

**Cour
Pénale
Internationale**



**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

Redacted Decision on the "Prosecution's request for non-disclosure of information in transcripts of the Lubanga case to defence in the *Katanga and Ngudjolo* case" and the "Joint Application for maintaining discrete redactions to transcripts of witness DRC-OTP-WWWW-0007"

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

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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*”), delivers the following decision (“Decision”) on the “Prosecution’s request for non-disclosure of information in transcripts of the *Lubanga case* to defence in the *Katanga and Ngudjolo case*”¹ and the “Joint Application for maintaining discrete redactions to transcripts of witness DRC-OTP-WWWW-0007” (“Joint Application”).²

Although the Chamber has stayed the proceedings, given that this Decision to a large extent only affects the work of Trial Chamber II, it is necessary to vary the stay to the extent of issuing the Orders herein which are to be implemented forthwith, subject to certain qualifications set out below, in order to facilitate work in the case against Mr Katanga and Mr Ngudjolo (“*Katanga and Ngudjolo case*”).

I. Background and Submissions

1. On 11 June 2010, the Chamber issued its “Decision on the request from the defence in the *Katanga and Ngudjolo case* for disclosure of transcripts in the *Lubanga case*”.³ This addressed an application from counsel for Mr Katanga, supported by counsel for Mr Ngudjolo, who requested, *inter alia*, 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. The Chamber ordered disclosure of the identities of several witnesses and notification of the relevant non-redacted transcripts

¹ Prosecution’s request for non-disclosure of information in transcripts of the *Lubanga case* to defence in the *Katanga and Ngudjolo case*, 18 June 2010, ICC-01/04-01/06-2495-Conf.

² Joint Application for maintaining discrete redactions to transcripts of witness DRC-OTP-WWWW-0007, 18 June 2010, ICC-01/04-01/06-2496-Conf.

³ Decision on the request from the defence in the *Katanga and Ngudjolo case* for disclosure of transcripts in the *Lubanga case*, 11 June 2010, ICC-01/04-01/06-2471-Conf. The decision was reclassified as public on the Chamber’s instructions of 16 July 2010.

to the defence teams in the *Katanga and Ngudjolo* case, under the same conditions as in the *Lubanga* case. It specified that if the parties or participants suggest that any discrete redactions ought to be retained, they are to liaise with the Victims and Witnesses Unit (“VWU”) and provide detailed reasons to the Chamber within 7 days of the decision.

Applications for redactions

2. On 18 June 2010, the Office of the Prosecutor (“prosecution”) requested limited redactions to transcript ICC-01/04-01/06-T-259-Conf (“T-259”) of 11 March 2010 relating to defence Witness DRC-D01-WWWW-0025 (“defence Witness 25”).⁴ In the course of his examination, defence Witness 25 had been questioned about prosecution Witness DRC-OTP-WWWW-0157 (“prosecution Witness 157”) and he mentioned a brother and his whereabouts.⁵ The prosecution now seeks to redact the brother’s first name and his current address in order to protect his safety. The prosecution submits that the name and location of the relative of prosecution Witness 157 is not relevant to the known issues in the *Katanga and Ngudjolo* case.⁶ It is argued that the redactions are not prejudicial to, or inconsistent with, the rights of the accused in the *Katanga and Ngudjolo* case as they do not affect the evidential value of the information in the transcript; the transcript remains intelligible and usable; and the defence is able to assess the relevant information.⁷ The prosecution relies on previous decisions authorizing redactions to names and identifying information for members of some witnesses’ families.⁸

3. In a second filing of 18 June 2010, the prosecution and the Office of Public Counsel for Victims (“OPCV”) jointly requested discrete redactions to the transcripts of Witness DRC-OTP-WWWW-0007 (“prosecution Witness 7”)

⁴ ICC-01/04-01/06-2495-Conf.

⁵ Transcript of hearing on 11 March 2010, ICC-01/04-01/06-T-259-CONF-ENG ET, page 13, line 17 *et seq.*

⁶ ICC-01/04-01/06-2495-Conf, paragraph 4.

⁷ ICC-01/04-01/06-2495-Conf, paragraph 7.

⁸ ICC-01/04-01/06-2495-Conf, paragraphs 5 and 6.

relating to (1) the name of a friend recruited with prosecution Witness 7; (2) the names of a relative of the witness; and (3) the whereabouts of the witness's relative.⁹ It is argued that the redactions will preserve the safety of two individuals who are irrelevant to the *Katanga and Ngudjolo* case, and who are currently residing in the Democratic Republic of the Congo ("DRC") where the security situation remains volatile.¹⁰ Moreover, the information has been held to be irrelevant to the defence in the *Katanga and Ngudjolo* case.¹¹

Responses

(1) *Transcript T-259 of 11 March 2010*

4. On 29 June 2010, counsel for Mr Lubanga filed a response resisting the prosecution's application for redactions to transcript T-259.¹² Counsel submits that the information which the prosecution seeks to protect is relevant to the defence, given it involves the age of prosecution Witness 157, and the relative's identity may assist the defence in exploring this issue with the witness.¹³ Counsel submits that the Chamber in the present case has invariably authorized questions about family members in similar circumstances, which will materially assist the Court in assessing the credibility of the witnesses.¹⁴ Moreover, Mr Lubanga's lawyers uncovered this information in the course of their investigations, and a defence witness referred to it in evidence.¹⁵ Accordingly, this history was not the result of disclosure of confidential information by the prosecution.¹⁶ Counsel argues that following the approach of this Chamber as regards the defence teams in the two trials sharing information, nothing should now prevent them discussing their research into the members of prosecution Witness 157's

⁹ ICC-01/04-01/06-2496-Conf. [REDACTED].

¹⁰ ICC-01/04-01/06-2496-Conf, paragraphs 6 and 7.

¹¹ ICC-01/04-01/06-2496-Conf, paragraph 7.

¹² Réponse de la Défense à la "Prosecution's request for non-disclosure of information in transcripts of the *Lubanga* case to defence in the *Katanga and Ngudjolo* case", déposée le 18 juin 2010, 29 June 2010, ICC-01/04-01/06-2508-Conf.

¹³ ICC-01/04-01/06-2508-Conf, paragraph 4.

¹⁴ ICC-01/04-01/06-2508-Conf, paragraph 4.

¹⁵ ICC-01/04-01/06-2508-Conf, paragraph 5.

¹⁶ ICC-01/04-01/06-2508-Conf, paragraph 5.

family, or from meeting with defence Witness 25 in order to obtain information directly from him.¹⁷ It is suggested it would therefore be artificial to redact this information at this late stage.¹⁸ Lastly, counsel notes that no reasons have been provided as to why disclosure would put this individual at risk, and accordingly it is argued that the redactions are unjustified.¹⁹

5. In his submissions of 28 June 2010, counsel for Mr Ngudjolo opposes redactions to the name and whereabouts of the relative of prosecution Witness 157.²⁰ It is argued that the information comes within Rule 77 of the Rules of Procedure and Evidence (“Rules”) and that there is no legal basis for the request since any potential danger to him that might justify non-disclosure has not been sufficiently identified.²¹
6. On 28 June 2010, counsel for Mr Katanga similarly opposed the prosecution’s request.²² Counsel notes that since the Chamber has ordered disclosure of the non-redacted transcripts, the prosecution must demonstrate that the redactions are necessary and justifiable on an exceptional basis, which, it is suggested, is not the case.²³ Prosecution Witness 157 is also a witness in the *Katanga and Ngudjolo* proceedings and counsel submits that the defence has a clear interest in contacting him to investigate certain aspects of his testimony, including his identity.²⁴ It is argued that identity has become a significant issue in the *Katanga and Ngudjolo* case and, accordingly, disclosure will greatly facilitate defence investigations.²⁵ It is suggested the identifying details of

¹⁷ ICC-01/04-01/06-2508-Conf, paragraphs 6 and 7.

¹⁸ ICC-01/04-01/06-2508-Conf, paragraph 8.

¹⁹ ICC-01/04-01/06-2508-Conf, paragraph 9.

²⁰ Réponse de la Défense de Mathieu Ngudjolo à la “Prosecution’s request for non-disclosure of information in transcripts of the *Lubanga* case to defence in the *Katanga and Ngudjolo* case”-ICC-01/04-01/06-2495-Conf, 28 June 2010, ICC-01/04-01/06-2505-Conf.

²¹ ICC-01/04-01/06-2505-Conf, paragraphs 8 – 10.

²² Response on behalf of Germain Katanga to Prosecution’s requests for redaction of Lubanga case transcripts and the Joint Application for maintaining discrete redactions to transcripts of witness DRC-OTP-WWWW-0007, 28 June 2010, ICC-01/04-01/06-2507-Conf.

²³ ICC-01/04-01/06-2507-Conf, paragraphs 6 – 9.

²⁴ ICC-01/04-01/06-2507-Conf, paragraphs 15 and 16.

²⁵ ICC-01/04-01/06-2507-Conf, paragraphs 16 and 17.

family members of other prosecution witnesses have proved to be essential for preparing cross-examination and there is no evidence that this has led to intimidation or that the individuals concerned have been put at risk following disclosure to the defence teams.²⁶ Counsel submits that disclosure of the identity of the relative of prosecution Witness 157 will not put him at risk, given the defence confidentiality obligations and the protocol approved by Trial Chamber II restricting disclosure of the names of prosecution witnesses.²⁷

(2) *Relating to transcripts of prosecution Witness 7*

7. On 23 June 2010, counsel for Mr Lubanga opposed the Joint Application.²⁸ It is argued that the identity of prosecution Witness 7's relative and the names of two localities where the witness and his relative allegedly went to school are necessary to facilitate preparation of the defence in the *Katanga and Ngudjolo* case. The information relates to the conduct of intermediary 143, which is covered by the Chamber's Decision and falls within the scope of the statutory disclosure obligations of the prosecution.²⁹ Moreover, the information will enable the defence to identify discrepancies in the disclosed evidence, and it is relevant to the credibility of the witness.³⁰ Counsel for Mr Lubanga contests the claim made by the prosecution and OPCV, that the redactions are necessary to protect this individual, as he has been placed in the Court's protection program.³¹ Counsel also opposes the redaction to the identity of prosecution Witness 7's friend. Given the prosecutions' submission that this individual lives in the DRC, where the security situation is still volatile, counsel for Mr Lubanga suggests that the prosecution appears to have additional information in its possession, since prosecution Witness 7 only

²⁶ ICC-01/04-01/06-2507-Conf, paragraph 12.

²⁷ ICC-01/04-01/06-2507-Conf, paragraphs 13, 14 and 18.

²⁸ Réponse de la Défense à la "Joint Application for maintaining discrete redactions to transcripts of witness DRC-OTP-WWWW-0007", déposée le 18 juin 2010, 23 June 2010, ICC-01/04-01/06-2502-Conf.

²⁹ ICC-01/04-01/06-2502-Conf, paragraphs 4, 5 and 16 – 18.

³⁰ ICC-01/04-01/06-2502-Conf, paragraphs 8 – 10.

³¹ ICC-01/04-01/06-2502-Conf, paragraph 12.

identified the individual by his first name.³² Counsel also notes that a general reference to the security situation in the DRC does not justify the redaction.³³ It is submitted that the information is necessary to prepare the defence, and an order is sought from the Chamber that the prosecution discloses to the three defence teams all the outstanding relevant information regarding the friend of prosecution Witness 7, save for his current address.³⁴

8. Finally, counsel for Mr Lubanga requests that this response is notified to the defence teams in the *Katanga and Ngudjolo* case, should the Chamber uphold the defence application.³⁵

9. In submissions filed on 28 June 2010, counsel for Mr Ngudjolo opposed the redactions sought by the prosecution and the OPCV for transcripts relating to prosecution Witness 7.³⁶ As to transcript T-259, it is argued that there are no grounds for the request.³⁷ Counsel submits that the information is necessary to test the credibility of the witness, and it is suggested that it is for defence counsel to assess whether information is relevant to the accused's case.³⁸

10. In submissions on 28 June 2010, partially addressed above, counsel for Mr Katanga objects to the redactions sought in the Joint Application from the prosecution and the OPCV on the same grounds as he objects to the redactions sought for transcript T-259.³⁹ Counsel additionally indicates that the defence has an interest in the names of the relative and friend of prosecution Witness 7. Although the latter is not a witness in the *Katanga and Ngudjolo* case, he was at Bogoro and the information could, for instance, be

³² ICC-01/04-01/06-2502-Conf, paragraph 14.

³³ ICC-01/04-01/06-2502-Conf, paragraph 15.

³⁴ ICC-01/04-01/06-2502-Conf, paragraph 14.

³⁵ ICC-01/04-01/06-2502-Conf, paragraph 19.

³⁶ Réponse de la Défense de Mathieu Ngudjolo à la "Joint Application for maintaining discrete redactions to transcripts of witness DRC-OTP-WWWW-0007", 28 June 2010, ICC-01/04-01/06-2506-Conf.

³⁷ ICC-01/04-01/06-2506-Conf, paragraph 8.

³⁸ ICC-01/04-01/06-2506-Conf, paragraphs 9 and 10.

³⁹ ICC-01/04-01/06-2507-Conf.

useful when examining the evidence of other witnesses.⁴⁰ Potentially, he may even become a potential defence witness.⁴¹ Counsel submits that for this information to be of use, it is crucial that the defence is able to use it to verify the reliability of this witness's evidence and his credibility, and thus it needs to be able to contact prosecution Witness 7's friend and relative.⁴² Disclosure of their identities may help to establish the truth of his identity.⁴³ Defence counsel requests immediate disclosure of the non-redacted transcripts relating to defence Witness 25, prosecution Witness 7 and victim Witnesses DRC-V02-WWWW-0001 ("victim Witness 1") and DRC-V02-WWWW-0002 ("victim Witness 2").

II. Applicable law and relevant decisions

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

Article 54 of the Statute

Duties and powers of the Prosecutor with respect to investigations

[...]

3. The Prosecutor may:

[...]

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

Article 64 of the Statute

Functions and powers of the Trial Chamber

[...]

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

[...]

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

(f) Rule on any other relevant matters.

⁴⁰ ICC-01/04-01/06-2507-Conf, paragraph 18.

⁴¹ ICC-01/04-01/06-2507-Conf, paragraph 18.

⁴² ICC-01/04-01/06-2507-Conf, paragraph 18.

⁴³ ICC-01/04-01/06-2507-Conf, paragraph 18.

[...]

Article 67 of the Statute

Rights of the accused

[...]

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.

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

[...]

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

[...]

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 137 of the Rules

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.

[...]

12. In the present case, the Appeals Chamber held that "[...] three of the most important considerations for an authorisation of non-disclosure of the identity of a witness pursuant to rule 81 (4) of the Rules of Procedure and Evidence [are]: the endangerment of the witness or of members of his or her family that the disclosure of the identity of the witness may cause; the necessity of the protective measure; and why [...] the measure would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."⁴⁴ The Appeals Chamber emphasised that this should include an examination of whether less restrictive protective measures are sufficient and feasible.⁴⁵

13. The Appeals Chamber held in the *Katanga and Ngudjolo* case that "Rule 81(4) of the Rules [...] should be read to include the words "persons at risk on

⁴⁴ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, 14 December 2006, ICC-01/04-01/06-773, paragraph 21; See also Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, paragraph 67.

⁴⁵ ICC-01/04-01/06-773, paragraph 33.

account of the activities of the Court” so as to reflect the intention of the States that adopted the Rome Statute and the Rules [...], as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect that category of persons.”⁴⁶ The Appeals Chamber emphasised that non-disclosure of information for the protection of persons at risk on account of the activities of the Court requires “a careful assessment [...] on a case by case basis, with specific regard to the rights of the [accused].”⁴⁷

14. Although the relevant decisions of the Appeals Chamber relate to restrictions on disclosure in the context of the confirmation of charges, and, therefore, are strictly not binding during the trial phase, the Chamber is of the view that the principles outlined are generally of high relevance to proceedings before the Trial Chamber. Therefore, the Chamber’s responsibility under Article 64(6)(e) to “[p]rovide for the protection of the accused, witnesses and victims” includes providing protection for all those at risk in the context of this trial on account of the activities of the Court.⁴⁸

III. Analysis and Conclusions

15. Applying the test established by the Appeals Chamber, and in line with its previous decisions on redactions, the Chamber has considered the need for these protective measures, the availability of alternatives, and, generally, the overall impact of the various options on the transcripts in question and, in consequence, on the rights of the accused.

16. The Chamber repeats its view that, generally, the Chamber cannot determine whether particular information or evidence in the present trial will be of

⁴⁶ ICC-01/04-01/07-475, paragraph 1.

⁴⁷ ICC-01/04-01/07-475, paragraph 2.

⁴⁸ Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" of 5 December 2008, 9 April 2009, ICC-01/04-01/06-1814-Conf, and public redacted version, ICC-01/04-01/06-1924-Anx2, 2 June 2009, paragraph 34.

relevance in another case. However, it is likely that if a witness, common to both cases, provides information that is of relevance to the defence in the *Lubanga* trial, any information that allows the assessment of his credibility will be relevant across the trials. Moreover, as the Chamber previously noted in its Decision of 11 June 2010, given certain intermediaries were used in both cases, evidence that is relevant to this issue may be material for the preparation of the defence in Trial Chambers I and II under Rule 77 of the Rules, especially since the accused in the *Katanga and Ngudjolo* case have expressly requested this information.

17. Although the proposed redactions to the transcripts are very limited, leaving them generally intelligible and useable, they nonetheless include information that may have an impact on the effective use of the individual transcripts, thereby causing prejudice to the accused in the *Katanga and Ngudjolo* case. The details supporting this general observation are set out below.

Transcript T-259

18. Addressing the redactions that are sought by the prosecution to the identity and whereabouts of prosecution Witness 157's relative (who was mentioned during the examination of defence Witness 25 in transcript T-259 of 11 March 2010), it is central to this analysis that prosecution Witness 157 is a witness common to both cases, and the defence has suggested that questions of identity are as equally relevant in the *Katanga and Ngudjolo* case, as they are in the *Lubanga* case.
19. Although the prosecution has not indicated whether Trial Chamber II has found it necessary to protect this (or any) family member of prosecution Witness 157 or how the VWU responded to its redaction proposals, the Chamber notes that Trial Chamber II, in its decision ICC-01/04-01/07-1551-Conf-Exp of 22 October 2009, authorized the prosecution to lift redactions to

the names and addresses of other family members of prosecution Witness 157, as set out in the witness's statement.⁴⁹

20. Given the prosecution has not provided any reasons why this particular member of prosecution Witness 157's family would be at risk if his identity and whereabouts are disclosed to the defence teams in the *Katanga and Ngudjolo* case, the Chamber is not persuaded that the redactions are justified. The burden is on the prosecution and it has failed to discharge it. Pursuant to Article 64(6)(f) of the Statute, the Chamber refuses the application to maintain the discrete redactions, as identified by the prosecution in transcript T-259, and orders immediate disclosure of the non-redacted transcript of 11 March 2009 to the defence teams in the *Katanga and Ngudjolo* case.

Prosecution Witness 7's relative

21. The Chamber is equally unpersuaded that the redactions relating to the member of prosecution Witness 7's family are necessary to ensure his security. Given that he is in the Court's protection program, a factor not mentioned by the prosecution and the OPCV in their joint filing, and the absence of an indication as to whether the VWU supports the redaction proposals, no basis has been provided for concluding that his identity and the two locations in question will create a risk if they are disclosed to the defence teams in the *Katanga and Ngudjolo* case.

22. Bearing in mind the apparent lack of grounds justifying the proposed non-disclosure of this information relating to the relative of prosecution Witness 7, pursuant to Article 64(6)(f) of the Statute the Chamber refuses the application to maintain the redactions, and orders its immediate disclosure to the defence teams in the *Katanga and Ngudjolo* case.

⁴⁹ Version publique expurgée de "la Décision relative à la levée, au maintien et au prononcé de mesures d'expurgations" du 22 Octobre 2009 (ICC-01/04-01/07-1551-Conf-Exp), 28 October 2009, ICC-01/04-01/07-1551-Red2, paragraphs 10 and 12.

Prosecution Witness 7's friend

23. Turning to the redactions that are sought to the identity of the friend of prosecution Witness 7, the Chamber is not persuaded that disclosure of his identity to the defence teams in the *Katanga and Ngudjolo* case will endanger his security. Although the Appeals Chamber in its decision of 13 May 2008 held that Rule 81(4) of the Rules should be read to include the words “persons at risk on account of the activities of the Court”, it also emphasised that non-disclosure requires careful assessment on a case by case basis, with specific regard to the rights of the accused.⁵⁰ This assessment is not possible in this instance, given the lack of information provided by the prosecution and the OPCV; instead they have merely referred to the volatile security situation in the DRC, which is an insufficient basis for the proposed order. The Appeals Chamber has established that when considering requests for redactions the relevant Chambers “must identify which facts it found to be relevant in coming to its conclusion”. Consistently, it has ruled that a general reference to “the security situation in some parts of the Democratic Republic of Congo [...] without clarifying the factors which it considered relevant for the protection of witnesses”⁵¹ denies the appellant “knowledge of the facts relied upon by the Pre Trial Chamber for its decision”.⁵² Moreover, although the Chamber has not been provided with information that will assist in determining the relevance of the identity of prosecution Witness 7's friend in the *Katanga and Ngudjolo* case, it is persuaded by the submission that his identity is, *prima facie*, material to the credibility of prosecution Witness 7. Therefore, in the absence of any justification for this redaction, the Chamber orders immediate disclosure of his identity pursuant to Article 64(6)(f) of the Statute.

⁵⁰ ICC-01/04-01/07-475, paragraphs 2 and 56.

⁵¹ ICC-01/04-01/06-773, paragraph 21.

⁵² *Ibid.*

Information on prosecution Witness 7's friend

24. The defence requests disclosure of all the information relevant to this individual, save for details as to his current address, on the basis that it is relevant to trial preparation. Given the context in which his name was provided, the Chamber is persuaded that he may assist in throwing light on the circumstances of prosecution Witness 7's arrest by UPC soldiers, and his identity may assist in evaluating the credibility of this and other witnesses. If the stay of proceedings is lifted hereafter, the Chamber orders the prosecution immediately to disclose any further relevant information on this individual in its possession to the defence team in the *Lubanga* case under Article 67(2) of the Statute and Rule 77 of the Rules, save for details relating to his current address.

Confidentiality obligations

25. The non-redacted transcripts considered above are to be disclosed to the defence teams in the *Katanga and Ngudjolo* case immediately. As decided in Decision 2471 of 11 June 2010, the prosecution is to seize Trial Chamber II with this issue, including the request from Trial Chamber I for an order for the same conditions to be applied as in the *Lubanga* case before the transcripts are released. The relevant conditions are described in paragraph 29 of the above decision.

Notification of the defence response 2502-Conf

26. Given that the Chamber has not granted the requested redactions, and instead has ordered disclosure of this information to the defence teams in the *Katanga and Ngudjolo* case, the Chamber authorizes notification of the *Lubanga* defence response of 24 June 2010 to the defence teams in the *Katanga and Ngudjolo* case under Rule 137 of the Rules and Regulation 23 *bis* of the Regulations of the Court.

IV. Orders

27. The Chamber therefore:
- (a) Refuses the prosecution's application for redactions to transcript T-259;
 - (b) Refuses the Joint Application for redactions in transcripts relevant to prosecution Witness 7;
 - (c) Orders immediate disclosure of the non-redacted transcript T-259 and those relating to prosecution Witness 7 (ICC-01/04-01/06-T-148-CONF; ICC-01/04-01/06-T-149-CONF; ICC-01/04-01/06-T-150-CONF) to the defence teams in the *Katanga and Ngudjolo* case and instructs the prosecution to request an order from Trial Chamber II for the same conditions as in the *Lubanga* case before the transcripts are released;
 - (d) Orders the prosecution to disclose to Mr Lubanga any other relevant information under Article 67(2) of the Statute and Rule 77 of the Rules it may have in its possession concerning the friend of Witness 7, save for his current address, as set out in paragraph 24. This order is to be effected immediately if the stay is lifted.
 - (e) Instructs the Registry to notify filing ICC-01/04-01/06-2502-Conf to the defence teams in the *Katanga and Ngudjolo* case.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 11 November 2010

At The Hague, The Netherlands