

1 International Criminal Court - Trial Chamber I - Courtroom 1
 2 Presiding Judge Adrian Fulford, Judge Elizabeth Odio Benito and
 3 Judge René Blattmann
 4 Situation in the Democratic Republic of the Congo -
 5 ICC-01/04-01/06 In the case of The Prosecutor v. Thomas Lubanga
 6 Dyilo
 7 Pursuant Trial Chamber's I instruction, dated 24 March 2010, the
 8 transcript of the Ex-Parte Hearing with the Office of the
 9 Prosecutor, the Defence and the Registry is reclassified as
 10 Public.
 11 Thursday, 11 March 2010 - (The hearing starts at 12.10 p.m.)
 12 Open session
 13 THE COURT USHER: All rise. The International Criminal
 14 Court is now in session. Please be seated.
 15 THE COURT OFFICER: Good afternoon, your Honours. We are in
 16 closed session.
 17 PRESIDING JUDGE FULFORD: Thank you. On 1 February 2010, the
 18 Chamber received a request from the Prosecution for authorisation
 19 to disclose the closed and private session transcripts of the
 20 Witness 46 to the Defence in the Katanga and Ngudjolo case
 21 (document 2279).
 22 Witness 46, a former child protection adviser for MONUC,
 23 testified before Pre-Trial Chamber I on 15, 20 and 21 November
 24 2006 and before this Chamber on 7, 8, 9, 13 and 14 July 2009.
 25 Portions of her evidence were heard in private or closed

1 session.

2 It is to be noted that Witness 46's testimony in the
3 Lubanga case was subject to conditions stipulated by the United
4 Nations in accordance with Article 16(1) of the "Negotiated
5 relationship agreement between the International Criminal Court
6 and the United Nations" (hereafter referred to as 'the
7 agreement') and Article 12 of the "Memorandum of understanding
8 between the United Nations and the International Criminal Court
9 concerning cooperation between the United Nations organisation
10 mission in the Democratic Republic of the Congo and the
11 International Criminal Court."

12 On 27 November 2009, the lawyers representing the
13 accused Germain Katanga, in the Katanga and Ngudjolo case, sent
14 an email to the Prosecution requesting disclosure of Witness 46's
15 evidence as given in private session between 2006 and 2009, in
16 non-redacted form.

17 The Prosecution submitted a request to the United
18 Nations on 2 December 2009 seeking consent for the disclosure of
19 the transcripts of Witness 46's evidence in their non-redacted
20 form to the Defence teams in the Katanga and Ngudjolo case and
21 seeking advice on the modalities for disclosure.

22 During a status conference before Trial Chamber I on 9
23 December 2009 (transcript 222, page 12), the Prosecution
24 requested that disclosure is authorised, but with the conditions
25 set out by the United Nations which were to be agreed, it was

1 hoped, by Trial Chamber II. This Chamber was of the view that
2 prior to authorising disclosure the details of the proposed
3 conditions by the United Nations should be made available.

4 The request referred to at the commencement of this
5 ruling contains in a confidential annex (document 2279 annex B)
6 two letters from the United Nations consenting to disclosure to
7 the Defence in the Katanga and Ngudjolo case of Witness 46's
8 testimony given during private sessions on Tuesday, 7 July 2009;
9 Wednesday, 8 July 2009; Thursday, 9 July 2009; and Monday, 13
10 July 2009. The United Nations additionally has consented to the
11 disclosure of the closed session transcript of the hearing held
12 before Pre-Trial Chamber I on 21 November 2006. Furthermore, the
13 conditions of the UN's consent, as set out in paragraph 10 of the
14 request, are as follows:

15 "(i) that both accused and their Defence teams be
16 prohibited, subject to what is said below, from disclosing the
17 contents of any of those parts of those transcripts to any third
18 person or body; and

19 (ii) in the event that either of the two accused and
20 their Defence team wish to make use of any parts of those
21 transcripts, or what was said therein, in proceedings before the
22 Chambers:

23 (a) copies of those parts of the transcripts may only
24 be submitted in evidence in closed (private) session;

25 (b) any parts of the proceedings in which the contents

1 of any of those parts of those transcripts are discussed must
2 likewise be held in closed session;

3 (c) unredacted transcripts and recordings of any such
4 parts of the proceedings must be restricted to the Chambers and
5 their staff in the case the Prosecutor v. Germain Katanga and
6 Mathieu Ngudjolo Chui (Katanga case), to your office (the
7 Prosecution) and its staff, to the accused and their Defence
8 teams and to the victims and their legal representatives in that
9 case; and

10 (iii) you (the Prosecution) seek and obtain from the
11 Trial Chamber before which the case of the Prosecutor v. Germain
12 Katanga and Mathieu Ngudjolo Chui (Katanga case) is being heard,
13 an order of protective measures giving effect to these
14 conditions."

15 Further conditions were stipulated with respect to the
16 disclosure of pages 8 to 10 of the English version of the private
17 session transcripts of the hearing held during the morning of 7
18 July 2009 (transcript 205). Those conditions (set out in
19 paragraph 11 of the request) are meant to operate in the event
20 that either the accused or the Defence in the Katanga and
21 Ngudjolo case seek to use those parts of the transcripts in
22 evidence or otherwise introduce or refer to the information that
23 it contains. The UN requested:

24 "(i) that disclosure of copies of that part of the
25 transcript be limited to the Chamber and their staff in the case

1 of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,
2 to your office (the Prosecution) and its staff and to the legal
3 representatives of the victims in that same case; and

4 (ii) that presence at any parts of the proceedings in
5 which those parts of the transcripts be limited to the Chamber
6 and their staff in the case of the Prosecutor v. Germain Katanga
7 and Mathieu Ngudjolo Chui to your office (the Prosecution) and
8 its staff and to the legal representatives of the victims in that
9 same case; and

10 (iii) that the availability of unredacted transcripts
11 and recordings of any such parts of the proceedings be likewise
12 so restricted."

13 Regarding the portion of the testimony given in closed
14 session during the morning of 13 July 2009 which, inter alia,
15 concerned a non-redacted portion of a document
16 (DRC-OTP-0208-0284), the UN stipulated that specific names should
17 be redacted from copies of the transcripts provided to the
18 accused and their Defence team in the Katanga and Ngudjolo case.
19 The redactions sought are to the names appearing on lines 24 and
20 25 of page 51 and the name appearing on line 7 of page 52 of
21 transcript T-208 (document 2279 Annex B, page 3).

22 The Prosecution observes that the Chamber granted
23 similar requests relating to the disclosure of transcripts and
24 exhibits from the Lubanga case to the parties in the Katanga and
25 Ngudjolo case and established a procedure for the release of such

1 items (transcript 222, 9 December 2009, page 9, line 20 to page
2 11, line 2.)

3 Via an email to a legal officer of the Trial Division
4 on 8 February 2010, the Defence in the Lubanga case informed the
5 Chamber that it would not respond to the Prosecution's request.

6 By Article 64(6)(c) of the Rome Statute, the Chamber
7 may, as necessary, provide for the protection of confidential
8 information. In addition, the agreement provides in Article
9 15(3) that "In the event that the disclosure of information or
10 documents or the provision of other forms of cooperation would
11 endanger the safety or security of current or former personnel of
12 the United Nations or otherwise prejudice the security or proper
13 conduct of any operation or activity of the United Nations, the
14 Court may order, particularly at the request of the United
15 Nations, appropriate measures of protection." Further, the
16 Chamber, under Article 68(1) of the Statute, shall take
17 appropriate measures to protect the witnesses and it shall not
18 disclose information gathered under confidentiality agreements
19 pursuant to Rule 81(3).

20 In all the circumstances, the Chamber authorises the
21 disclosure of the transcripts of Witness 46, and the evidence
22 that she has given to the two Defence teams in the Katanga and
23 Ngudjolo case, subject to the conditions stipulated by the United
24 Nations as set out in the Prosecution's request and as rehearsed
25 above once the necessary redactions have been implemented.

1 (Trial Chamber confers)

2 PRESIDING JUDGE FULFORD: Maître Mabilille, although we
3 will repeat this on Monday in the presence of everyone, it may
4 be useful for you to know now that, particularly bearing in mind
5 that the Prosecution do not oppose the inclusion of four
6 additional witnesses to your list, * the Chamber grants the
7 application and that may assist as regards ensuring that all
8 proper protective measures are put in place for those witnesses
9 within that group who need them.

10 MS MABILLE: (Interpretation) Thank you very much,
11 your Honour.

12 PRESIDING JUDGE FULFORD: Thank you all very much for
13 your attendance. We hope that we will all meet again at 2.30 on
14 Monday afternoon.

15 THE COURT USHER: All rise.

16 (The hearing ends at 12.28 p.m.)

17 CORRECTION REPORT

18 Page 7 line 6 "the Defence (sic)" is corrected by "the Chamber".

19 RECLASSIFICATION REPORT

20 Pursuant Trial Chamber's I instruction, dated 24 March 2010, the
21 transcript of the Ex-Parte Hearing with the Office of the
22 Prosecutor, the Defence and the Registry is reclassified as
23 Public.