

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/04-02/06  
Date: 12 December 2014

**TRIAL CHAMBER VI**

**Before: Judge Robert Fremr, Presiding Judge  
Judge Kuniko Ozaki  
Judge Geoffrey Henderson**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF  
*THE PROSECUTOR v. BOSCO NTAGANDA***

**Public  
with public Annex A**

**Decision on the Protocol establishing a redaction regime**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart  
Ms Nicole Samson

**Counsel for Bosco Ntaganda**

Mr Stéphane Bourgon  
Mr Luc Boutin

**Legal Representatives of Victims**

Ms Sarah Pellet  
Mr Dmytro Suprun

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber VI** ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 54(3), 64(2), (3) and (6)(c), 67 and 68 of the Rome Statute ('Statute'), Rules 76 to 79, 81, 82, 84 and 87 of the Rules of Procedure and Evidence ('Rules') and Regulation 42 of the Regulations of the Court ('Regulations'), issues the following 'Decision on the Protocol establishing a redaction regime'.

### **I. Procedural history and submissions**

1. On 21 July 2014, the Chamber issued its 'Order Scheduling a Status Conference and Setting a Provisional Agenda',<sup>1</sup> whereby it invited the parties to make written submissions by 14 August 2014 on, *inter alia*, the timing, volume and modalities of disclosure of evidence pursuant to Rule 76 of the Rules, and the material already disclosed and intended to be disclosed by the Office of the Prosecutor ('Prosecution') pursuant to Article 67(2) of the Statute and Rule 77 of the Rules.
2. On 14 August 2014, in its submissions on the provisional agenda, the Prosecution submitted two lists of items it intends to include in its List of Incriminating Evidence: one with respect to which redactions or other protective measures will be required and one with respect to which redactions previously authorised, either by Pre-Trial Chamber II or Trial Chamber I in the context of *The Prosecutor v. Thomas Lubanga Dyilo* case ('Lubanga case'), need to be maintained under Regulation 42(2) of the Regulations.<sup>2</sup> In order to expedite the disclosure process, the Prosecution further indicated that it intended to submit, to the defence team of Mr Ntaganda ('Defence') and the Chamber, a modified version of the redaction protocols adopted by Trial

<sup>1</sup> Order Scheduling a Status Conference and Setting a Provisional Agenda, 21 July 2014, ICC-01/04-02/06-339.

<sup>2</sup> Prosecution's Submissions on the Provisional Agenda for the 20 August 2104 Status Conference, 14 August 2014, ICC-01/04-02/06-352, paras 14-19 and annexes A and B. *See also*, Order Scheduling a Status Conference and Setting a Provisional Agenda, 21 July 2014, ICC-01/04-02/06-339, para. 8.

Chamber V in the *The Prosecutor v. Uhuru Kenyatta* and *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* cases ('Kenya Protocols').<sup>3</sup>

3. On 11 September 2014, the Chamber convened a first status conference, during which the parties informed the Chamber that they had engaged in preliminary consultations with a view to establishing a redaction protocol.<sup>4</sup>
4. On 9 October 2014, the Chamber issued its 'Order Scheduling a Status Conference and Setting the Commencement Date for the Trial' ('Order of 9 October 2014'), whereby it scheduled a second status conference for 17 October 2014 and ordered the parties to file written submissions on the protocols to be agreed upon in this case. In this regard, it instructed them to focus first on a protocol pertaining to redactions, as it considered that such a protocol 'may facilitate consistent and efficient disclosure'.<sup>5</sup>
5. On 14 October 2014, in their written submissions in preparation for the second status conference, both parties indicated that they intended to meet prior to the hearing in order to discuss the content of a future protocol establishing a redaction regime and that they would advise the Chamber of the progress they have made during the scheduled status conference.<sup>6</sup>
6. During the second status conference held on 17 October 2014, the Chamber invited the parties to use the Kenya Protocols as a starting point when

<sup>3</sup> Prosecution's Submissions on the Provisional Agenda for the 20 August 2104 Status Conference, 14 August 2014, ICC-01/04-02/06-352, paras 20-22; Prosecution's Additional Observations in Preparation for the Status Conference, 8 September 2014, ICC-01/04-02/06-365-Conf-Exp ('public redacted version at ICC-01/04-02/06-365-Red, para 44(b). See, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V, Corrigendum of Annex A to Decision on the protocol establishing a redaction regime ('*Ruto Redaction Decision*'), 27 September 2012, ICC-01/09-01/11-458-AnxA-Corr; *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Trial Chamber V, Corrigendum of Annex A to Decision on the protocol establishing a redaction regime ('*Kenyatta Redaction Decision*'), 27 September 2012, ICC-01/09-02/11-495-AnxA-Corr.

<sup>4</sup> Transcript of hearing of 11 September 2014, ICC-01/04-02/06-T-13-ENG ET, page 22, line 23 to page 24, line 16.

<sup>5</sup> Order Scheduling a Status Conference and Setting the Commencement Date for the Trial, 9 October 2014, ICC-01/04-02/06-382, paras 2 and 4.

<sup>6</sup> Written Submissions on Behalf of Mr Ntaganda 9 October 2014 Status Conference, 14 October 2014, ICC-01/04-02/06-384, para. 7; Prosecution Submissions in Preparation for the 17 October 2014 Status Conference, 14 October 2014, ICC-01/04-02/06-385, paras 3 and 28-29.

agreeing on a redaction regime for the present case.<sup>7</sup> Adopting the timeline suggested by the parties, the Chamber decided that the Prosecution would make a protocol proposal by 31 October 2014 and that the Defence would make its submission thereon by 14 November 2014.<sup>8</sup>

7. On 31 October 2014, the Prosecution filed and made submissions on a proposed redaction protocol (respectively ‘Proposed Protocol’ and ‘Prosecution Submissions’).<sup>9</sup> It indicated that both parties had discussed the redaction regime to be adopted in the present case on the basis of the Kenya Protocols and it set out in detail justifications warranting the Chamber’s approval of redactions under seven disputed categories.
8. On 10 November 2014, the Legal Representatives of Victims submitted joint observations on the Proposed Protocol,<sup>10</sup> whereby they indicated that they fully supported the Prosecution Submissions.
9. On the same date, in accordance with instructions from the Chamber,<sup>11</sup> the Victims and Witnesses Unit (‘VWU’) filed its observations on the Proposed Protocol.<sup>12</sup>
10. On 14 November 2014, the Defence filed its ‘Response on Behalf of Mr Ntaganda to Prosecution’s Proposed Protocol on Redactions’,<sup>13</sup> in which it submitted that the underlying principle, *i.e.* allowing the Prosecution to redact

<sup>7</sup> Transcript of hearing of 17 October 2014, ICC-01/04-02/06-T-15-ENG ET, page 16, lines 8-19.

<sup>8</sup> ICC-01/04-02/06-T-15-ENG ET, page 15, lines 13-15. *See also*, page 14, lines 9-12.

<sup>9</sup> Prosecution’s Proposed Protocol on Redactions, 31 October 2014, ICC-01/04-02/06-393-Conf-Exp (public redacted version at ICC-01/04-02/06-393-Red2) and public annex A.

<sup>10</sup> Common Legal Representatives’ joint observations on the “Public Redacted Version of Prosecution’s Proposed Protocol on Redactions” and on the “Prosecution’s Proposed Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party and Witnesses of the Opposing Party”, 10 November 2014, ICC-01/04-02/06-397.

<sup>11</sup> Email communication from Legal Officer of the Trial Chamber to Registry on 6 November 2014 at 12:56.

<sup>12</sup> Victims and Witnesses Unit’s Observations on the Prosecution’s Proposed Protocol on Redactions and on the Prosecution’s Proposed Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party and Witnesses of the Opposing Party, 10 November 2014, ICC-01/04-02/06-398-Conf.

<sup>13</sup> Response on Behalf of Mr Ntaganda to Prosecution’s Proposed Protocol on Redactions, 14 November 2014, ICC-01/04-02/06-401-Conf-Exp (‘Defence Response’) (public redacted version at ICC-01/04-02/06-401-Red).

information without first seeking the Chamber's authorisation: i) is contrary to the principle of full disclosure; ii) reverses the Prosecution's obligation to justify the need for redactions into an obligation on the Defence to justify the need for lifting redactions of information it is not privy to; iii) hinders the ability of the Defence to investigate the charges against Mr Ntaganda; and iv) allows for the redaction of information without any legitimate purpose as the Defence is already under an enforceable obligation not to disclose the same.<sup>14</sup> The Defence argued that if such a protocol is to be adopted, it must be restricted to the 'most basic and obvious cases not likely to impact the ability of the Defence to investigate and not likely to give rise to a dispute'.<sup>15</sup> Accordingly, it requested the Chamber to deny the adoption of all proposed redaction categories, with the exception of: i) contact information of witnesses; ii) location of witnesses who are admitted in the Court's protection program ('ICCP') and information revealing the places used for present and future relocation of these witnesses; and iii) locations of witness interviews/accommodation.

11. The issue of a redaction protocol was further addressed during the third status conference held on 2 December 2014.<sup>16</sup> The Defence reiterated that it had 'some serious reservations' with the Proposed Protocol which appears to put the Defence 'in the same boat' as third parties.<sup>17</sup>

## II. Applicable law

12. The Chamber recalls that, under Rules 76 and 77 of the Rules, the Prosecution has a disclosure obligation for all incriminatory material in the form of witness statements and any other material to be relied on at trial. It also has an obligation to disclose material falling under the ambit of Article 67(2) of the

<sup>14</sup> Defence Response, ICC-01/04-02/06-401-Red, paras 3 and 7-33.

<sup>15</sup> Defence Response, ICC-01/04-02/06-401-Red, para. 4.

<sup>16</sup> Transcript of hearing on 2 December 2014, ICC-01/04-02/06-T-17-CONF-ENG ET.

<sup>17</sup> ICC-01/04-02/06-T-17-CONF-ENG ET, page 7, lines 15-23.

Statute and to permit inspection of all items that are material to the preparation of the Defence under Rule 77 of the Rules.

13. Chambers of this Court have consistently emphasised that disclosable material should be served in full and any redactions need to be justified and authorised individually under the provisions of the Statute.<sup>18</sup>
14. In this regard, Rules 81 and 82 provide the legal basis for restrictions on disclosure. Under Rule 81(2), where the disclosure of information may prejudice further or ongoing investigations, the Prosecution is entitled to request redactions. Rule 81(4) of the Rules provides for non-disclosure where the disclosure of information would compromise the safety of victims, witnesses, their families, or any other 'person at risk on account of activities of the Court'.<sup>19</sup> Lastly, Rules 81(4) and 82 of the Rules set out the regime for non-disclosure of material and information, under Article 54(3)(e) of the Statute, where the Prosecution has obtained information on the condition of confidentiality.
15. The Appeals Chamber has held that 'it will be for the Prosecutor seeking redactions to establish that such redactions are warranted',<sup>20</sup> while it is for the Chamber to rule upon such requests. It further held that the requirements to authorise the non-disclosure of information are the following: i) the existence of an 'objectively justifiable risk'<sup>21</sup> to the safety of the person concerned or which may prejudice further or ongoing investigations;<sup>22</sup> ii) the risk must arise

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<sup>18</sup> *Ruto* Redaction Decision, ICC-01/09-01/11-458, para 9; *The Prosecutor v. Germain Katanga*, Appeals Chamber, 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, OA, ('*Katanga* OA Judgment'), para. 70; *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568('Lubanga OA3 Judgment'), paras 36-39.

<sup>19</sup> *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 56.

<sup>20</sup> *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 97.

<sup>21</sup> *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 71.

<sup>22</sup> *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 97.

from disclosing the particular information to the Defence;<sup>23</sup> iii) the infeasibility or insufficiency of less restrictive protective measures;<sup>24</sup> iv) an assessment as to whether the redactions sought are ‘prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’;<sup>25</sup> and v) the obligation to periodically review the decision authorising the redactions should circumstances change.<sup>26</sup>

### III. Analysis

16. The Chamber shall ensure, pursuant to Article 64(2) of the Statute, that the trial is fair and expeditious, and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
17. The Chamber recalls that in its Order of 9 October 2014, it set the commencement date for trial for 2 June 2015 and directed the Prosecution to complete, by 2 March 2015, full disclosure of all incriminatory material in the form of witness statements and any other material to be relied on at trial, as well as disclosure of all Article 67(2) material and provision of all Rule 77 material for inspection to the Defence. The Chamber further set the deadline for requests for delayed disclosure for 16 February 2015.
18. In light of its statutory obligations and taking into consideration the specific circumstances of the case at hand, the Chamber adopts the protocol set out in the annex to the present decision (‘Protocol’) and hereby sets the redaction regime to be followed in the trial proceedings.

<sup>23</sup> *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 71(b).

<sup>24</sup> *Lubanga* OA3 Judgment, ICC-01/04-01/06-568, para. 37; 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, OA5 (‘*Lubanga* OA5 Judgment’), para. 33.

<sup>25</sup> *Lubanga* OA5 Judgment, ICC-01/04-01/06-773, para. 34.

<sup>26</sup> *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 73(c); *The Prosecutor v. Germain Katanga*, Appeals Chamber, Judgment on the appeal of Mr Germain Katanga 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-01/04-01/07-476, OA2, para. 64.



## A. General principles underlying the redaction regime adopted

19. In the Protocol, the Chamber has followed the approach that it considers most appropriate to increase the expeditiousness and focus of the proceedings whilst remaining fully consistent with the rights of the accused. The Chamber adopts a redaction regime whereby, in addition to the rules regulating retention or lifting of existing redactions, exceptions to disclosure are ruled upon by way of two procedures:

- i. *Standard redactions.* Redactions corresponding to categories covered by standard justifications authorised by the Chamber by virtue of the present decision can be automatically applied by the disclosing party, the Chamber being informed of any dispute arising and seised with a request for relief on a case-by-case basis if needed; and
- ii. *Non-standard redactions.* Redactions that do not fall under the above-mentioned categories will be subject to a case-by-case review by the Chamber following receipt of an application justifying the requested redactions ('application-based procedure').

20. The Chamber agrees with the Defence that only the 'most basic' redactions, the ones 'not likely to impact the ability of the Defence to investigate' or 'to give rise to a dispute' should be covered by standard justifications.<sup>27</sup> The standard redactions have been thoroughly considered in the light of the parties' submissions and with due regard to the competing interests at stake. The Prosecution has submitted standard justifications which, for each category upheld by the Chamber, were considered sufficiently circumscribed and necessary, at this stage, to protect the interests warranting restrictions to disclosure under Rule 81(2) or (4) of the Rules. The Chamber considers that

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<sup>27</sup> Defence Response, ICC-01/04-02/06-401-Red, para. 4.

the procedures laid out in the Protocol do not result in any prejudice to the accused and are consistent with a fair and impartial trial.

21. The Chamber emphasises that, under the redaction regime outlined in the Protocol, a case-by-case assessment is never foreclosed and mechanisms are put in place to ensure that every contested redaction is reassessed by the Chamber in light of all relevant information. Indeed, the receiving party can, at any moment after reception, request that specific redactions falling under any of the categories covered by standard justifications be submitted to the Chamber for adjudication. Furthermore, the Chamber recalls that the disclosing party is required: i) to individually assess whether the standard justifications are met for each document disclosed; and ii) to review and lift redactions applied should circumstances change.

22. In addition, contrary to the Defence argument,<sup>28</sup> the Chamber confirms that the Protocol does not reverse the burden for justification of redactions. The receiving party's challenge to a redaction applied on the basis of standard justification activates the burden on the disclosing party to justify the specific redaction in accordance with the redaction criteria outlined above.<sup>29</sup>

### **B. Chamber's approach in assessing the Proposed Protocol**

23. The Chamber notes that, in the Protocol, it has streamlined and reordered some of the introductory paragraphs. In addition, having noted a degree of duplication, the Chamber has deleted from the Protocol the provisions relating to inadvertent disclosure, as this matter shall be addressed in the Chamber's decision on a protocol governing the handling of confidential information and contacts with witnesses.<sup>30</sup> For ease of reference, the

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<sup>28</sup> Defence Response, ICC-01/04-02/06-401-Red, paras 14-18.

<sup>29</sup> *See above*, para. 15.

<sup>30</sup> Prosecution's Proposed Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party and Witnesses of the Opposing Party, 31 October 2014, ICC-01/04-02/06-392 and

numbering of the redaction regime used at the confirmation stage, as reflected in the Proposed Protocol, has been retained.

24. As a preliminary matter, the Chamber finds it appropriate to address a recurring submission of the Defence made in the context of the proposed categories of information. The Defence argues that the jurisprudence referred to by the Prosecution relates to cases in which redactions were authorised on a case-by-case basis and are therefore inapposite to support a regime authorising redactions on the basis of standard justifications.<sup>31</sup> In the view of the Chamber, this jurisprudence is relevant as it concerns similar risk assessments and evaluation of their impact on the rights of the accused in application of the requirements also applicable to the case at hand.

25. Furthermore, whether or not the identity of witnesses can be withheld at this time has not been raised in the context of the adoption of the Protocol. In light of the 2 March 2015 deadline for completion of all prosecution disclosure, any request for delayed disclosure of the identity of Prosecution witnesses relied upon for trial will require prior authorisation from the Chamber and shall be filed at the latest by 16 February 2015, as set out in the Order of 9 October 2014.<sup>32</sup> In order to increase the readability of redacted materials and in the event redactions to witnesses' identities are granted, the Chamber considers it appropriate for the Prosecution to include in each corresponding redaction box the witnesses' assigned pseudonym.

### **C. Specific categories and points of disagreement between the parties**

26. The Chamber observes that the parties held preliminary consultations on the basis of the Kenya Protocols and were in agreement with regard to a certain

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public annex; Response on behalf of Mr Ntaganda to Prosecution's Proposed Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party and Witnesses of the Opposing Party, 14 November 2014, ICC-01/04-02/06-400.

<sup>31</sup> *See, for example*, Defence Response, ICC-01/04-02/06-401-Red, paras 41-42, 49 and 61.

<sup>32</sup> Order of 9 October 2014, ICC-01/04-02/06-382, para. 9(b) and (d).

number of categories. It will therefore limit itself to discussing: i) the points of disagreement as raised by the parties, giving reasons for its decision in favour of one over the other; and ii) a small number of amendments which the Chamber considers appropriate to make on a *proprio motu* basis.

### *Pseudonyms*

27. The Chamber has noted that the Proposed Protocol incorporated a requirement for the disclosing party to provide individual pseudonyms, in addition to the redaction code, in respect of intermediaries and investigators. The Chamber considers that this is a useful element which enables the Defence to better contextualise the underlying information and, as applicable, to cross-reference relevant contacts. The Chamber has considered it appropriate to expand this requirement to other categories of redacted material<sup>33</sup> to allow the reader identify whether the same person is referenced across multiple statements and increase the usefulness of material disclosed with redactions.

### *Existing redactions*

28. In order to ensure that the trial is conducted with full respect for the rights of the accused and taking into consideration that the stage of the proceedings necessarily impacts on the assessment of the appropriateness of non-disclosure, the Chamber also considered that a modification of the procedure proposed for existing redactions was warranted. The Chamber's intervention seeks to ensure that information material for the preparation of the Defence *at trial* is not unduly withheld because non-disclosure was authorised *at the confirmation stage*. Hence, redactions already approved by the Pre-Trial Chamber, in the context of the present case, or another Chamber, in the context of other proceedings, shall remain so long as they are covered by standard justifications outlined in the Protocol or Regulation 42 of the

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<sup>33</sup> Protocol, paras 12, 32 and 35.

Regulations. The Prosecution shall follow the application-based procedure to maintain all other already approved redactions.

*Category A.1. Recent contact information of witnesses*

29. Notwithstanding the parties' agreement on the standard justification for category A.1. redactions, the Chamber considers that the category of 'contact information of witnesses' requires further specification. The Chamber accepts that witnesses' recent contact information would not ordinarily be relevant to the preparation of the Defence and may be permitted as an ongoing redaction on the basis of the potential risk posed to witnesses from dissemination of such information. However, historical contact information, relating in particular to the time period of the crimes charged, may be of assistance in the preparation of the Defence's case. Hence, the Chamber directs the parties to follow the application-based procedure for any redaction of historical contact information of witnesses and approves, by way of the present decision, only the non-disclosure of the witnesses' recent contact information under the category A.1.

*Category B. Identifying and contact information of family members of witnesses*

30. The Prosecution submits that identifying and contact information of family members of witnesses should be a standard category of information to be redacted on an ongoing basis. It alleges that disclosing the identifying and contact information of family members poses an objectively identifiable risk to their safety and well-being, including arising from a risk of intimidation, violence or interference, and may effectively dissuade witnesses from cooperating with the Prosecution. The Prosecution submits that it has a 'solid basis' for believing that such a risk may arise from disclosure to the accused,

or those close to him. It further argues that the information is usually irrelevant for proceedings and of no legitimate interest to the Defence.<sup>34</sup>

31. The Defence opposes the redaction of identifying information of family members of witnesses on an ongoing basis, with the exception of family members of witnesses for whom delayed disclosure has been granted until the identity of the witness is disclosed. The Defence opposes the general assumption that family members are not involved in the Court's activities and thus not relevant to the case against the accused as there were numerous instances where the identity of family members was relevant for Defence's investigations as well as material for the preparation of the Defence. The Defence therefore requests that category B be rejected or, in the alternative, that the Chamber adopts a version similar to the equivalent category in the Kenya Protocols.<sup>35</sup>

32. The Chamber notes that witnesses testifying before the Court make a deliberate choice to contribute to its activities, thereby advancing the interests of justice. The Chamber has the duty, under Article 68(1) of the Statute and in accordance with Rule 81(4) of the Rules, to ensure that their involvement does not lead to a situation where their safety and well-being are put at stake. This is all the more the case for family members of witnesses; they have not agreed to be part of the Court process and may not even be aware of their relative's involvement with the Court.

33. Notwithstanding the Defence's reservations regarding certain aspects of the Registry's recent security reports, the Chamber considers the independently established reality that the overall security situation in the Democratic Republic of the Congo ('DRC') remains volatile, with Ituri province being amongst the most affected regions, needs to be taken into account when

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<sup>34</sup> Prosecution Submissions, ICC-01/04-02/06-393-Red2, paras 12-25.

<sup>35</sup> Defence Response, ICC-01/04-02/06-401-Red, paras 37-47.

adjudicating this issue.<sup>36</sup> Consequently, there are reasons to believe that family members of witnesses residing in the region may be particularly vulnerable and require an enhanced level of protection.

34. The Chamber notes that Trial Chamber V decided, in relation to identifying information of family members, that redactions were to be:

- i. Lifted when the identity of the witness was to be disclosed, for family members whose identifying information was redacted only for the witness' protection;
- ii. Lifted 60 days prior to the commencement of the trial (unless otherwise ordered by the Chamber on the basis of exceptional circumstances), for family members whose identifying information was redacted on the basis of their own security; and
- iii. Ongoing, for minor family members.<sup>37</sup>

35. The Chamber authorises ongoing redaction of contact information of family members. However, the Chamber considers the approach put forward by the Prosecution in the Proposed Protocol in respect of the identities of family members to be overly broad. In the Chamber's view, the identity of family members might be material to the preparation of the Defence, including, for example, if the family members are relevant to the evidence of the witness.

36. In the view of the Chamber, the security considerations, which arise primarily from the potential use of the information during investigations, militate only partially against disclosure and require a differentiation between family

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<sup>36</sup> Annex 1 to Registry's provision of updated security information in relation to participation related activities pursuant to Trial Chamber VI's oral instructions date 11 September 2014, 13 October 2014, ICC-01/04-02/06-383-Conf-Exp-Anx; Confidential Annex 1 to Registry's Report on the Security Situation in the Democratic Republic of the Congo, 7 November 2014, ICC-0/04-02/06-396-Conf-Anx1. *See also*, Defence Response, ICC-01/04-02/06-401-Red, para. 66 as well as the Defence submissions made during the Status Conference on 2 December 2012, ICC-01/04-02/06-T-17-CONF-ENG ET, page 29, line 20 to page 34, line 3.

<sup>37</sup> *Ruto* Redaction Decision, ICC-01/09-01/11-458, para 30. *See also*, Annex A to *Ruto* Redaction Decision, ICC-01/09-01/11-458-AnxA-Corr, para. 56; Annex A to *Kenyatta* Redaction Decision, ICC-01/09-02/11-495-AnxA-Corr, para. 56.

members on the basis of their apparent relevance to the case. Redaction of a family member's identifying information is authorised by virtue of the present decision only where his or her identity has no relevance to a known issue in the case. In this regard, the Chamber wishes to clarify that direct family members of witnesses who are testifying about their experience as young recruits in the UPC/FPLC are relevant to a known issue in the case, namely the age of their relative. The authorisation is intended to capture only family members who are mentioned in an incidental manner or by way of general biographical background. Identifying information for all other family members should be disclosed, either immediately or, in the case of any witnesses for whom delayed disclosure may be granted, at the time of disclosing the identity of the relevant witness. Allowing for timely disclosure of information potentially material to the Defence, as proposed, will avoid any prejudice to the accused and is, in the view of the Chamber, the least restrictive protective measure available to it.

*Category C. Identifying and contact information of 'other persons at risk as a result of the activities of the Court' (also known as 'innocent third parties')*

37. The Prosecution requests that identifying and contact information of innocent third parties be redacted on an ongoing basis. This category seeks to protect other persons at risk who may unwittingly be perceived as potential witnesses. Referring to the Pre-Trial Chamber II decision on redactions,<sup>38</sup> the Prosecution points out that particular weight should be attached to the fact that innocent third parties: i) are unaware that they are identified in materials; ii) do not benefit from any protection provided by the Court; and iii) have not agreed to their identities being disclosed.<sup>39</sup> It further submits that innocent third parties are in most cases irrelevant to the case and, hence, that non-disclosure does not prejudice the accused.

<sup>38</sup> Prosecution Submissions, ICC-01/04-02/06-393-Red2, para. 29 referring to First Decision on the Prosecutor's Requests for Redactions and Other Related Requests, 1 October 2013, ICC-01/04-02/06-117-Conf-Exp.

<sup>39</sup> Prosecution Submissions, ICC-01/04-02/06-393-Red2, paras 26-32.



38. The Defence, claiming that redactions covered by this category were not approved by Trial Chamber V, opposes the allegation that individuals falling under this category are not involved in the Court's activity and that in most cases they are not relevant to the case. It further requests that the redaction of identifying and contact information of third parties be submitted to a case-by-case disclosure regime. In the alternative, the Defence suggests that the Chamber adopts an approach similar to the one provided for in the Kenya Protocols.<sup>40</sup>

39. The Chamber notes that under the relevant provisions of the Kenya Protocols, redaction of identifying information of persons at risk was lifted 60 days before trial while ongoing redactions were limited to contact information.<sup>41</sup> The Chamber is mindful of the fact that these individuals might be unknowingly processed in the context of the proceedings. However, again, it considers the approach of the Prosecution to be overly broad. It is recalled that, should particular risks arise, the disclosing party can seek authorisation to redact information in accordance with the application-based procedure as set out in paragraphs 48-50 of the Protocol. Hence, in accordance with its approach to redaction of identifying information of family members, the Chamber authorises redactions beyond contact information only for individuals who are of no relevance to a known issue in the case.

*Categories D.2. and D.3. Identifying and contact information of parties' staff (excluding investigators) and VWU or other Court staff members, who travel frequently to, or are based in, the field; Identifying and contact information of translators, interpreters, stenographers and psycho-social experts assisting during interviews who are not prosecution staff members but who travel frequently to, or are based in, the field*

40. The Prosecution requests the Chamber to approve redactions to information under categories D.2. and D.3. to ensure that these individuals are able to

<sup>40</sup> Defence Response, ICC-01/04-02/06-401-Red, paras 48-53.

<sup>41</sup> Annex A to *Ruto* Redaction Decision, ICC-01/09-01/11-458-AnxA-Corr, para. 58; Annex A to *Kenyatta* Redaction Decision, ICC-01/09-02/11-495-AnxA-Corr, para. 58.

continue to perform their duties safely and without jeopardising the integrity of further and ongoing investigations. It recalls that the work they perform is highly specialised and that there is only a limited pool of qualified translators, interpreters, stenographers and psychosocial experts available to assist the parties. Moreover, the Prosecution stresses that anonymity is essential to their ability to conduct their work safely.<sup>42</sup>

41. The Defence opposes the ongoing redaction of information contained in categories D.2. and D.3. 'without seeking prior authorisation from the Chamber'.<sup>43</sup> The Defence submits that the Prosecution is relying on jurisprudence of Chambers following a different approach, namely authorisation of redactions after reception of an application by the disclosing party.<sup>44</sup> The Defence further submits that information falling under these two categories is 'highly relevant' in order to investigate a witness's credibility as well as to 'understand the specific circumstances' of interviews.<sup>45</sup>

42. The Chamber considers that the information covered by both category D.2. and D.3. is usually irrelevant and, taking into consideration that lack of anonymity may put the ongoing investigations, and victims or witnesses with whom the staff interact, at increased risk, it is of the view that non-disclosure appears, in the case at hand, necessary. The Chamber is further of the view that redactions to this information do not affect the substance of the witness statement or the comprehensibility of the document for the purpose of dealing with trial issues, and are the least intrusive way to protect the integrity of further and ongoing investigations.

43. Lastly, with regard to the jurisprudence referred to by the Defence, the Chamber notes that the circumstances rendering the names of certain staff

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<sup>42</sup> Prosecution Submissions, ICC-01/04-02/06-393-Red2, paras 36-37, 40 and 43.

<sup>43</sup> Defence Response, ICC-01/04-02/06-401-Red, para. 60.

<sup>44</sup> Defence Response, ICC-01/04-02/06-401-Red, para. 61.

<sup>45</sup> Defence Response, ICC-01/04-02/06-401-Red, para. 62.

members relevant for the case is not shared with the case at hand. Given it will be apparent how many individuals were present, and given their identification by pseudonyms, the Chamber is of the view that, under the Protocol, the Defence will be able to use the material disclosed and understand the circumstances of the witnesses' interviews. The Chamber also considers that the Defence will be able to seek a ruling of the Chamber in the event that there is a change in the circumstances of the case which would warrant a modification of its assessment.

*Category D.4. Identifying and contact information of intermediaries*

44. The Prosecution recalls that intermediaries are nearly always based in the field, and that they are relied on to conduct activities related to investigations.<sup>46</sup> Because disclosing the identity of intermediaries would create an objectively justifiable risk to '[their] safety [...], the safety of the witnesses with whom they are in contact and the location of securing interview sites',<sup>47</sup> the Prosecution requests that the Chamber approves ongoing redaction of identifying and contact information of intermediaries.
45. The Defence requests the Chamber to reject the Prosecution's proposal in this regard. It recalls that the role of intermediaries became 'an issue of major importance' in the *Lubanga* case and suggests, in light of the fact that 'many witnesses are similar in the *Ntaganda* case', and therefore that the question of intermediaries is a 'highly sensitive one', that the Chamber closely monitors the redaction of any intermediary's identifying and contact information.<sup>48</sup>
46. The Chamber recalls, as stated above,<sup>49</sup> that it considers it appropriate to refer to the overall security situation in adjudicating this issue.<sup>50</sup>

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<sup>46</sup> Prosecution Submissions, ICC-01/04-02/06-393-Red2, paras 46-47.

<sup>47</sup> Prosecution Submissions, ICC-01/04-02/06-393-Red2, paras 47. *See also*, paras 48-50.

<sup>48</sup> Defence Response, ICC-01/04-02/06-401- Red, paras 68-70.

<sup>49</sup> *See above*, para. 33.

47. However, the Chamber also notes, as pointed out by the Defence,<sup>51</sup> that the question of intermediaries was a highly sensitive one in the context of the *Lubanga* case and acknowledges the possibility that the Prosecution's list of witnesses, in light of the nature of the charges, includes witnesses also involved in the *Lubanga* case. The Chamber is mindful of the fact that, when the role of intermediaries became an issue of great importance in the *Lubanga* case, Trial Chamber I ordered the disclosure of their identities to the Defence.<sup>52</sup>
48. The Chamber considers that the disclosure of intermediaries' identifying and contact information, and subsequent potential use of such information in the context of investigations, would pose an objectively identifiable risk to the further or ongoing investigations, including by impacting on their future usefulness, and that there is currently no indication that this information is material to the preparation of the Defence in the present case. Furthermore, the Chamber finds that the scope of the proposed redaction category is necessary and proportionate. Nonetheless, the current determination, under Rule 81(2) of the Rules, can be reassessed at a later stage should circumstances change or new information emerge. Indeed, as detailed in the Protocol, the Defence retains the right, upon receipt, to raise objections requiring the Prosecution to justify any specific instances of redaction.
49. As noted above, in order to facilitate investigations and the Defence's preparation for trial, the disclosing party has, under the Protocol, the obligation to provide the receiving party with a document identifying each individual intermediary by pseudonym. Moreover, recognising the potential importance for the Defence of assessing the impact of the role some intermediaries involved in the investigations related to the *Lubanga* case might

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<sup>50</sup> The Chamber however refrained from directly inferring, from the existence of risks to the intermediaries working with the Registry, the existence of risks to the intermediaries working with the parties.

<sup>51</sup> Defence Response, ICC-01/04-02/06-401-Red, para. 69.

<sup>52</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on intermediaries, 12 May 2010, ICC-01/04-01/06-2434-Red2, para. 138.

have had in the case at hand, the Chamber considers that the Prosecution shall use pseudonyms assigned to the intermediaries in the context of the *Lubanga* case when appropriate. In light of these measures, the Chamber is of the view that the proposed redactions are not prejudicial to or inconsistent with the rights of the accused and fair and impartial proceedings.

*Category D.5. Identifying and contact information of leads and sources*

50. The Prosecution submits that the current security situation in the DRC, and in particular in the Ituri district, exposes leads and sources to a heightened risk. Leads and sources are active in the field and generally based in the region, making it difficult to ensure their protection. The Prosecution submits that non-disclosure of their identifying and contact information is the least restrictive protective measure available to the Chamber and is not prejudicial to the rights of the accused.<sup>53</sup>
51. The Defence opposes the automatic ongoing redaction of information covered by category D.5. . In addition, it claims that leads and sources could be highly relevant in order to investigate a specific document's authenticity or information's credibility.<sup>54</sup>
52. The Chamber observes that the aim of this category is to protect leads and sources and to shield them from intimidation or interference which could prejudice further investigations. The Chamber recalls that Trial Chamber V decided that identifying and contact information of leads and sources shall be subject to ongoing redaction with the exception of disclosed material provided by the lead, in which case the lead will be disclosed as the source.<sup>55</sup> It sees no reason to deviate from the general approach that was taken previously by Trial Chamber V when adopting the Kenya Protocols.

<sup>53</sup> Prosecution Submissions, ICC-01/04-02/06-393-Red2, paras 54-56.

<sup>54</sup> Defence Response, ICC-01/04-02/06-401-Red, paras 71-74.

<sup>55</sup> Annex A to *Ruto* Redaction Decision, ICC-01/09-01/11-458-AnxA-Corr, paras 41-43; Annex A to *Kenyatta* Redaction Decision, ICC-01/09-02/11-495-AnxA-Corr, paras 41-43.

53. Finally, the Chamber has taken note of the Defence's contention that leads and sources are of relevance in order to investigate a specific document's credibility and/or information's credibility. In this regard, the Chamber considers that providing the Defence with a separate document identifying leads and sources by pseudonym will increase the intelligibility of the information contained in the document and facilitate its use in the preparation of the Defence's case.<sup>56</sup> It will notably give the recipient a clear indication of the number of leads and sources as well as their relevance in a specific context by allowing cross-referencing of information.

*Category D.6. Identifying and contact information of investigators*

54. The Prosecution proposes that the Chamber pre-approves redaction of investigators' identifying and contact information on an ongoing basis. In order to preserve the integrity of further and ongoing investigations, and taking into consideration that it only has a limited number of investigators, the Prosecution considers that their identities should not be disclosed because it could compromise the security of the witnesses they regularly meet with.<sup>57</sup>

55. The Defence opposes the ongoing redaction of identifying and contact information and also questions the fact that such redaction could be approved based on a standard justification. It recalls that this category was not included in the Kenya Protocols and considers that, because such information is 'highly relevant' for the Defence's investigations, the Prosecution should apply for every redaction sought to investigators' identifying and contact information.<sup>58</sup>

56. The Chamber notes that identifying information of investigators was not covered by a redaction category in the Kenya Protocols and that Trial Chamber V considered that standard justification was only appropriate for

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<sup>56</sup> Protocol, paras 12 and 40.

<sup>57</sup> Prosecution Submissions, ICC-01/04-02/06-393-Red2, para. 58.

<sup>58</sup> Defence Response, ICC-01/04-02/06-401-Red, paras 54-55 and 57.

investigators' contact information. In rejecting the Prosecution's proposal, Trial Chamber V decided that, 'given the potential relevance of this information to the case preparation of the defence, and in view of the fact that investigators are not permanently based in the field', redactions to the names of Prosecution's investigators must be applied for individually.<sup>59</sup> Trial Chamber V subsequently amended its redaction regime and granted temporary redactions of the investigators' identifying information until the disclosure of the identity of the last witness interviewed or contacted by that investigator.<sup>60</sup>

57. Concerning the investigators' identifying information, the Chamber deems it necessary to minimise the chances of any link being made between the investigators and those with whom they are meeting. Disclosing the investigators' identifying information at this stage of the proceedings may pose security risks to witnesses whose identities are not yet known to the Defence. Notwithstanding the fact that investigators might be relied on in the course of the Defence case or in the context of other proceedings, the Chamber is of the view that risks to witnesses are minimal after their identity has been disclosed. Therefore identifying information shall be covered by a temporary redaction, *i.e.* until the disclosure of the identity of the last witness interviewed or contacted by that investigator.

58. The Chamber fails to see lesser measures practicable at this stage and considers that the systematic use of pseudonyms in the material disclosed sufficiently mitigates the impact the non-disclosure will have on the receiving party's ability to use the documents.<sup>61</sup> Before the identifying information is lifted the Defence will already be in a position to know which investigators

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<sup>59</sup> *Kenyatta Redaction Decision*, ICC-01/09-02/11-495, para. 23.

<sup>60</sup> *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Trial Chamber V, Decision on prosecution application to vary the Redaction Protocol and to redact investigators' identifying information, ICC-01/09-02/11-579, para 17.

<sup>61</sup> Protocol, para. 12.

interviewed which witnesses, assess this information and request, at any time, that the Prosecution supplement the justification for such redaction for the Chamber to re-assesses their necessity and their impact on the fairness of trial.

59. Lastly, the Defence suggests that redacting investigators' names from the material disclosed is impermissible under Rule 111 of the Rules.<sup>62</sup> However, in this regard, the Chamber notes that such reasoning would also seem to apply to other information which has not been contested by the Defence, such as the location of interviews. Moreover, the Chamber recalls that the Appeals Chamber held that a Chamber may, if it determines that such information falls under the conditions stipulated by Rule 81(2) or (4), authorise the redaction of information that is required to be recorded pursuant to Rule 111(1) of the Rules.<sup>63</sup> Consequently, the Chamber does not consider that Rule 111 of the Rules prevents, in light of the circumstances of the case at hand, redaction of information included in the record of questioning.

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<sup>62</sup> Defence Response, ICC-01/04-02/06-401-Red, para. 58.

<sup>63</sup> *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 93.

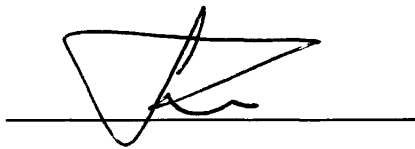


**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**DECIDES** that the parties shall apply the Protocol set out in the annex to the present decision; and

**ORDERS** the Prosecution to include the relevant witness pseudonym when making any redactions to witness identity prior to the relevant date for disclosure of the identity of the witness.

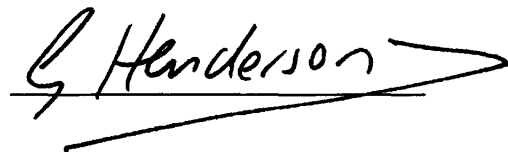
Done in both English and French, the English version being authoritative.

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**Judge Robert Fremr, Presiding Judge**

A handwritten signature in black ink, appearing as a series of fluid, connected loops and curves.

**Judge Kuniko Ozaki**

A handwritten signature in black ink, with the name 'Henderson' clearly legible and a long horizontal line extending to the right.

**Judge Geoffrey Henderson**

Dated this 12 December 2014

At The Hague, The Netherlands