division on 4 May 2010.

Article 64 of the Statute
Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

[...]

(c) Provide for the protection of confidential information;

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

(e) Provide for the protection of the accused, witnesses and victims; and

(f) Rule on any other relevant matters.

[...]

Article 67 of the Statute
Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

[...]

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

[...]

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 68 of the Statute
Protection of the victims and witnesses and their participation in the proceedings

[...]

1. The Court shall take the appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime in particular, but not limited to, where the crime involves sexual or gender violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[...]

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings

determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

[...]

Rule 77 of the Rules

Inspection of material in possession or control of the Prosecutor

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

Rule 81 of the Rules

Restrictions on disclosure

[...]

2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an *ex parte* basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

3. Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with those articles. When the disclosure of such information may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance.

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

[...]

Rule 84 of the Rules

Disclosure and additional evidence for trial

In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the disclosure of documents or

information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.

Rule 87 of the Rules Protective measures

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.
2. A motion or request under sub-rule 1 shall be governed by rule 134, provided that:
 - (a) Such a motion or request shall not be submitted *ex parte*;
 - (b) A request by a witness or by a victim or his or her legal representative, if any, shall be served on both the Prosecutor and the defence, each of whom shall have the opportunity to respond;
 - (c) A motion or request affecting a particular witness or a particular victim shall be served on that witness or victim or his or her legal representative, if any, in addition to the other party, each of whom shall have the opportunity to respond;
 - (d) When the Chamber proceeds on its own motion, notice and opportunity to respond shall be given to the Prosecutor and the defence, and to any witness or any victim or his or her legal representative, if any, who would be affected by such protective measure; and
 - (e) A motion or request may be filed under seal, and, if so filed, shall remain sealed until otherwise ordered by a Chamber. Responses to motions or requests filed under seal shall also be filed under seal.
3. A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*:
 - (a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;
 - (b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;
 - (c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;
 - (d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or
 - (e) That a Chamber conduct part of its proceedings in camera.

Rule 137 Record of the trial proceedings

[...]

2. A Trial Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist.

[...]

Regulation 23 bis of the Regulations of the Court

Filing of documents marked *ex parte*, under seal or confidential

1. Any document filed by the Registrar or a participant and marked "ex parte", "under seal" or "confidential", shall state the factual and legal basis for the chosen classification and, unless otherwise ordered by a Chamber, shall be treated according to that classification throughout the proceedings.
2. Unless otherwise ordered by a Chamber, any response, reply or other document referring to a document, decision or order marked "ex parte", "under seal" or "confidential" shall be filed with the same classification. If there are additional reasons why a response, reply or any other document filed by the Registrar or a participant should be classified "ex parte", "under seal", or "confidential", or reasons why the original document or other related documents should not be so classified, they shall be provided in the same document.
3. Where the basis for the classification no longer exists, whosoever instigated the classification, be it the Registrar or a participant, shall apply to the Chamber to reclassify the document. A Chamber may also re-classify a document upon request by any other participant or on its own motion. In the case of an application to vary a protective measure, regulation 42 shall apply.

[...]

Article 8 of the Code of Professional Conduct for counsel

Respect for professional secrecy and confidentiality

1. Counsel shall respect and actively exercise all care to ensure respect for professional secrecy and the confidentiality of information in accordance with the Statute, the Rules of Procedure and Evidence and the Regulations of the Court.
2. The relevant provisions referred to in paragraph 1 of this article include, *inter alia*, article 64, paragraph 6©, article 64, paragraph 7, article 67, paragraph 1(b), article 68, and article 72 of the Statute, rules 72, 73 and 81 of the Rules of Procedure and Evidence and regulation 97 of the Regulations of the Court. Counsel shall also comply with the relevant provisions of this Code and any order of the Court.
3. Counsel may only reveal the information protected under paragraphs 1 and 2 of this article to co-counsel, assistants and other staff working on the particular case to which the information relates and solely to enable the exercise of his or her functions in relation to that case.
4. Subject to paragraph 3 of this article, counsel may only disclose the information protected under paragraphs 1 and 2 of this article, where such disclosure is provided for by a particular provision of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court or this Code or where such disclosure is ordered by the Court. In particular, Counsel shall not reveal the identity of protected victims and witnesses, or any confidential information that may reveal their identity and whereabouts, unless he or she has been authorized to do so by an order of the Court.

III. Analysis and Conclusions

The suggested barrier between counsel and the accused they represent as regards certain disclosed information

23. In an oral decision delivered on 6 May 2010 the Chamber addressed the issue of whether there can be disclosure of protected information to defence counsel which is withheld from the accused.⁴⁴ It determined that the defence teams may exchange information on common witnesses (including the accused), as follows (but see also the previous oral ruling of 18 March 2010⁴⁵):

13. Accordingly, Article 8(3) of the Code of Professional Conduct for Counsel does not apply to restrict the information that can properly pass between the accused and his defence team. However, it has been recognised by counsel for Katanga and Lubanga that in exceptional circumstances restrictions may be appropriate, for instance if it is sufficiently demonstrated that an accused has been misusing confidential or protected information to intimidate witnesses or participating victims. As set out in the submissions of counsel, exceptions of this kind, although sparingly applied, are recognized in the Romano-Germanic and common law systems, as well as before the ad hoc tribunals. It would be inappropriate for the Chamber in the course of this decision to seek to delineate the circumstances when exceptions may properly be applied; instead, it will be for individual Chambers to resolve requests for a limitation on disclosure to the accused on a case-by-case basis.

14. It follows that the defence teams appearing before Trial Chambers I and II are entitled to discuss the testimony of the four common witnesses, providing all of the information received to the three accused, so long as they ensure that they do not discuss or exchange confidential information that has not been provided to the other team.⁴⁶

24. This Decision was notified to Trial Chamber II and the parties and participants in the *Katanga and Ngudjolo* case. The prosecution, pursuant to the oral ruling of 18 March 2010, provided redacted tables to defence counsel setting out the differences in disclosure between the two trials, on 24 March 2010.⁴⁷ These enable counsel to identify whether confidential information has been provided to the other team or teams.

⁴⁴ Transcript of hearing on 6 May 2010, ICC-01/04-01/06-T-282-CONF-ENG ET, page 1, line 13 – page 9, line 2.

⁴⁵ Transcript of hearing on 18 March 2010, ICC-01/04-01/06-T-265-CONF-Red-ENG ET, page 59, line 20 – page 64, line 10.

⁴⁶ Transcript of hearing on 6 May 2010, ICC-01/04-01/06-T-282-CONF-ENG ET, page 8, lines 6 – 25.

⁴⁷ Email communication to the Chamber through the Legal Advisor to the Trial Division on 30 March 2010.

25. This disposes of the submission that protected material provided to counsel should not be provided to the accused, given that no exceptional reasons have been advanced.

Disclosure of transcripts relating to Bogoro and any incriminating witnesses in the Katanga and Ngudjolo case

26. Counsel for Mr Katanga has indicated that disclosure of the transcripts set out above is necessary in order to facilitate the preparation of the defence case before Trial Chamber II. Concerns have been expressed by the prosecution as to certain aspects of the relevance of the evidence of V02-0001. The Chamber has reviewed this material and it considers that the transcripts are disclosable in the *Katanga and Ngudjolo* trial because the testimony of V02-0001 not only contains general references to clashes between the UPC and the FNI, but it is also closely related to the testimony of V02-0002. Additionally, it is not suggested that this information does not fall within the ambit of the prosecution disclosure obligations under Rule 77 of the Rules. At paragraph 2 of its Judgment on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008 of 11 July 2008, the Appeals Chamber determined that “[i]n rule 77 of the Rules of Procedure and Evidence, the term “material to the preparation of the defence” should be understood as referring to all objects that are relevant for the preparation of the defence.”⁴⁸

27. Although generally the Chamber cannot determine whether particular information or evidence in the present trial will be of relevance in another case, it seems likely that the information on Bogoro, and the witnesses who tend to incriminate the accused in the *Katanga and Ngudjolo* case will be material to the preparation of the defence in that trial (e.g. they may have a direct impact on the defence strategy), and as a result these transcripts in their

⁴⁸ ICC-01/04-01/6-1433.

entirety are disclosable under Rule 77 of the Rules (as defined by the Appeals Chamber).

28. Protective measures have already been authorized pursuant to Rule 87 of the Rules for some of the witnesses – or for individuals they referred to – resulting in non-disclosure to the public of the closed-session testimony now requested by counsel for Mr Katanga and Mr Ngudjolo. However, the reasons underlying the decision to withhold some of this information from the public still apply, notwithstanding the VWU's assessment that sufficient protective measures are in place to enable disclosure of the witnesses' identities to the defence teams in the *Katanga and Ngudjolo* case. Therefore, the parties and participants are to treat the transcripts of private or closed proceedings as confidential documents.

29. In an earlier decision dealing with the treatment of non-public information, the Chamber gave the following instructions:⁴⁹

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. For the purposes of this order, the term "public" includes all persons, governments, organisations, entities, associations and groups. It does not include the judges of the Court, members of the Registry, the Prosecutor and his representatives, the Accused, the defence team, victims granted the right to participate in the proceedings and their legal representatives.

⁴⁹ Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses., 3 June 2008, ICC-01/04-01/06-1372, paragraphs 12 and 13.

13. Any member of the legal teams of the prosecution, the defence or a participating victim shall, upon no longer being part of those teams, return all "non-public" material in their possession to the relevant person within the team.

This applies *mutatis mutandis* to the transcripts under consideration.⁵⁰

30. The Chamber notes that in accordance with its oral ruling of 11 March 2010, the transcripts relating to Witness 46 were provided to the defence teams in the *Katanga and Ngudjolo* case on 29 March 2010, with the protective measures ordered by the Chamber.⁵¹ It thus considers this element of the request is moot.

31. The redacted transcripts relating to witnesses 7, D01-0025, V02-0001 and V02-0002 were disclosed to the defence teams in the *Katanga and Ngudjolo* case in accordance with the Chamber's interim order of 1 April 2010, and subsequently the VWU has indicated that the protective measures currently in place for each of these individuals remain appropriate if their identities and evidence are disclosed to defence counsel in the *Katanga and Ngudjolo* case. Significantly, the parties and participants have not objected to this course. Thus, there is no justification for continuing to withhold their identities, and this particular information, as currently redacted, is to be provided forthwith.

32. The Chamber indicated in its preliminary approval of the redaction proposals submitted by the prosecution that the entirety of the redactions should be reviewed. Accordingly, if the parties or participants suggest that any other discrete redactions ought to be retained (*e.g.* to protect "third parties"), they are to liaise with the VWU within 4 days of notification of this Decision, providing detailed reasons to the Chamber within 7 days of notification of this

⁵⁰ The Chamber has considered Trial Chamber II's 'Protocol on investigations in relation to witnesses benefiting from protective measures' (ICC-01/04-01/07-2007-Anx1 endorsed by the 'Décision sur le "Protocole régissant les enquêtes concernant les témoins bénéficiant de mesures de protection"' of 26 April 2010, ICC-01/04-01/07-2047) and 'Décision sur la requête de la Défense de Germain Katanga relative à la communication et l'utilisation de photographies de témoins protégés, 31 May 2010, ICC-01/04-01/07-2148.

⁵¹ Email communication to the Chamber through the Legal Advisor of the Trial Division on 12 April 2010.

Decision. The non-redacted transcripts relating to witnesses 7, D01-0025, V02-0001 and V02-0002 are to be disclosed 7 days following notification of this Decision to defence counsel in the *Katanga and Ngudjolo* case, pursuant to Rule 77 of the Rules and under the same conditions as applied in the *Lubanga* case, save that any redactions referred to Trial Chamber I for resolution are to be maintained until they are resolved. However, as hitherto, the prosecution should seize Trial Chamber II of the issue and the request for an order for the same conditions as in the *Lubanga* case before the transcripts are released.

33. The Chamber reminds the prosecution of its disclosure obligations in both cases. This may apply particularly in the *Katanga and Ngudjolo* case to recent evidence given by certain witnesses called by the defence in the *Lubanga* case, such as DRC-D01-WWWW-0032, DRC-D01-WWWW-0033, DRC-D01-WWWW-0034 and DRC-D01-WWWW-0035, who referred to witnesses V02-0001 and V02-0002.

Disclosure of transcripts relating to intermediaries

34. As to the disclosure of transcripts relating to the alleged corruption or manipulation of prosecution witnesses by the intermediaries, in its Decision on Intermediaries of 12 May 2010, the Chamber indicated that in the *Lubanga* case, “[t]he precise role of the intermediaries (together with the manner in which they discharged their functions) has become an issue of major importance in this trial.”⁵² This Chamber is not in a position to evaluate whether this finding applies also to the *Katanga and Ngudjolo* case. However, given that certain intermediaries were used in both cases, potentially this issue, and the evidence relevant to it, may be material to the preparation of the defence for Mr Katanga and Mr Ngudjolo. This may apply especially to the

⁵² Decision on Intermediaries, 12 May 2010, ICC-01/04-01/06-2434-Conf-Exp, paragraph 135. A corrigendum was issued on 27 May 2010, ICC-01/04-01/06-2434-Conf-Exp-Corr. Redacted public and confidential versions were issued on 20 May 2010 (ICC-01/04-01/06-2434-Conf-Red; corrigendum of 27 May, ICC-01/04-01/06-2434-Conf-Red-Corr) and 31 May 2010 (ICC-01/04-01/06-2434-Red2) respectively.

evidence of witnesses D01-0003 and DRC-OTP-WWWW-0015. This addresses the prosecution's observation that the testimony of Witness D01-0003 does not fall within the ambit of the interim order: the latter decision did not address transcripts relevant to the issue of intermediaries, whereas the present decision addresses the defence application in its entirety.

35. This Chamber has considered Trial Chamber II's oral ruling of 7 June 2010, in which Trial Chamber II dealt, *inter alia*, with the disclosure of the identity of intermediary 143 to the *Katanga and Ngudjolo* defence teams.⁵³

Public filings

36. Several issues addressed in this decision are potentially of considerable relevance to the rights of the accused and the protection of victims and witnesses in proceedings before the Court and given their likely general importance, these matters should be addressed publicly. The filings relevant to this decision have been classified as confidential, *ex parte*, and notably the initial filing submitted by counsel for Mr Katanga does not include any factual or legal basis justifying this classification, as required by Regulation 23 *bis* of the Regulations of the Court.

37. Judge Pikis, in a separate opinion on an appeal before the Appeals Chamber, in the course of observing that the framework of the Rome Statute, including Article 67(1) of the Statute, establishes that proceedings should be transparent, put the matter as follows:⁵⁴

4. Rule 137 (2) of the Rules provides that a Trial Chamber "may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its nondisclosure no longer exist." [...] Rule 137 (2) of the Rules gives procedural expression to the duty of a Chamber to ensure the openness of the judicial process.

⁵³ Transcript of hearing on 7 June 2010, ICC-01/04-01/07-T-150-CONF-ENG ET, page 6, line 2 – page 10, line 16.

⁵⁴ Decision of the Appeals Chamber on the Unsealing of Documents, 4 February 2008, ICC-02/04-01/05-266, Separate opinion of Judge Georghios M. Pikis, paragraph 4.

The duty arises when the reasons for non-disclosure disappear. The word "may" does no more than reproduce the power of a Chamber to see that the judicial process is opened to the public. "May" in this context does not import discretion but gives expression to the obligation to do what is required by law. Asking the question whether in the absence of reasons justifying the continued withholding of the publication of proceedings the court has discretion to leave the seal intact, brings to the fore the mandatory nature of the power to make the proceedings public. Not to act would be a derogation from the duty to administer justice openly. The non-disclosure of oral and documentary evidence adduced before a Chamber would hide from view the judicial process in the absence of any reasons that could validate such a course. In those circumstances the departure from the norm of a public hearing can find no justification.

38. In all the circumstances, the relevant filings are to be re-classified as public.

IV. Orders

39. The Chamber orders as follows:

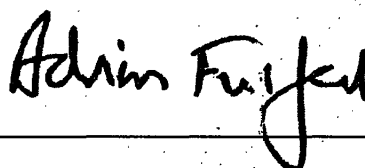
(i) The prosecution to disclose the identities of witnesses DRC-OTP-WWWW-0007, DRC-D01-WWWW-0025, DRC-V02-WWWW-0001 and DRC-V02-WWWW-0002 to the defence teams in the *Katanga and Ngudjolo* case forthwith under the same conditions as in the *Lubanga* case;

(ii) The non-redacted transcripts relating to witnesses DRC-OTP-WWWW-0007, DRC-D01-WWWW-0025, DRC-V02-WWWW-0001 and DRC-V02-WWWW-0002 are to be provided 7 days following notification of this Decision to defence counsel in the *Katanga and Ngudjolo* case, save that if the parties or participants suggest that any discrete redactions ought to be retained, they are to liaise with the VWU within 4 days of notification of this Decision, providing detailed reasons to the Chamber within 7 days of notification of this Decision. Any redactions referred to Trial Chamber I for resolution are to be maintained until they are resolved. However, as hitherto, the prosecution shall seize Trial Chamber II of the issue and the request for

an order for the same conditions as in the *Lubanga* case before the transcripts are released.

(iii) Filings ICC-01/04-01/06-2361-Conf-Exp, ICC-01/04-01/06-2377-Conf-Exp, ICC-01/04-01/06-2378-Conf-Exp, ICC-01/04-01/06-2380-Conf-Exp, ICC-01/04-01/06-2381-Conf-Exp, ICC-01/04-01/06-2382-Conf-Exp, ICC-01/04-01/06-2386-Conf-Exp are to be re-classified as public, pursuant to Rule 137(2) of the Rules and Regulation 23*bis* of the Regulations of the Court within 7 days of notification of this decision, unless a public-redacted version of the relevant document has been (or is) filed.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 11 June 2010

At The Hague, The Netherlands