



Original: **French**

No.: **ICC-01/04-01/07**

Date: **25 March 2009**

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF

THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI

Public redacted version

**Decision on Three Prosecutor's Applications to Maintain Redactions or
Reinstate Redacted Passages
(ICC-01/04-01/07-859, ICC-01/04-01/07-860 and ICC-01/04-01/07-862)**

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
 Ms Fatou Bensouda, Deputy Prosecutor
 Mr Éric MacDonald, Senior Trial Lawyer

Counsel for Germain Katanga

Mr David Hooper
 Mr Andreas O'Shea
 Ms Caroline Buisman

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
 Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Ms Carine Bapita Buyangandu
 Mr Joseph Keta
 Mr Jean-Louis Gilissen
 Mr Hervé Diakiese
 Mr Jean Chrysostome Mulamba
 Nsokoloni
 Mr Fidel Nsita Luvengika
 Mr Vincent Lurquin
 Ms Flora Ambuyu Andjelani

Legal Representatives of the Applicants

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 54, 67 and 68 of the *Rome Statute* (“the Statute”) and rules 77 and 81 of the *Rules of Procedure and Evidence* (“the Rules”), decides as follows:

I. Procedural history

1. This decision arises from three applications (“the Applications”) submitted on 30 January 2009 by the Prosecutor to redact documents concerning Witnesses 12, 132, 157, 219, 249, 287, 292 and 353¹ and to maintain or reinstate redacted passages in 47 documents² as well as redactions ordered by Pre-Trial Chamber I.³ The Applications were submitted in accordance with the Chamber’s *Decision on the process for redactions*.⁴ The Prosecutor is seeking authorisation to redact certain information contained in those documents pursuant to rules 81(1), 81(2) and 81(4) of the Rules.

2. On 16 February 2009, the Defence for Mathieu Ngudjolo submitted observations on the Applications.⁵ The Defence for Germain Katanga did not submit any observations.

¹ Office of the Prosecutor, “Prosecution’s Application to Redact Evidence Relating to Witnesses W-132, W-157 and W-287 and Provision of Information Relating to Witnesses W-12, W-132, W-219, W-249, W-287, W-292 and VV-353”, 30 January 2009, ICC-01/04-01/07-859, with confidential *ex parte* Annexes only available to the Prosecutor.

² Office of the Prosecutor, “*Requête de l’Accusation aux fins de maintien ou de suppression des expurgations dans 47 documents*”, 30 January 2009, ICC-01/04-01/07-860, with confidential *ex parte* Annexes only available to the Prosecutor.

³ Office of the Prosecutor, “*Requête de l’Accusation aux fins de maintien ou de suppression des expurgations de certaines informations dans des éléments de preuve conformément à la ‘Décision relative à la procédure d’expurgation’*”, 30 January 2009, ICC-01/04-01/07-862, with confidential *ex parte* Annexes only available to the Prosecutor.

⁴ *Decision on the Redaction Process*, 12 January 2009, ICC-01/04-01/07-819-tENG.

⁵ Mathieu Ngudjolo’s Defence Team, “*Observations de la Défense concernant les requêtes visées aux points 4 et 5 de la Décision relative à la procédure d’expurgation*”, 16 February 2009, ICC-01/04-01/07-900.

3. On 26 February 2009, the Chamber issued an order directing the Prosecutor to provide further details on his applications ICC-01/04-01/07-860 and ICC-01/04-01/07-862.⁶ The Prosecutor responded to that request for clarification on 3 March 2009.⁷

II. The Chamber's analysis

4. The Chamber emphasises once again⁸ the requirements laid down by the Appeals Chamber: (1) the existence of an objectively justifiable risk to the safety of the person concerned or which may prejudice further or ongoing investigations;⁹ (2) the existence of a link between the source of the risk and the accused;¹⁰ (3) the infeasibility or insufficiency of less restrictive protective measures;¹¹ (4) an assessment whether the redactions sought are prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial;¹² and (5) the obligation to periodically review the decision authorising the redactions should circumstances change.¹³

⁶ Trial Chamber II, *Order Instructing the Prosecutor to Provide Additional Details about his Requests ICC-01/04-01/07-860 and ICC-01/04-01/07-862 (Regulation 28 of the Regulations of the Court)*, 26 February 2009, ICC-01/04-01/07-930-Conf-Exp-tENG.

⁷ Office of the Prosecutor, *"Réponse de l'Accusation relative à l'Ordonnance enjoignant au Procureur de fournir des détails supplémentaires concernant ses requêtes ICC-01/04-01/07-860 et ICC-01/04-01/07-862"*, 3 March 2009, ICC-01/04-01/07-939-Conf-Exp.

⁸ ICC-01/04-01/07-889-Conf, para. 4.

⁹ 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, paras. 71 and 97.

¹⁰ ICC-01/04-01/07-475, para. 71.

¹¹ 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, para. 37; Appeals Chamber, *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, para. 33.

¹² ICC-01/04-01/06-773, para. 34.

¹³ ICC-01/04-01/07-475, para. 73.

5. As the Chamber has had occasion to point out on several occasions,¹⁴ any application for redactions is subject to strict judicial scrutiny on a case-by-case basis. Any decision by which the Chamber authorises the non-disclosure of part of a document to the Defence must be sufficiently reasoned in light of, *inter alia*, the arguments submitted by the Prosecutor in support of his application. The Chamber has a duty to balance the various interests at stake, as stipulated in rule 81 of the Rules, whilst ensuring that the proceedings include safeguards which would protect the interests of the accused so as to comply, to the fullest extent possible, with the requirements of adversarial proceedings and the principle of equality of arms.¹⁵ The Chamber has undertaken a detailed review of each redaction sought on the basis of the criteria set out in the previous paragraph.

6. In order to better assess the redactions sought on a case-by-case basis, the Chamber has drawn a distinction between those redactions justified by the Prosecutor on the basis of rule 81(1) of the Rules, those whose objective is to avoid prejudicing further or ongoing investigations (rule 81(2) of the Rules) and those which aim to ensure the safety of witnesses and members of their families (rule 81(4) of the Rules). Furthermore, it has reviewed separately the requests for reinstatement of redacted passages. Although two of the Applications are to maintain redactions already ordered, the Chamber has treated them as new applications for redactions in order to simplify the format of its decision.

7. The Chamber notes that the Prosecutor's arguments pertaining to the existence of an objectively justifiable risk are identical, both for redactions sought

¹⁴ *Order Instructing the Registry to File Documents on the Influence that the Accused may have Retained in the DRC and on the Pressure that they Might Currently Exert on Victims and Witnesses*, 18 December 2008, ICC-01/04-01/07-800-tENG, para. 9; *Decision on the Redaction Process*, 12 January 2009, ICC-01/04-01/07-819-tENG, paras. 1 and 7; *Grounds for the Oral Decision on the Prosecutor's Application to Redact the Statements of Witnesses 001, 155, 172, 280, 281, 284, 312 and 323 and the Investigator's Note concerning Witness 176 (rule 81 of the Rules of Procedure and Evidence)*, ICC-01/04-01/07-888-Conf-Exp and ICC-01/04-01/07-889-Conf-tENG, para. 3 ("Grounds for the Oral Decision").

¹⁵ *Grounds for the Oral Decision*, ICC-01/04-01/07-888-Conf-Exp and ICC-01/04-01/07-889-Conf, para. 3.

under rule 81(2) of the Rules and for those sought under rule 81(4) of the Rules). It therefore seems appropriate to give a joint response on this issue.

8. The Prosecutor mentions the state of insecurity prevailing in the Democratic Republic of the Congo ("the DRC") and he also refers to the existence of threats made against persons cooperating with the Court [REDACTED].¹⁶

9. Furthermore, he draws the Chamber's attention to threats allegedly made against [REDACTED].¹⁷ [REDACTED].¹⁸

10. The Chamber recalls that that hearing was indeed held on 28 January 2009, and that, on that occasion, the risk of pressure was discussed. It has already recognised that there exists an objectively justifiable risk resulting from the insecurity prevailing in Ituri and, more generally, in the DRC, both for the Prosecutor's ongoing or further investigations and for the safety of witnesses, victims and members of their families.¹⁹

11. Furthermore, the Chamber cannot disregard information indicating that pressure may have been exerted on witnesses, which prompted the Registry, considering that there were reasonable grounds for it, to order, *inter alia*, the surveillance and monitoring of the accused's telephone communications from the Detention Centre. That decision is currently being challenged before the Presidency of the Court.²⁰

¹⁶ ICC-01/04-01/07-859, Anxs A-I, B-I, C-I; ICC-01/04-01/07-860, Anxs D-I, E-I, F-I, G-I, H-I, I-I, L-I, M-I, O-I, P-I, Q-I, R-I, S-I; ICC-01/04-01/07-862, Anxs B, C, D, E, F, G, H, J, K, L, M, N, O, P, Q, R, S, T.

¹⁷ *Idem*.

¹⁸ [REDACTED]

¹⁹ Grounds for the Oral Decision, ICC-01/04-01/07-888-Conf-Exp and ICC-01/04-01/07-889-Conf, para. 9.

²⁰ Mathieu Ngudjolo's Defence Team, "Defence Application for Review of the Decision of the Registrar of 27 February 2009 entitled Second Decision of the Registrar on the Monitoring of Non-privileged Telephone Communications and Visits of Mr Mathieu Ngudjolo Chui", 3 March 2009, ICC-RoR221-03/09-I-Conf-Exp-tENG.

12. The general observation does not, however, prejudice the existence of an objectively identifiable risk of which the Chamber must satisfy itself when reviewing each of the redactions sought on a case-by-case basis.

a) Non-disclosure of internal information of the Office of the Prosecutor (rule 81(1))

13. The Prosecutor requests, pursuant to rule 81(1) of the Rules, that certain passages in several investigators' notes pertaining to Witnesses 28,²¹ 132,²² 157,²³ 166²⁴ and 167²⁵ be redacted. He submits that these passages contain internal comments of the Office of the Prosecutor or information pertaining to its internal operations and considers that, as such, they fall under rule 81(1) of the Rules.

14. The Chamber takes note thereof, while recalling that the provisions of rule 81(1) of the Rules cannot constitute a valid legal basis for the submission of applications for redactions. The Chamber suggests once again to the Prosecutor that, in future, he should set out, in a separate document, everything that falls strictly under rule 81(1) of the Rules, such that only information which should be disclosed may be the subject of requests for redactions.²⁶

b) Protection of further or ongoing investigations (rule 81(2))

15. The Prosecutor requests authorisation to redact three types of information under rule 81(2) of the Rules:

- the locations where the interviews of Witnesses 132, 157, 166, 219, 249, 258, 267, 279, 280, 287 and 311 were conducted;

²¹ ICC-01/04-01/07-862-Conf-Exp-AnxB. See also the clarification as to the legal basis for this redaction in "*Réponse de l'Accusation relative à l'Ordonnance enjoignant au Procureur de fournir des détails supplémentaires*", ICC-01/04-01/07-939-Conf-Exp, paras. 10 and 11.

²² ICC-01/04-01/07-860-Conf-Exp-AnxM-2-1.

²³ ICC-01/04-01/07-862-Conf-Exp-AnxD.

²⁴ ICC-01/04-01/07-862-Conf-Exp-AnxH.

²⁵ ICC-01/04-01/07-860-Conf-Exp-AnxE-2.

²⁶ Grounds for the Oral Decision, ICC-01/04-01/07-888-Conf-Exp and ICC-01/04-01/07-889-Conf, para. 10.

- the Office of the Prosecutor’s sources and staff members of the Court and other international organisations in the field;
- the names, initials and signatures of the interpreters present during the taking of the statements of Witnesses 28, 132, 157, 159, 161, 166, 233, 249, 250, 268, 279, 280 and 287; and
- the means of communication used by the Office of the Prosecutor.²⁷

16. As was already recalled²⁸ at the status conference held on 27 and 28 November 2008, the Prosecutor stated that he was coming to the end of his investigation and that disclosure of such information would be prejudicial to it.

i) Locations where the interviews were conducted

17. The Prosecutor requests that references to “[REDACTED]” and “[REDACTED]” in the transcripts of the statements of Witnesses 132,²⁹ 157,³⁰ 166,³¹ 219,³² 249,³³ 258,³⁴ 267,³⁵ 279,³⁶ 280,³⁷ 287³⁸ and 311 be redacted.³⁹

18. The Prosecutor submits that [REDACTED] is one of the only towns [REDACTED] where it is possible to take statements from witnesses.⁴⁰ He considers that it is only by redacting the name of the place where the interviews are conducted that the risk would be lessened and that there is no less restrictive protective measure that can be implemented, since this is the only location in the Ituri region which offers

²⁷ ICC-01/04-01/07-860-Conf-Exp-Anx Q-2; ICC-01/04-01/07-862-Conf-Exp-Anx O.

²⁸ Grounds for the Oral Decision, ICC-01/04-01/07-888-Conf-Exp and ICC-01/04-01/07-889-Conf, para. 11.

²⁹ ICC-01/04-01/07-860-Conf-Exp-Anx M-2-1.

³⁰ ICC-01/04-01/07-862-Conf-Exp-Anx D.

³¹ ICC-01/04-01/07-862-Conf-Exp-Anx H.

³² ICC-01/04-01/07-862-Conf-Exp-Anx J.

³³ ICC-01/04-01/07-862-Conf-Exp-Anx M.

³⁴ ICC-01/04-01/07-862-Conf-Exp-Anx O.

³⁵ ICC-01/04-01/07-860-Conf-Exp-Anx R-2.

³⁶ ICC-01/04-01/07-862-Conf-Exp-Anx Q.

³⁷ ICC-01/04-01/07-862-Conf-Exp-Anx R.

³⁸ ICC-01/04-01/07-862-Conf-Exp-Anx S.

³⁹ ICC-01/04-01/07-862-Conf-Exp-Anx T.

⁴⁰ See footnotes 29 to 39.

satisfactory security conditions. Noting the existence of threats to persons cooperating with the Court, the Prosecutor would like the name of that locality to be temporarily removed in order to avoid obstruction of his activities by persons demonstrating hostility towards the Court's action. He proposes that the information redacted be disclosed 30 days prior to the commencement of the trial.⁴¹

19. Mathieu Ngudjolo's Defence considers that the disclosure of certain evidence only 30 days prior to the commencement of the trial would not facilitate the work of the Defence in designing its strategy and conducting its investigations.⁴² After recalling that the Defence teams' staffing is low, it expressed the wish to have access to the redacted materials five to six months prior to the commencement of the trial.⁴³

20. The Chamber has already admitted that, because of the prevailing instability in Ituri and the resulting danger, disclosing the interview location could indeed interfere with ongoing investigations.⁴⁴ Moreover, the proposed redactions are limited in time. Furthermore, it does not seem feasible, at this stage, to have recourse to measures which are less restrictive than those proposed, given their very limited scope.

21. The Chamber notes that redacting the names of the locations where interviews are conducted does not affect the intelligibility or use of the documents by the Defence. In the Chamber's view, knowing the place where an interview is conducted is not essential, under the circumstances, to the preparation of the Defence, and redacting the location does not prejudice the rights of the accused. Lastly, it considers that the Defence's application for the redacted passages to be reinstated five to six months prior to the trial is inconsistent with the principle of proportionality which should be respected in the current matter, since the redactions

⁴¹ *Ibid.*

⁴² ICC-01/04-01/07-900, para. 22.

⁴³ ICC-01/04-01/07-900, para. 25.

⁴⁴ Grounds for the Oral Decision, ICC-01/04-01/07-888-Conf-Exp and ICC-01/04-01/07-889-Conf, para.15.

are limited in number. Accordingly, the Chamber grants the redactions requested by the Prosecutor until the thirtieth day prior to the commencement of the trial.

ii) Sources of the Office of the Prosecutor and field staff

22. The Prosecutor seeks permission to redact references to two non-governmental organisations (“NGOs”), [REDACTED]⁴⁵ and [REDACTED],⁴⁶ as well as other information enabling these organisations and their employees to be identified, which appear in several documents. He also seeks the redaction of the reference in the statement of Witness 157 to the “[REDACTED]”.⁴⁷ The Prosecutor believes that the redactions sought are necessary insofar as these organisations, which operate in the region, are a source for his Office. He also points out, with respect to the NGO [REDACTED].⁴⁸

23. The Prosecutor also requests the redaction of the names “[REDACTED]”,⁴⁹ “[REDACTED]”,⁵⁰ “[REDACTED]”,⁵¹ and “[REDACTED]”,⁵² as well as their telephone numbers. He also requests the redaction of the names of [REDACTED] staff members of the Court [REDACTED]⁵³ and the names of employees of other international organisations also operating in the region, in order to protect his investigations.⁵⁴

24. According to the Prosecutor, the redaction of these names is necessary since the persons concerned act as intermediaries and facilitate contacts between the witnesses and his Office. He considers that these persons and organisations are vital for the conduct of his activities since, without their cooperation, his investigations

⁴⁵ ICC-01/04-01/07-860-Conf-Exp-Anxs F-2, G-2 and H-2.

⁴⁶ ICC-01/04-01/07-860-Conf-Exp-Anxs I-2 and L-2-1, ICC-01/04-01/07-862-Conf-Exp-Anx H.

⁴⁷ ICC-01/04-01/07-862-Conf-Exp-Anx D.

⁴⁸ ICC-01/04-01/07-860-Conf-Exp-Anxs I-1 and L-1, ICC-01/04-01/07-862-Conf-Exp-Anx H.

⁴⁹ ICC-01/04-01/07-860-Conf-Exp-Anxs M-2-1.

⁵⁰ ICC-01/04-01/07-862-Conf-Exp-Anx B.

⁵¹ ICC-01/04-01/07-860-Conf-Exp-Anxs Q.

⁵² ICC-01/04-01/07-862-Conf-Exp-Anx D.

⁵³ ICC-01/04-01/07-859-Conf-Exp-Anx B-2; ICC-01/04-01/07-860 Conf-Exp-Anx E-2.

⁵⁴ ICC-01/04-01/07-860 Conf-Exp-Anx L-2-1.

would be slowed down considerably, if not made impossible.⁵⁵ Accordingly, he submits that disclosing their identity could endanger their safety and, hence, prejudice ongoing investigations.⁵⁶

25. According to the Prosecutor, the proper conduct of a third investigation by his Office into crimes committed in the DRC⁵⁷ requires that the names of those sources and the information concerning them be redacted throughout the duration of the trial, which leads him to request permanent redactions for some of them.⁵⁸

26. The Prosecutor also makes a similar request for redactions for the entire duration of the proceedings⁵⁹ or permanent redactions⁶⁰ in relation to the names of staff members of the Court as well as other international organisations working in the area.

27. Where the proposed redaction does not allow the nature of the information in question to be deduced, the Prosecutor nevertheless suggests that it be specified that it involves the name of an intermediary and information enabling him or her to be identified.⁶¹

28. The Defence for Mathieu Ngudjolo disputes the Prosecutor's allegation that the information for which redactions are requested is not essential to the Defence. It is of the view that this is "[TRANSLATION] a request which must be subject to adversarial proceedings, pitting the arguments of the Prosecution against those of the Defence in order to enable the Chamber, as a neutral and impartial referee, after balancing them, to make its decision with full knowledge of the facts".⁶² The Defence considers that "[TRANSLATION] [t]he Prosecution [...] must not put itself in the position

⁵⁵ ICC-01/04-01/07-860, para. 10; ICC-01/04-01/07-862, para. 13.

⁵⁶ See footnotes 46 to 55.

⁵⁷ ICC-01/04-01/07-860-Conf-Exp-Anxs F-1, G-1, H-1, I-1, L-1, M-1.

⁵⁸ ICC-01/04-01/07-862-Conf-Exp-Anx B, D, H.

⁵⁹ ICC-01/04-01/07-859-Conf-Exp-Anx B-1.

⁶⁰ ICC-01/04-01/07-860 Conf-Exp-Anx E-1 and L-1.

⁶¹ ICC-01/04-01/07-860 Conf-Exp-Anx E-1 and M-1; ICC-01/04-01/07-862-Conf-Exp-Anx B, D and H.

⁶² ICC-01/04-01/07-900, para. 16.

of the Defence and conclude that, in its opinion, the information which it seeks to have redacted is of no use to the defence of the accused”.⁶³

29. The Chamber considers that disclosing the identity of these intermediaries could only increase the threats hanging over them. Accordingly, it considers it necessary to redact the names of the persons and organisations acting in this capacity between the Court and potential witnesses in order to ensure their protection. It is also mindful of the important role played by these sources in the proper conduct of the investigations and of the risk that they might refuse to continue to cooperate with the Office of the Prosecutor and, more generally, with the Court, in the event that their names were disclosed. Redacting their names therefore is necessary for the protection of the investigations, and it does not appear feasible to resort to less restrictive measures.

30. The Chamber considers that these redactions do not interfere with the overall intelligibility of the documents. The Defence will, in fact, have access to most of the information contained therein. However, it is of the view that it cannot authorise the redactions until the end of the trial, as the Chamber does not believe that such a measure, under the circumstances and in the absence of any indication to the contrary, takes sufficient account of the rights of the Defence. In fact, the Chamber must reconcile the contradictory interests of the Prosecutor, who is anxious to protect his investigations and the people working on them, and of the Defence, which must be able to contact persons who are likely to possess exculpatory information. At this stage, it is difficult for the Chamber to conclusively assess the usefulness and relevance of such information for the Defence. It is actually up to the Defence to make such an assessment, since it is the Defence and the Defence alone which determines the strategy it intends to adopt.

31. In this case, the Defence has so far been unable to fully assess the value of this information, since the Applications only describe it in general terms. It will have an

⁶³ *Ibid.*, para. 18.

opportunity to analyse and assess the usefulness and relevance of the redacted documents once it has received them, and, if necessary, will be able to submit an application for reconsideration to the Chamber prior to the commencement of the trial. In that event, the Chamber will assess the actual impact of the redactions sought, in the light of its arguments.⁶⁴ For his part, the Prosecutor may also, no later than 45 days prior to the commencement of the trial, request that these redactions be maintained.

32. Having thus balanced the interests at stake, the Chamber finds that the redactions sought are warranted, until the thirtieth day prior to the commencement of the trial.

iii) Surnames, first names, initials and signatures of the interpreters present at the taking of the witness statements

33. The Prosecutor requests, pursuant to rule 81(2) of the Rules, the redaction of the surnames, first names, initials and signatures of the interpreters who were involved in the taking of the statements of Witnesses 28,⁶⁵ 132,⁶⁶ 157,⁶⁷ 159,⁶⁸ 161,⁶⁹ 166,⁷⁰ 233,⁷¹ 249,⁷² 250,⁷³ 268,⁷⁴ 279,⁷⁵ 280⁷⁶ and 287.⁷⁷

⁶⁴ See European Court of Human Rights, *Rowe and Davis v. The United Kingdom*, No. 28901/95, 16 February 2000, *Reports* 2000-II, para. 66. In this respect, see the Appeals Chamber judgment ICC-01/04-01/07-475, para. 57. See also European Court of Human Rights, *Jasper v. The United Kingdom*, No. 27052/95, 16 February 2000, 2000-II, para. 56, and European Court of Human Rights, *Edwards and Lewis v. The United Kingdom*, No. 39647/98 and 40461/98, 27 October 2004, paras. 36-37.

⁶⁵ ICC-01/04-01/07-862 Conf-Exp-Anx B.

⁶⁶ ICC-01/04-01/07-860 Conf-Exp-Anx M-2-2 and ICC-01/04-01/07-862 Conf-Exp-Anx C.

⁶⁷ ICC-01/04-01/07-862 Conf-Exp-Anx D.

⁶⁸ ICC-01/04-01/07-862 Conf-Exp-Anx E.

⁶⁹ ICC-01/04-01/07-860 Conf-Exp-Anx O-2 and ICC-01/04-01/07-862 Conf-Exp-Anx G.

⁷⁰ ICC-01/04-01/07-862 Conf-Exp-Anx H.

⁷¹ ICC-01/04-01/07-862 Conf-Exp-Anx K.

⁷² ICC-01/04-01/07-862 Conf-Exp-Anx M.

⁷³ ICC-01/04-01/07-862 Conf-Exp-Anx N.

⁷⁴ ICC-01/04-01/07-862 Conf-Exp-Anx P.

⁷⁵ ICC-01/04-01/07-862 Conf-Exp-Anx Q.

⁷⁶ ICC-01/04-01/07-862 Conf-Exp-Anx R.

⁷⁷ ICC-01/04-01/07-862 Conf-Exp-Anx S.

34. He submits that disclosing the names of the interpreters, like his Office's sources might prejudice ongoing investigations, since the interpreters who are involved in the interviews and the taking of statements reside in the DRC with their families. He also invokes the limited number of Congolese interpreters currently available to take part in the investigations, as well as the level of qualifications of such staff, which makes them difficult to replace. He therefore considers that the redactions sought are preventive measures which are necessary to protect those interpreters.⁷⁸

35. The Prosecutor states that the information pertaining to the names of the interpreters may be disclosed 30 days prior to the commencement of the trial and that there are no other less restrictive protective measures.⁷⁹ The Defence for Mathieu Ngudjolo considers that this 30-day time limit does not allow it to prepare its investigations effectively and that a period of five to six months prior to the commencement of the trial should be granted.⁸⁰

36. The Chamber takes note of the difficulties in finding suitably qualified persons to provide quality interpretation services *in situ*. It also considers that it is necessary to protect the interpreters who are involved in the interviews and the taking of statements from witnesses, given their small number and the ease with which they may be identified. It notes that relocating them with their families is not a feasible option, and considers that disclosing their names and the risk of pressure to which they may be exposed would compromise the conduct of the Prosecutor's investigations.⁸¹

37. The Chamber notes that the redactions sought do not interfere with the document's intelligibility. They are restricted to names, initials and signatures, and

⁷⁸ See footnotes 65 to 77.

⁷⁹ *Ibid.*

⁸⁰ ICC-01/04-01/07-900, paras. 22-25.

⁸¹ See also Grounds for the Oral Decision, ICC-01/04-01/07-888-Conf-Exp and ICC-01/04-01/07-889-Conf, para. 27.

do not seem disproportionate in the Chamber's view. It therefore considers that these redactions do not prejudice the right to a fair and impartial trial.⁸²

38. The Defence will indeed be able to find out the identity of the interpreters 30 days prior to the trial; this safeguards the rights of the accused. Furthermore, as the Chamber stated above, the five to six month period sought by the Defence for Mathieu Ngudjolo does not pass the required proportionality test, given the limited scope of the redacted information. Accordingly, the Chamber agrees with the proposed redactions.

iv) Means of communication

39. The Prosecutor seeks permission to redact the information pertaining to the means of communication that he uses to contact witnesses. In his view, these redactions are necessary to prevent the risk of revealing an investigative technique, or the location of a witness. The purpose of these redactions is therefore to protect the investigations as well as those who cooperate with the Office of the Prosecutor. He requests that these redactions be permanent, since he does not deem them relevant for the preparation of the Defence.⁸³

40. The Chamber concurs with the Prosecutor concerning the possibility of reprisals against persons who cooperate with the Court. It considers that the redactions sought do not affect the intelligibility of the document in question and that they do not prejudice the fairness of the trial. Nevertheless, adopting the same position as set forth at paragraphs 30 and 31 of this decision, the Chamber authorises the redactions sought until the thirtieth day prior to the date of the trial. For his part, the Prosecutor may also, no later than 45 days prior to the commencement of the trial, request that these redactions be maintained.

⁸² See also Grounds for the Oral Decision, ICC-01/04-01/07-888-Conf-Exp and ICC-01/04-01/07-889-Conf, para. 28.

⁸³ ICC-01/04-01/07-860-Conf-Exp-Anx Q-2; ICC-01/04-01/07-862-Conf-Exp-Anx O.

c) **Safety of witnesses, members of their families, NGO and Red Cross staff members and the IRS process (rule 81(4))**

i) **Identities of witnesses and information about their families**

41. The Prosecutor requests, under rule 81(4) of the Rules, leave from the Chamber to permanently redact the names of the family members of Witnesses 14, 132, 157, 159, 160, 161, 233, 238, 243, 249, 250, 268, 279, 280, 287 as well as information enabling them to be identified.⁸⁴ This information includes, *inter alia*:

- [REDACTED],⁸⁵
- [REDACTED],⁸⁶
- [REDACTED],⁸⁷
- [REDACTED],⁸⁸
- [REDACTED],⁸⁹
- [REDACTED],⁹⁰
- [REDACTED],⁹¹
- [REDACTED],⁹²
- [REDACTED],⁹³
- [REDACTED],⁹⁴
- [REDACTED],⁹⁵
- [REDACTED],⁹⁶
- [REDACTED],⁹⁷
- [REDACTED],⁹⁸

⁸⁴ ICC-01/04-01/07-859-Conf-Exp; ICC-01/04-01/07-860-Conf-Exp; ICC-01/04-01/07-862-Conf-Exp;

⁸⁵ ICC-01/04-01/07-860-Conf-Exp Anxs L2-1 and L2-2.

⁸⁶ ICC-01/04-01/07-859-Conf-Exp-Anxs A-2-1, A-2-2 and A-2-3; and ICC-01/04-01/07-862-Conf-Exp-AnxC.

⁸⁷ ICC-01/04-01/07-862-Conf-Exp-Anx D.

⁸⁸ ICC-01/04-01/07-862-Conf-Exp-Anx E.

⁸⁹ ICC-01/04-01/07-862-Conf-Exp-Anx F.

⁹⁰ ICC-01/04-01/07-862-Conf-Exp-Anx G.

⁹¹ ICC-01/04-01/07-862-Conf-Exp-Anx H.

⁹² ICC-01/04-01/07-862-Conf-Exp-Anx K.

⁹³ ICC-01/04-01/07-862-Conf-Exp-Anx L.

⁹⁴ ICC-01/04-01/07-860-Conf-Exp-Anx Q-2.

⁹⁵ ICC-01/04-01/07-862-Conf-Exp-Anx M.

⁹⁶ ICC-01/04-01/07-862-Conf-Exp-Anx N and ICC-01/04-01/07-939-Conf-Exp, paras. 20-21.

⁹⁷ ICC-01/04-01/07-862-Conf-Exp-Anx P.

- [REDACTED];⁹⁹ [REDACTED]
- [REDACTED].¹⁰⁰

42. In addition to identifying information, the Prosecutor also proposes the redaction of information which would enable the family members of Witnesses 14, 28, 132, 157, 161, 166, 233, 238, 243, 249, 250, 268, 280, 287 and 311 to be located. He requests leave of the Chamber to permanently redact:

- [REDACTED];¹⁰¹
- [REDACTED]¹⁰² [REDACTED];¹⁰³
- [REDACTED],¹⁰⁴ [REDACTED];¹⁰⁵
- [REDACTED];¹⁰⁶
- [REDACTED];¹⁰⁷
- [REDACTED];¹⁰⁸
- [REDACTED];¹⁰⁹
- [REDACTED];¹¹⁰
- [REDACTED];¹¹¹
- [REDACTED];¹¹²
- [REDACTED];¹¹³
- [REDACTED];¹¹⁴
- [REDACTED];¹¹⁵

⁹⁸ ICC-01/04-01/07-862-Conf-Exp-Anx Q.

⁹⁹ ICC-01/04-01/07-862-Conf-Exp-Anx R.

¹⁰⁰ ICC-01/04-01/07-862-Conf-Exp-Anx S.

¹⁰¹ ICC-01/04-01/07-860-Conf-Exp-Anx L2-1 and L2-2.

¹⁰² ICC-01/04-01/07-862-Conf-Exp-Anx B.

¹⁰³ ICC-01/04-01/07-939-Conf-Exp, para. 13.

¹⁰⁴ ICC-01/04-01/07-859-Conf-Exp-Anx A-2-1; ICC-01/04-01/07-860-Conf-Exp-Anx M-2-1.

¹⁰⁵ ICC-01/04-01/07-862-Conf-Exp-Anx C.

¹⁰⁶ ICC-01/04-01/07-862-Conf-Exp-Anx D.

¹⁰⁷ ICC-01/04-01/07-862-Conf-Exp-Anx G.

¹⁰⁸ ICC-01/04-01/07-862-Conf-Exp-Anx H.

¹⁰⁹ ICC-01/04-01/07-862-Conf-Exp-Anx K.

¹¹⁰ ICC-01/04-01/07-862-Conf-Exp-Anx L and ICC-01/04-01/07-939-Conf-Exp, paras. 17-18.

¹¹¹ ICC-01/04-01/07-860-Conf-Exp-Anx Q-2.

¹¹² ICC-01/04-01/07-862-Conf-Exp-Anx M.

¹¹³ ICC-01/04-01/07-862-Conf-Exp-Anx N.

¹¹⁴ ICC-01/04-01/07-862-Conf-Exp-Anx P.

- [REDACTED];¹¹⁶ [REDACTED]
- [REDACTED].¹¹⁷

43. Like the Prosecutor, the Chamber considers that disclosing the identity of the family members of the witnesses as well as information enabling them to be identified or located might jeopardise their safety, especially where they are located in Ituri.

44. The Chamber is also of the opinion that some of the redactions sought constitute an appropriate measure to lessen that risk, and that no other less restrictive measure would achieve the same result, given, moreover, that the family members of the witnesses in question are not covered by the Court's witness protection programme.¹¹⁸ Furthermore, the Prosecutor requests the redaction of [REDACTED]¹¹⁹ [REDACTED],¹²⁰ [REDACTED],¹²¹ [REDACTED].¹²² These last redactions are intended to ensure that their relocation is successful.

45. In certain instances, the Prosecutor proposes other forms of redactions, where it is not clear from the text that the information pertains to the families of witnesses. Accordingly, he suggests referring to the "first name of the witness's son" and the "first name of the witness's daughter" for Witness [REDACTED];¹²³ to the "name of the witness's father" for Witness [REDACTED];¹²⁴ to "the identity and family details" for Witness [REDACTED];¹²⁵ to the "name of the witness's wife" for Witness [REDACTED];¹²⁶ to the "name of the witness's sister" and to the "name(s) of the witness's cousin(s)"

¹¹⁵ ICC-01/04-01/07-862-Conf-Exp-Anx R.

¹¹⁶ ICC-01/04-01/07-859-Conf-Exp-Anx C-2; ICC-01/04-01/07-862-Conf-Exp-Anx S; and ICC-01/04-01/07-939-Conf-Exp, paras. 23-24.

¹¹⁷ ICC-01/04-01/07-862-Conf-Exp-Anx T.

¹¹⁸ See footnotes 101 to 117.

¹¹⁹ ICC-01/04-01/07-862-Conf-Exp-Anx B.

¹²⁰ ICC-01/04-01/07-859-Conf-Exp-Anx A-1.

¹²¹ ICC-01/04-01/07-862-Conf-Exp-Anx F.

¹²² ICC-01/04-01/07-862-Conf-Exp-Anx M.

¹²³ ICC-01/04-01/07-859-Conf-Exp-Anx A-1.

¹²⁴ ICC-01/04-01/07-862-Conf-Exp-Anx E.

¹²⁵ ICC-01/04-01/07-862-Conf-Exp-Anx F.

¹²⁶ ICC-01/04-01/07-862-Conf-Exp-Anx G.

for Witness [REDACTED].¹²⁷ Furthermore, it is proposed that the redacted information be communicated in the form “witness’s place of residence” for Witness [REDACTED];¹²⁸ “current place of residence of the witness’s parents” and “place of residence of the witness’s family members” for Witness [REDACTED];¹²⁹ “place of residence of the witness’s older brother” for Witness [REDACTED];¹³⁰ and “place of residence of the witness’s family members” for Witness [REDACTED].¹³¹ The Chamber welcomes this proposal, which enables the Defence to assess the nature of the redacted information.

46. The Chamber considers that the redactions sought in the format suggested by the Prosecutor do not prejudice the rights of the accused, since the documents can be read, understood and used by the Defence. The Chamber is therefore in favour of maintaining the redactions sought, but is of the view that it can only redact the passages in question on a temporary basis and not through to the end of the trial, as, in its opinion, such a measure seems excessive with regard to the exercise of the rights of the defence. It considers that only those redactions intended to protect the places to which witnesses were relocated mentioned in paragraph 44 may be authorised permanently. It therefore authorises the last-named redactions through to the end of the trial, and all other redactions until the thirtieth day prior to the date of the trial.

47. Moreover, the Prosecutor requests that the name, signature and occupation of Witness [REDACTED] be redacted¹³² and that the witness’s identity not be disclosed for as long as possible, in accordance with a procedure he outlined in an application filed on 9 February 2009.¹³³ He also seeks authorisation from the Chamber to redact

¹²⁷ ICC-01/04-01/07-862-Conf-Exp-Anx K.

¹²⁸ ICC-01/04-01/07-862-Conf-Exp-Anx B and ICC-01/04-01/07-939-Conf-Exp, para. 13.

¹²⁹ ICC-01/04-01/07-862-Conf-Exp-Anx D.

¹³⁰ ICC-01/04-01/07-862-Conf-Exp-Anx G.

¹³¹ ICC-01/04-01/07-862-Conf-Exp-Anx P.

¹³² ICC-01/04-01/07-860-Conf-Exp-Anx R-2.

¹³³ Office of the Prosecutor, *Prosecution’s Submissions on the Modalities of Disclosure Required for the Protection of Incriminating Witnesses*, 9 February 2009, ICC-01/04-01/07-882.

the names and signatures of Witnesses [REDACTED]¹³⁴ and [REDACTED],¹³⁵ as well as the surname and first name of Witness [REDACTED],¹³⁶ and again proposes that this information be disclosed in accordance with an appropriate procedure.¹³⁷

48. Before the Chamber rules on the procedures just mentioned, it considers that, in the circumstances, disclosing the identity of the witnesses as well as information enabling them to be identified or located might jeopardise their safety, especially where they are located in Ituri. Furthermore, it is of the opinion that the redactions sought are an appropriate measure to lessen this risk, and that no other less restrictive measure would achieve the same result, since the witnesses in question are not currently covered by the Court's witness protection programme.

ii) Staff members of NGOs and the Congolese Red Cross

49. The Prosecutor further requests the redaction from the statement of Witness 14 the references to names of staff members of NGOs working locally, in order to protect them and thus ensure their safety.¹³⁸ Moreover, he requests authorisation to maintain non-disclosure of two pictures which show a staff member of the Congolese Red Cross and reveal the staff member's place of work.¹³⁹

50. As regards staff members of NGOs, the Chamber considers that the redactions sought do not interfere with the overall intelligibility of the documents and, in this respect, refers to its reasons at paragraphs 30 and 31 of this decision, which it intends to apply *mutatis mutandis*, without the need to restate them. It therefore considers the redactions sought to be warranted, until the thirtieth day prior to the commencement of the trial.

¹³⁴ ICC-01/04-01/07-860-Conf-Exp Anxs S-2-1, S-2-2 and S-2-3.

¹³⁵ ICC-01/04-01/07-860-Conf-Exp-Anx P-2 and ICC-01/04-01/07-862-Conf-Exp-Anx J.

¹³⁶ ICC-01/04-01/07-860-Conf-Exp-Anx Q-2.

¹³⁷ Office of the Prosecutor, "Prosecution's Submissions on the Modalities of Disclosure Required for the Protection of Witnesses Providing Exculpatory Evidence or Evidence of a Nature material to the Preparation of the Defense", 11 February 2009, ICC-01/04-01/07-893.

¹³⁸ ICC-01/04-01/07-860-Conf-Exp Anxs L-2-1 and L-2-2.

¹³⁹ ICC-01/04-01/07-860-Conf-Exp-Anx C-2.

51. In respect of the staff member of the Congolese Red Cross, the Chamber wishes to obtain additional details from the Prosecutor concerning, firstly, the exact basis of his request, in particular, in respect of the appropriateness in this matter of the reference to rule 73(4) of the Rules and, secondly, the reasons for the proposed redactions.

iii) Initial Response System

52. Relying on rule 81(1) of the Rules, the Office of the Prosecutor had initially envisaged not disclosing to the Defence more than 18 pages of the transcript of a telephone interview with Witness [REDACTED].¹⁴⁰ Having noted that this information concerned the place of residence of the witness and his or her family, the witness's health, the modalities of his or her cooperation with the Court as well as the witness's safety, the Chamber therefore instructed the Prosecutor to provide it with additional details¹⁴¹ and to submit any relevant justifications.¹⁴² In his response of 3 March 2009,¹⁴³ the Prosecutor recharacterised his application by basing it on rule 81(4) of the Rules. He submits that "[TRANSLATION] gathering this type of information is indispensable to initiate the steps and procedures of the Initial Response System" and that, if "[TRANSLATION] this information were disclosed, [it would] be harmful to the measures put in place and would reveal how the Court's protection programme functions".¹⁴⁴

53. Having noted the redactions sought, the Chamber notes that they encompass a very significant portion of the document and appear to extend way beyond the objective sought. It will therefore ask the Prosecutor, after consulting with the Victims and Witnesses Unit, to review the redactions sought by restricting them to those passages that are strictly necessary (for example, by removing only the

¹⁴⁰ ICC-01/04-01/07-860-Conf-Exp-Anx Q-2.

¹⁴¹ *Ibid.*

¹⁴² ICC-01/04-01/07-930-Conf-Exp.

¹⁴³ ICC-01/04-01/07-939-Conf-Exp.

¹⁴⁴ ICC-01/04-01/07-939-Conf-Exp, paras. 8-9.

telephone numbers and other information concerning the Initial Response System procedure, as well as identifying information for witnesses).

f) Authorisation to reinstate redacted passages

54. The Prosecutor requests the reinstatement of passages initially redacted under rule 81(4) of the Rules.¹⁴⁵ He notes, respectively, that certain documents have become public,¹⁴⁶ that there is no longer any danger since the witness has been relocated and his or her name disclosed,¹⁴⁷ that the information provided is not precise enough to identify the witness's family members,¹⁴⁸ that the document is part of the dossier of the *Auditeur Général Militaire*,¹⁴⁹ that the document has already been disclosed to the Defence,¹⁵⁰ that the individual has consented to his or her identity being disclosed to the Defence,¹⁵¹ that there simply is no objectively justifiable risk for the redaction of the information¹⁵² and that the passages have already been reinstated by his Office *proprio motu*.¹⁵³

55. Having reviewed the said applications and satisfied itself that there is no risk that disclosing this information would endanger the safety of the witnesses, victims, their family members and the persons concerned, the Chamber authorises the reinstatement of the redacted passages.

¹⁴⁵ ICC-01/04-01/07-860-Conf-Exp and ICC-01/04-01/07-862-Conf-Exp.

¹⁴⁶ ICC-01/04-01/07-860-Conf-Exp Anxs A-2, B-2-1 and B-2-2.

¹⁴⁷ ICC-01/04-01/07-860-Conf-Exp Anxs D-2, N-2-1, N-2-2, N-2-3, N-2-4; ICC-01/04-01/07-862-Conf-Exp Anxs B, D and F.

¹⁴⁸ ICC-01/04-01/07-860-Conf-Exp-Anx E-2; ICC-01/04-01/07-862-Conf-Exp Anxs H and N.

¹⁴⁹ ICC-01/04-01/07-860-Conf-Exp Anxs J-2, K-2-1 and K-2-2.

¹⁵⁰ ICC-01/04-01/07-860-Conf-Exp-Anxs T-2, U-2-1, U-2-2, U-2 -3, V-2 and W-2.

¹⁵¹ ICC-01/04-01/07-862-Conf-Exp Anxs D and T.

¹⁵² ICC-01/04-01/07-860-Conf-Exp-AnxL-2-1; ICC-01/04-01/07-862-Conf-Exp Anxs A, B, C, D, E, G, H, I, K, M, N, O, P, Q, S and T.

¹⁵³ ICC-01/04-01/07-860-Conf-Exp Anxs G-2, H-2, O-2, P-2, R-2, S-2-1, S-2-2 and S-2-3; ICC-01/04-01/07-862-Conf-Exp Anxs B, C, D, E, G, H, K, N, O, P, Q, R and T.

FOR THESE REASONS, THE CHAMBER

- 1) **GRANTS** the Applications, whilst reserving the right to periodically review the authorised redactions, either *proprio motu* or upon an application submitted for this purpose, with the exception of:
 - the additional details requested at paragraph 51 of this decision;
 - the application referred to at paragraph 52 of this decision, for which the Prosecutor must review the redactions sought, limiting them to the passages that are strictly necessary;
- 2) **DIRECTS** the Prosecutor to submit his new proposals no later than 4 p.m. on 27 March 2009;
- 3) **AUTHORISES** all of the redactions sought until the thirtieth day prior to the date of the commencement of the trial, save that the Prosecutor may, no later than 45 days prior to that date, request that they be maintained; and
- 4) **AUTHORISES** all of the requests for reinstatement of redacted passages and **ORDERS**, where applicable, the disclosure of the relevant information to the Defence as soon as practicable.

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

[signed]
Judge Bruno Cotte
Presiding Judge

[signed]
Judge Fatoumata Dembele Diarra

[signed]
Judge Fumiko Saiga

Dated this 25 March 2009

At The Hague, The Netherlands