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TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

**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 the Protection of 21 Witnesses Under Article 67(2) of the Statute and/or
Rule 77 of the Rules of Procedure and Evidence**

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 the Defence of Germain Katanga

Mr David Hooper
 Mr Andreas O'Shea

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Legal Representatives of the Victims

Ms Carine Bapita Buyangandu
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Legal Representatives of the Applicants

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Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber I

Trial Chamber II of the International Criminal Court (“the Chamber”), acting pursuant to articles 64(6)(e), 67 and 68(1) of the Rome Statute (“the Statute”), rule 77 of the Rules of Procedure and Evidence (“the Rules”) and regulation 42 of the Regulations of the Court, decides as follows.

1. On 11 February 2009, the Prosecutor submitted to the Chamber a report on the modalities envisaged for his disclosure of statements of witnesses providing exculpatory evidence who, in his view, require special protective measures.¹ These were witnesses who had indicated that they were not willing to consent to the disclosure of their identity.

2. In response to an Order of 12 February 2009² inviting them to submit their observations, both Defence teams³ and the legal representatives of the victims⁴ filed their submissions on 23 February 2009. The Chamber considered the situation of a number of the witnesses concerned at two *ex parte* hearings on 25 February⁵ and 16 March 2009.⁶

3. The Prosecutor further submitted to the Chamber two reports dated 16 and 23 March 2009 respectively, informing it of the progress of disclosure to the Defence

¹ 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 Defence”, 11 February 2009, ICC-01/04-01/07-893.

² *Order fixing a Time Limit for Responses by the Participants in the Proceedings (regulation 34 of the Regulations of the Court)*, 12 February 2009, ICC-01/04-01/07-895-tENG.

³ Defence for Mathieu Ngudjolo, “Réponse unique de la Défense aux soumissions numéros 893 et 902 de l’Accusation”, 23 February 2009, ICC-01/04-01/07-911; Defence for Germain Katanga, “Defence Response to the 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 Defence”, 23 February 2009, ICC-01/04-01/07-918.

⁴ Legal Representatives of Victims a/0333/07 and a/0110/08, “Réponse des représentants légaux des victimes a/0333/07 et a/0110/08 aux « 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 Defence »”, 23 February 2009, ICC-01/04-01/07-913; Legal Representatives of the Victims, “Observations des représentants légaux de victimes sur les mesures de protection liées à la communication par le Procureur, à la Défense, de pièces de témoins à décharge”, 23 February 2009, ICC-01/04-01/07-919.

⁵ ICC-01/04-01/07-T-60-CONF-EXP-FRA ET 25-02-2009, pp. 6 to 20.

⁶ ICC-01/04-01/07-T-62-CONF-EXP-FRA ET 16-03-2009, pp. 1 to 26.

of the witness statements falling under article 67(2) of the Statute or rule 77 of the Rules of Procedure and Evidence (“the Rules”).⁷

4. Lastly, on 23 March 2009, the Prosecutor submitted two specific applications to the Chamber. The first concerns 12 witnesses and seeks protective measures consisting of permanent redactions of their identity or disclosure to the Defence of summaries of their statements (“the Application for Redactions”).⁸ The second proposes a procedure for the admission of facts and non-disclosure of the identity of nine witnesses (“the Application for Admission”).⁹

5. On 1 April 2009, the Defence teams submitted their observations on those two applications.¹⁰

⁷ Office of the Prosecutor, “*Information de la Chambre – en vue de l’audience ex parte du 16 mars 2009 – sur l’état d’avancement de la communication à la Défense des déclarations de témoins relevant de l’article 67-2 ou de la règle 77 justifiant de potentielles expurgations*”, 16 March 2009, ICC-01/04-01/07-960-Conf-Exp; Office of the Prosecutor, “*Notice d’information de la Chambre sur la situation des différents témoins relevant de l’article 67-2 ou de la règle 77 et objets de requêtes en date des 20 et 23 mars 2009 aux fins notamment d’expurgations*”, 23 March 2009, ICC-01/04-01/07-983-Conf-Exp.

⁸ Office of the Prosecutor, “Prosecution’s Application for Protective Measures for Witness 243, Witness 288, Witness 169, Witness 178 – also known as witness 253 -, Witness 179, Witness 337, Witness 271, Witness 292, Witness 175, Witness 270, Witness 280 and Witness 90 pursuant to Article 54(3)(f), Article 64(2) and 64(6)(e), and Article 68(1) of the Statute and Rule 81(4) of the Rules”, 23 March 2009, ICC-01/04-01/07-985. See also Office of the Prosecutor, “Corrigendum to Prosecution’s Application for Protective Measures for Witness 243, Witness 288, Witness 169, Witness 178 – also known as witness 253 -, Witness 179, Witness 337, Witness 271, Witness 292, Witness 175, Witness 270, Witness 280 and Witness 90 pursuant to Article 54(3)(f), Article 64(2) and 64(6)(e), and Article 68(1) of the Statute and Rule 81(4) of the Rules”, 25 March 2009, ICC-01/04-01/07-985-corr.

⁹ Office of the Prosecutor, “*Requête aux fins d’admission de faits et de non communication de l’identité de neuf témoins (W-023, W-033, W-037, W-044, W-047, W-052, W-068, W-101, W-113) ayant fourni des éléments de preuve relevant de la règle 77*”, 23 March 2009, ICC-01/04-01/07-986-Conf-Exp and ICC-01/04-01/07-991 (public redacted version).

¹⁰ Defence for Mathieu Ngudjolo, “*Observations consolidées de la Défense de Mathieu Ngudjolo relatives aux demandes d’expurgations et autres sollicitées par le Procureur dans ses soumissions référencées sous ICC-01/04-01/07-985 et ICC-01/04-01/07-991*”, 1 April 2009, ICC-01/04-01/07-1014; Defence for Germain Katanga, “Defence Response to Prosecution’s Application for Protective Measures for Witness 243, Witness 288, Witness 169, Witness 178 – also known as witness 253 -, Witness 179, Witness 337, Witness 271, Witness 292, Witness 175, Witness 270, Witness 280 and Witness 90 pursuant to Article 54(3)(f), Article 64(2) and 64(6)(e), and Article 68(1) of the Statute and Rule 81(4) of the Rules”, 1 April 2009, ICC-01/04-01/07-1016; Defence for Germain Katanga, “Defence Response to Prosecution’s “*Requête aux fins d’admission de faits et de non communication de l’identité de neuf témoins (W-023, W-033, W-037, W-044, W-047, W-052, W-068, W-101, W-113) ayant fourni des éléments de preuve relevant de la règle 77*”, 3 April 2009, ICC-01/04-01/07-1028.

6. On 26 June 2009, the Chamber convened an *ex parte* hearing with the Office of the Prosecutor and the Registry, deeming it necessary to obtain additional details from the Prosecutor and the Victims and Witnesses Unit (“VWU”) about both the security situation of the witnesses concerned and the modalities of the proposed disclosure measures.

7. In its order convening the hearing, the Chamber invited the Prosecutor to state the reasons why he had not had recourse to the redaction procedure from the outset with regard to each of the nine witnesses concerned by the applications for admission. It requested that the proposed redactions to their statements, transcripts or investigator’s notes be submitted to the Chamber prior to the hearing so that it could determine the most appropriate protective measures. It also invited the Prosecutor to consider the option of combining redactions and admissions of facts in one document in order to comply fully with his disclosure obligation pursuant to rule 77 of the Rules.

8. On 30 June¹¹ and 6 July¹² 2009, the Prosecutor filed his proposed redactions, to which the Defence for Mathieu Ngudjolo¹³ and the Defence for Germain Katanga¹⁴ responded. As the Chamber had requested at the *ex parte* hearing held on 8 July

¹¹ Office of the Prosecutor, “Prosecution’s Submission of Proposed Redactions and Provision of a Summary”, 30 June 2009, ICC-01/04-01/07-1259, with confidential, *ex parte* annexes.

¹² Office of the Prosecutor, “*Mémoire de l’Accusation, en application de l’ordonnance du 26 juin 2009, aux fins de dépôt de propositions d’expurgation (témoins P-23, P-33, P-37, P-44, P-47, P-52, P-68, P-101 et P-113)*”, 6 July 2009, ICC-01/04-01/07-1269, with confidential, *ex parte* annexes.

¹³ Defence for Mathieu Ngudjolo, “*Réponse de la Défense de Mathieu Ngudjolo à la soumission 1259 du Bureau du Procureur: « Prosecution’s Submission of Proposed Redactions and Provision of a Summary »*”, 8 July 2009, ICC-01/04-01/07-1277-Conf-Exp.

¹⁴ Defence for Germain Katanga, “Defence Observations following the prosecution’s Submission of proposed redactions and Provision of a Summary”, 10 July 2009, ICC-01/04-01/07-1289-Conf and “Defence Response to Prosecution’s Public « *Mémoire de l’Accusation, en application de l’ordonnance du 26 juin 2009, aux fins de dépôt de propositions d’expurgation (témoins P-23, P-33, P-37, P-44, P-47, P-52, P-68, P-101 et P-113)* »”, 14 July 2009, ICC-01/04-01/07-1302.

2009,¹⁵ the Prosecutor also submitted to it, on 10 July 2009, proposed redactions related to proposed admissions of facts for Witnesses 44 and 68.¹⁶

I. Proposed protective measures for Witnesses 90, 169, 175, 178 alias 253, 179, 243, 270, 271, 282, 288, 292 and 337

9. In his Application for Redactions, the Prosecutor explains that 12 witnesses whose statements fall under article 67(2) of the Statute and/or rule 77 of the Rules either objected to disclosure of their identity to the accused or to the protective measures proposed to them, could not be contacted, or refused to cooperate any further with the Court.¹⁷

10. The Prosecutor seeks the Chamber's leave to disclose the statements of Witnesses 243, 271 and 288, the investigator's notes for Witnesses 90, 169, 178 alias 253, 175 and 179, the transcripts of the evidence of Witnesses 337, 270 and 292, and lastly the preliminary interview with Witness 282, with permanent redactions of the identity of the persons concerned or in summarised form.¹⁸

11. He recalls that the 12 items of testimony in question are initially incriminating and that the statements taken all contain material of this nature, which for a number of them relates to Thomas Lubanga. While there is apparently no evidence that these witnesses have indeed been threatened,¹⁹ the Prosecutor nonetheless stresses that they all face an objective risk linked to the content of their statements and to possible reprisals they would face from associates of Germain Katanga and Mathieu Ngudjolo if their identity were to be disclosed.²⁰ He further notes that in the DRC no distinction

¹⁵ ICC-01/04-01/07-T-68-CONF-EXP-ENG ET 08-07-2009.

¹⁶ Office of the Prosecutor, "*Mémoire de l'Accusation aux fins de dépôt de propositions d'expurgations associées à des propositions d'admissions de faits (témoins P-44 et P-68)*", 10 July 2009, ICC-01/04-01/07-1290.

¹⁷ ICC-01/04-01/07-985-Conf-Exp, para. 4.

¹⁸ *Ibid.*, para. 5.

¹⁹ ICC-01/04-01/07-T-68-CONF-EXP-ENG ET 08-07-2009, p. 45, lines 11 to 13.

²⁰ ICC-01/04-01/07-985-Conf-Exp, para. 25; ICC-01/04-01/07-T-68-CONF-EXP-ENG ET 08-07-2009, p. 45, lines 1 to 5.

is made between “prosecution” and “defence” witnesses, and that anyone known to be collaborating with the Court is currently at risk.²¹

12. He states that, of these 12 witnesses, 11 are “potentially exculpatory”, since they provide information falling under article 67(2) of the Statute and/or rule 77 of the Rules. These are Witnesses 243, 288, 169, 178 alias 253, 179, 337, 271, 292, 175, 270 and 282. In the Prosecutor’s view, the statement of Witness 90 falls under rule 77 of the Rules only.²²

13. Prior to ruling on the situation of each witness, the Chamber wishes to make certain observations on the protective measures sought by the Prosecutor in an application under regulation 42 of the Regulations of the Court.

a. Situation of the witnesses who are the subject of the application under regulation 42 of the Regulations of the Court

14. Since certain witnesses have already been granted protective measures in the *Lubanga* case, the Prosecutor has filed an application before Trial Chamber I pursuant to regulation 42 of the Regulations of the Court.²³ He asks in particular that that Chamber lift a number of redactions which it had initially ordered for the statements of Witnesses 33, 271, 282 and 288.²⁴ He also asks it to agree additional redactions in the statements of Witnesses 33, 178 alias 253, 179, 243, 282 and 288 in order to enable appropriate disclosure for the *Katanga/Ngudjolo* case.²⁵ Accordingly, this Chamber will not assess the situation of the abovementioned witnesses in the present Decision, since, in accordance with regulation 42(3) of the Regulations of the Court, it is for Trial Chamber I to rule on the variations sought to the measures initially granted in the case it is hearing.

²¹ ICC-01/04-01/07-T-68-CONF-EXP-ENG ET 08-07-2009, p. 45, line 11 to p. 46, line 13.

²² ICC-01/04-01/07-985-Conf-Exp, para. 6.

²³ Office of the Prosecutor, “Prosecution’s Request Pursuant to Regulation 42 in Relation to Protective Measures Sought Before Trial Chamber II (Witnesses 33, 169, 175, 178/253, 179, 243, 271, 282, 288)”, 14 July 2009, ICC-01/04-01/06-2047.

²⁴ ICC-01/04-01/06-2047, para. 5.

²⁵ *Ibid.*, para. 6.

15. This Chamber itself has already had to consider the question of the scope to be given to the aforementioned regulation 42. To this end, it has sought the observations of the participants in the proceedings²⁶ and informed the Presiding Judge of Trial Chamber I. Upon consultation with the latter, and having established that both Chambers were required to rule on the interpretation of regulation 42 of the Regulations of the Court, the two Chambers have agreed to issue a decision on the matter very shortly.

16. In the meantime, this Chamber wishes to inform Trial Chamber I of the situation of certain witnesses in relation to whom it considers that it may review the appropriateness of maintaining the protective measures ordered by Trial Chamber I, having regard, *inter alia*, to the fact that there has been no update as to the real and objective risk they might face. To this end, it refers Trial Chamber I to the transcript of the *ex parte* hearing held by it on 8 July 2009 and to all of the submissions filed by the parties, in particular those of the Defence, in order to enable it to assess the desirability of those protective measures in the specific context of the *Katanga/Ngudjolo* case. The Chamber is concerned to make it clear that it authorises Trial Chamber I to have access to all of those documents.

i. Witnesses 178 alias 253 and 179

17. First under consideration are Witness 178 alias 253 and Witness 179, [REDACTED].

²⁶ *Ordonnance relative à la soumission d'écritures sur l'interprétation de la norme 42 du Règlement de la Cour (norme 28 du Règlement de la Cour)*, 12 June 2009, ICC-01/04-01/07-1205; Defence for Mathieu Ngudjolo, "*Observations de la Défense de Mathieu Ngudjolo sur l'interprétation de la norme 42 du Règlement de la Cour (norme 28 du Règlement de la Cour)*", 19 June 2009, ICC-01/04-01/07-1218; Defence for Germain Katanga, "*Defence Observations on the Interpretation of Regulation 42 of the Regulations of the Court*", 19 June 2009, ICC-01/04-01/07-1221; Legal Representatives of Victims a/0333/07 and a/0110/08, "*Observations des représentants légaux des victimes a/0333/07 et a/0110/08 sur l'interprétation de la norme 42 du Règlement de la Cour*", 19 June 2009, ICC-01/04-01/07-1225; Office of Public Counsel for Victims, "*Observations du Bureau du conseil public pour les victimes sur la norme 42 du Règlement de la Cour*", 19 June 2009, ICC-01/04-01/07-1226; Office of the Prosecutor, "*Prosecution's Submissions regarding Interpretation of Regulation 42*", 19 June 2009, ICC-01/04-01/07-1231-Conf-Exp and ICC-01/04-01/07-1244 (public redacted version); Legal Representatives of Victims a/0330/07 and a/0331/07, "*Observations des représentants légaux des victimes a/0330/07 et a/0331/07 sur l'interprétation de la norme 42 du Règlement de la Cour*", 19 June 2009, ICC-01/04-01/07-1232.

18. [REDACTED]. The Office of the Prosecutor interviewed him in December 2005, in [REDACTED]. An attempt to contact him in February 2009 was unsuccessful. At the time of his interview, he did not voice any particular fears for his safety.

19. [REDACTED] by the Office of the Prosecutor and, in August 2008, she clearly refused to have her identity disclosed to the accused.

20. When invited at the *ex parte* hearing of 8 July 2009 to state the precise nature of the risk faced by these two witnesses, the Prosecutor was unable to provide the Chamber with relevant information, beyond general considerations related to the specific situation in Ituri and the risks inherent in any evidence-giving. However, the Chamber is bound to recall that certain witnesses who are in apparently similar circumstances, and who were initially opposed to any disclosure of their identity, changed their mind after the Prosecutor contacted them again. Such changes in attitude show that a general reference to the instability prevailing in the eastern part of the Congo is insufficient to warrant protective measures which could affect the rights of the Defence.

21. In view of this finding, the Chamber would indicate to Trial Chamber I that it is not ruling out disclosing the investigator's notes for these two witnesses in unredacted form. However, it is mindful of the fact that such disclosure may be risky for these witnesses if their identity were to be disclosed to Thomas Lubanga or his supporters, which cannot be ruled out, since the detained persons are able to communicate within the detention centre.²⁷ Thus, in accordance with regulation 42(3) of the Regulations of the Court, it considers that it must refer the matter *proprio motu* to Trial Chamber I, which ordered the protective measures enjoyed by these witnesses, since it alone can assess whether or not they must be maintained, after satisfying itself that a real and objective risk persists in that Chamber's own case.

²⁷ [REDACTED].

22. In respect of these two witnesses, the Chamber draws the attention of Trial Chamber I to the importance to the Defence of Germain Katanga and Mathieu Ngudjolo of the information falling under article 67(2) of the Statute which is contained in the two investigator's notes in question. By way of example, Witness 178 indicates amongst other things that Mathieu Ngudjolo's FNI militias were trained only to kill armed persons. Furthermore, [REDACTED]. Witness 179 emphasises [REDACTED]. The witness also states that the FNI did not participate in the Bogoro attack, a matter which the Defence for Mathieu Ngudjolo has expressly sought to emphasise.²⁸

ii. Witnesses 90 and 169

23. In his application under regulation 42 of the Regulations of the Court submitted to Trial Chamber I on 14 July 2009, the Prosecutor indicated that he was asking the present Chamber to adopt the same protective measures for Witnesses 90 and 169 as those ordered by Trial Chamber I. The Chamber would make the following observations in respect of these two witnesses.

24. [REDACTED] (Witness 90) only provides information falling under rule 77 of the Rules. In May 2005, the witness was living in [REDACTED], where he may still reside, although it must be stated that the Office of the Prosecutor's latest attempts to contact him in February 2009 were unsuccessful.

25. [REDACTED] (Witness 169) is [REDACTED]. He was interviewed by the Office of the Prosecutor for the purposes of this case on 14 December 2005 while he was living in [REDACTED]. Since then, it has not been possible to trace him, and the Prosecutor's attempts to locate him in February 2009 were unsuccessful. Although the witness said in 2005 that he was concerned for his safety, four years later the Chamber has no information about the risks he faces or indeed about where he is living.

²⁸ ICC-01/04-01/07-1014-Conf-Exp-Anx, p. 2.

26. The Chamber has no information whatsoever about the risks actually faced by these two witnesses in the *Katanga/Ngudjolo* case. It notes that the Prosecutor has not provided any evidence of the existence of an objective risk which would result in this case from disclosure of their identity. Furthermore, it notes that both witnesses were interviewed more than four years ago and that the Prosecutor is unable to establish their current whereabouts. Again, all of these factors can only lead the Chamber to contemplate disclosing the unredacted version of the investigator's notes concerning them. Nevertheless, it is again mindful of the fact that such disclosure may pose a risk for these witnesses if their identity were to become known to Thomas Lubanga and his associates, which, as stated above, cannot be ruled out, since the detained persons are able to communicate within the detention centre.²⁹ Thus, in accordance with regulation 42(3) of the Regulations of the Court, it prefers to request Trial Chamber I, which ordered the protective measures for these witnesses, to assess whether or not those measures should be maintained, after verifying whether the witnesses still face a real and objective risk in the case of which it is itself seized.

27. As regards Witness 90, the Chamber notes that this witness, [REDACTED], only provides information falling under rule 77 of the Rules about the role of Uganda and Rwanda in the Ituri conflict. The investigator's note contains information which the Chamber considers is potentially necessary to the Defence in that it concerns, for example, Thomas Lubanga's standpoint during the pacification process, [REDACTED]. The Chamber stresses that the redactions proposed by the Prosecutor essentially relate to information enabling the witness to be identified. Accordingly, in the event that Trial Chamber I decides that the redactions it ordered must be maintained, this would not result in any prejudice to the Defence for Germain Katanga and Mathieu Ngudjolo.

28. In respect of Witness 169, the Chamber would draw the attention of Trial Chamber I to the fact that he stated that, [REDACTED], the [REDACTED] combatants

²⁹ [REDACTED].

were ordered to kill UPC combatants, not civilians. In the Prosecutor's view, this information falls under article 67(2) of the Statute.

iii. Witness 175

29. Lastly, the Chamber notes that, in his proposed redactions filed on 30 June 2009, the Prosecutor contemplated redactions over and above those ordered by Trial Chamber I, which should have prompted him to bring the matter before that Chamber pursuant to regulation 42 of the Regulations of the Court.³⁰ However, it appears from the application to Trial Chamber I that he did not fulfil this requirement. The Chamber must therefore stress this point, making it clear that, as far as it is concerned, it does not *prima facie* rule out disclosing the identity of this witness, unless, of course, as stated above, Trial Chamber I decides otherwise.

30. [REDACTED] (Witness 175) is a [REDACTED] interviewed by the Office of the Prosecutor in November 2005 in [REDACTED], where he was living at that time. It has been impossible to contact him; a fresh attempt in February 2009 was unsuccessful. At his interview, this witness did not express any fears for his safety. As in the case of Witnesses 178 alias 253 and 179, the Chamber notes that it has no accurate up-to-date information about the real and objective risks he faces. It further notes that he refers, as do other witnesses, to the necessary distinction that combatants were asked to make between civilians and soldiers during the [REDACTED] attack [REDACTED]; all of this information is significant for the Defence of Germain Katanga and Mathieu Ngudjolo.

b. The Chamber's assessment of the situation of Witnesses 270, 292 and 337

31. It is clear from all of the above that ultimately, as things stand at present, only the situation of the three witnesses, 270, 292 and 337, falls to be assessed and made the subject of a decision by this Chamber.

³⁰ ICC-01/04-01/07-T-68-CONF-EXP-ENG ET 08-07-2009, p. 53, lines 13 to 20.

32. In accordance with the decision rendered by it on 20 May 2009,³¹ the Chamber will analyse the real and objective risk faced by each witness concerned, in particular in light of the content of their statement and on the basis of their specific situation, as well as by reference to the question of whether less restrictive protective measures exist. It will also assess the measures proposed to counterbalance the limitation on the Defence rights.

i. Witness 270³²

33. [REDACTED] (Witness 270) was interviewed by the Prosecutor on 12 and 13 February 2007. The Prosecutor seeks disclosure to the Defence of just one anonymous summary of the interview transcript,³³ which the Defence has already had in its possession since 29 April 2008.³⁴ The Chamber nevertheless notes that, in his Application for Redactions, the Prosecutor contemplated redacting the information in the transcripts which would enable the witness to be identified.³⁵

34. The witness is currently living in [REDACTED]. The Prosecutor indicated to the Chamber that the witness could not be reached, that various attempts to contact him in March and April 2009 were unsuccessful, and that to date his Office has decided not to risk sending an intermediary to [REDACTED] to contact the witness.³⁶

35. The Chamber notes that the witness is a [REDACTED] and that the relevance of his transcripts, as pointed out by the Defence, is [REDACTED]. The witness's statements provide important information – both incriminating, since they refer inter alia [REDACTED] the joint FNI-FRPI attacks on Bogoro, [REDACTED], and exculpatory, since they date the establishment of the FNI-FRPI alliance to after the Bogoro attack, demonstrate [REDACTED]. Furthermore, the Defence for Mathieu Ngudjolo submits

³¹ *Decision on the Protection of Prosecution Witnesses 267 and 353*, 20 May 2009, ICC-01/04-01/07-1156-Conf-Exp-tENG and ICC-01/04-01/07-1179-tENG (public redacted version).

³² ICC-01/04-01/07-985-Conf-Exp-AnxB, paras. 63 to 69.

³³ DRC-OTP-1019-0172.

³⁴ ICC-01/04-01/07-1259, para. 6.

³⁵ ICC-01/04-01/07-985-Conf-Exp, para. 24.

³⁶ ICC-01/04-01/07-T-68-CONF-EXP-ENG ET 08-07-2009, p. 71, line 23 to p. 72, line 3.

that the exculpatory material contained in the witness's transcripts, of which it was informed in the summary with which it was provided, is particularly important to it.³⁷

36. The Chamber cannot underestimate the importance to the Defence of this witness's evidence in this case. It observes that the Prosecutor does not have up-to-date information about the witness's security situation and notes that he has been unable to show that there is still an objective risk linked to immediate disclosure of the witness's identity. At the hearing, the Prosecutor indicated that he was not contemplating contacting the witness again, unless the Chamber ordered him to do so.³⁸ Since the transcripts of this witness contain information which the Chamber considers is particularly useful for the Defence, the Office of the Prosecutor must increase its efforts to contact the witness. In accordance with the requirements of the Appeals Chamber,³⁹ it must assess whether there are no other less restrictive measures which would respond effectively to the dangers which witnesses face.⁴⁰ As may have been the case for other witnesses, in particular Witnesses 44 and 101 referred to below, it may be the case that the witness will now consent to having his identity disclosed to the Defence teams. Furthermore, if the Prosecutor did not attempt to satisfy himself, prior to disclosing redacted versions or summaries of his transcripts to the Defence, that the witness still faces a risk and still objects to his identity being disclosed to the Defence, he would be breaching his obligations under the Statute. The Chamber thus considers that the Prosecutor's obligation to investigate exonerating circumstances pursuant to article 54(1)(a) of the Statute requires him to intensify, or even recommence, his search for this witness.

³⁷ ICC-01/04-01/07-1014-Conf-Exp-Anx, p. 4.

³⁸ ICC-01/04-01/07-T-68-CONF-EXP-ENG ET 08-07-2009, p. 72, lines 4 to 7.

³⁹ 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.

⁴⁰ ICC-01/04-01/07-1156-Conf-Exp and ICC-01/04-01/07-1179 (public redacted version), para. 34.

37. Accordingly, the Chamber considers itself bound to order the Prosecutor to implement as soon as possible any and all measures to contact Witness 270. Pending a possible update on the real risk faced by the witness, the Chamber considers it appropriate to disclose to the Defence a redacted version of his transcripts. As it has already indicated, it will, as far as possible, give preference to disclosure of redacted statements or transcripts rather than summaries, since, in the Chamber's view, the former has a lesser impact on the rights of the Defence.⁴¹ In the current matter, it appears to the Chamber that it is possible to redact the transcripts and that this would prevent the witness from being identified. The Prosecutor has not shown in what way a redacted version was in practice impossible or unusable by the Defence. On the contrary, it would seem to the Chamber that the redacted versions of the nine transcripts in question, as proposed by the Prosecutor, would enable the Defence to begin to make effective use of the information contained therein, pending the witness's possible consent to having his identity disclosed, which, in the circumstances, would appear to be an adequate counterbalancing measure.

ii. Witness 292⁴²

38. [REDACTED] (Witness 292) was interviewed by the Prosecutor on 22 and 24 October 2007 and on 14 and 15 February 2008. Two summaries of his long transcripts were disclosed as incriminating evidence during the pre-trial phase. Furthermore, the Prosecutor has repeatedly attempted to have this witness included on his list of prosecution witnesses.⁴³

39. At the *ex parte* hearing, the Prosecutor confirmed his intention to disclose at trial this witness's evidence in the form of an anonymous summary, even though in

⁴¹ ICC-01/04-01/07-1156-Conf-Exp and ICC-01/04-01/07-1179 (public redacted version), para. 52.

⁴² ICC-01/04-01/07-985-Conf-Exp-AnxB, paras. 70 to 78.

⁴³ ICC-01/04-01/07-T-68-CONF-EXP-ENG ET 08-07-2009, p. 81, lines 1 to 8.

his Application for Redactions he contemplated permanent redaction of all information enabling the witness to be identified.⁴⁴

40. The Defence for Mathieu Ngudjolo indicated to the Chamber that it intended to use this witness's evidence during its investigations and cross-examinations and that it must know the witness's identity in order to be able to corroborate any information it gathers.⁴⁵

41. Witness 292 is [REDACTED] participated in the [REDACTED] attack [REDACTED].

42. [REDACTED] with his family and appears to be easily contactable. He fervently opposed disclosure of his identity to the Defence, on the ground inter alia that [REDACTED]. The Prosecutor recalled that [REDACTED] the witness[REDACTED].

43. At the hearing, the Prosecutor further indicated that the witness had [REDACTED] and that, despite the fact that this event [REDACTED], it compounds the climate of insecurity claimed by the witness.⁴⁶

44. The witness provides incriminating information about [REDACTED] the attack on Bogoro, which would only further increase the risks he faces and the sense of insecurity to which he refers, in the event that his identity were to be disclosed. In the case of this witness, it has been shown that disclosing his identity would expose him to excessive risk, and that an alternative measure is required in this instance.

45. In the Chamber's view, use of redactions appears possible and necessary, given the length of his 26 transcripts and the importance of this evidence for the Defence. In effect, the witness provides particularly important exculpatory information, in particular for the Defence of Mathieu Ngudjolo, since he indicates

⁴⁴ ICC-01/04-01/07-985-Conf-Exp, para. 24.

⁴⁵ ICC-01/04-01/07-1014-Conf-Exp-Anx, p. 3.

⁴⁶ ICC-01/04-01/07-T-68-CONF-EXP-ENG ET 08-07-2009, p. 80, line 14 to p. 82, line 4.

that the Bogoro attack was prepared by Germain Katanga, that Mathieu Ngudjolo was not present during the offensive [REDACTED].⁴⁷

46. The Chamber has satisfied itself that the redactions proposed by the Office of the Prosecutor are both necessary for the protection of the witness and sufficient to maximise the usefulness to the Defence of the documents in question. Accordingly, it proposes the following modifications:

[REDACTED]

47. Furthermore, the Chamber notes that the proposed redactions are particularly extensive from page DRC-OTP-1017-0303 onwards. In this respect, it stresses that the Prosecutor should adopt objective, systematic criteria when choosing which redactions to make. The Chamber notes that the Prosecutor considered the redaction process to be eminently “subjective”, as he stated at the *ex parte* hearing. However, this subjective view of redactions is likely to lead him, as the Chamber has already noted on several occasions, to redact information in a haphazard, sometimes inconsistent or even unjustified manner, which ultimately makes the Chamber’s judicial oversight particularly complex, since it is difficult for the Chamber to comprehend the internal logic of the proposed redactions.

48. In this case, the Chamber therefore invites the Prosecutor to comply with the following objective guidelines, which are set forth below as suggestions. For each transcript, the Prosecutor should systematically redact – concerning information related to persons – the names of individuals in the witness’s personal network of interaction (friends, family, combatants of the same rank...) and disclose the names of officers, except for the direct superior; for locations, places where the witness passed through should be redacted, except for certain large, very busy military bases such as Aveba for the FRPI, Zumbe for the FNI and Mandro for the UPC; for accounts of

⁴⁷ [REDACTED].

events, those given impersonally, where the witness did not participate, should be disclosed.

iii. Witness 337⁴⁸

49. [REDACTED] (Witness 337) is [REDACTED]. She was interviewed by the Office of the Prosecutor from 12 to 14 November 2008. Having initially sought disclosure of only a summary of her statement and then, at the Chamber's request, made proposed redactions, the Prosecutor indicated at the hearing that it had ultimately been possible to contact her, and that she was willing to consent to her identity being disclosed if her application for participation as a victim were approved.

50. The Chamber must shortly rule on all of the applications for participation submitted in the case, and if Witness 337 is authorised to participate, it will be noted in the decision on the participation of victims that the Prosecutor must disclose to the Defence the text of her transcript as soon as practicable.

II. Proposed admission of facts and non-disclosure of the identity of Witnesses 23, 33, 37, 44, 47, 52, 68, 101 and 113

51. In his Application for Admission, the Prosecutor explains that several witnesses, all of whom have given evidence falling under rule 77 of the Rules cannot currently be contacted and that, in their case, the redaction process is not appropriate. He proposes using unilateral admissions, that is, recognition of the truthfulness of the facts stated by such witnesses, so as to avoid disclosing the statements in question to the Defence. To this end, he compiles a list of the facts which he declares he is willing to admit, while stating that "[TRANSLATION] in certain cases, the Prosecutor does not recognise the fact as such, but recognises that the witness reports that fact".⁴⁹

⁴⁸ ICC-01/04-01/07-985-Conf-Exp-AnxB, paras. 33 to 39.

⁴⁹ ICC-01/04-01/07-986-Conf-Exp, footnote 3.

52. At the *ex parte* hearing held on 8 July 2009, the Chamber noted that, contrary to what the Prosecutor claimed, it was possible, at the very least, to redact the investigator's notes, statements or transcripts for almost all of the witnesses concerned, the only exception being Witness 68, for whom disclosure of a summary appears preferable. It is therefore not necessary for the Chamber to rule on the proposed admission procedure.

53. It must, however, rule on the extent to which redacting the identities of the relevant witnesses is warranted, on the basis of the criteria laid down in its decision of 20 May 2009.⁵⁰

54. It appears that four of the nine witnesses concerned have been the subject of protective measures ordered by Trial Chamber I in *Lubanga* – Witnesses 33, 37, 44 and 101.

55. The Prosecutor informed the Chamber that he had ultimately been able to contact two of them – Witnesses 44 and 101 – and that they had consented to their identity being disclosed henceforth. Given their change of heart, the Prosecutor should inform Trial Chamber I of their situation pursuant to regulation 42 of the Regulations of the Court and submit to it his proposed redactions pursuant to rule 81(2) and (4) of the Rules.⁵¹

52. As regards Witness 33, the Prosecutor has already submitted to Trial Chamber I a request for leave to lift certain of the redactions ordered by that Chamber in *Lubanga*, and to add others.⁵² Accordingly, it is for Trial Chamber I to rule on the merits of the variations sought under regulation 42 of the Regulations of the Court.

⁵⁰ ICC-01/04-01/07-1179 (public redacted version).

⁵¹ Office of the Prosecutor, "Prosecution's Resubmission of the Statements of Witnesses 101 and 44", 17 July 2009, ICC-01/04-01/07-1315, paras. 1 to 4.

⁵² ICC-01/04-01/07-2047, paras. 5 and 6.

56. Concerning Witness 37, the Chamber notes that the disclosure of a summary to the Defence was authorised in *Lubanga* by Trial Chamber I and any variation of protective measures must therefore be submitted to it, in accordance with regulation 42 of the Regulations of the Court. [REDACTED] whose testimony essentially concerns the *Lubanga* case and appears only very indirectly related to *Katanga/Ngudjolo*. In this instance, at the Chamber's request, the Prosecutor made proposed redactions which he does not intend to support, since, in his view, they could lead to the witness being identified.⁵³ Contrary to what the Prosecutor maintains, and unless Trial Chamber I decides otherwise, the proposed redactions do not appear, in this Chamber's view, to pose such a risk to the witness. The main information which would enable the witness to be identified, [REDACTED], is rightly redacted from his transcript.

57. Nevertheless, the Chamber must consider whether such a measure is justified. In this respect, when the Prosecutor was invited at the *ex parte* hearing of 8 July 2009 to state the exact nature of the risk faced by this witness, he could, once again, only give the Chamber very general considerations related to the specific situation in Ituri and the risks inherent in any evidence-giving. In the absence of any more extensive details on the real and objective risk now faced by this witness, and given, moreover, the content of the evidence in question, the Chamber is not ruling out the option of disclosure in the instant case. In accordance with regulation 42(3) of the Regulations of the Court, it therefore refers the matter for the consideration of Trial Chamber I, which alone can assess whether a real and objective risk persists in the case of which it is itself seized.

58. Accordingly, the Chamber need rule only on the situation of the other witnesses referred to in the Application for Admission, that is, Witnesses 23, 47, 52, 68 and 113.

⁵³ ICC-01/04-01/07-1269.

a. Witness 23

59. [REDACTED] (Witness 23) was a [REDACTED] and was unemployed in January and February 2005, at the time of his interview with the Office of the Prosecutor. The Prosecutor states that he has been unable to contact this witness, despite several attempts in March 2009.⁵⁴ Once again, the Chamber does not have any up-to-date information about his security situation, other than general considerations on the risks faced by witnesses who collaborate with the Court. Furthermore, the witness's statement relates principally to [REDACTED]. The Chamber therefore considers that there are only very indirect links to the case of which it is seized and that it is difficult to conclude that the content of the witness's evidence would expose the witness to additional risks in the *Katanga/Ngudjolo* case. Accordingly, the Chamber feels impelled to contemplate disclosure to the Defence of his unredacted statement.

b. Witness 47

60. [REDACTED] (Witness 47) [REDACTED] at the time of his interview with the Office of the Prosecutor in March 2005. At the *ex parte* hearing, the Prosecutor indicated that the witness had no telephone number.⁵⁵ The Chamber does not have any other information about the risk he faces. [REDACTED] during the war in Ituri, the witness provides information about [REDACTED] in the region, and in particular about the activities [REDACTED]. Once again, the Chamber notes that this witness's statement is of little relevance for the Defence teams of Germain Katanga and Mathieu Ngudjolo. Accordingly, it intends to disclose the witness's statement in unredacted form.

c. Witness 52

61. [REDACTED] (Witness 52) was interviewed by the Office of the Prosecutor in May 2005 as a former [REDACTED]. The Prosecutor informed the Chamber that his last

⁵⁴ ICC-01/04-01/07-T-68-CONF-EXP-ENG ET 08-07-2009, p. 24, lines 3 to 11.

⁵⁵ ICC-01/04-01/07-T-68-CONF-EXP-ENG ET 08-07-2009, p. 24, line 15.

unsuccessful attempt to contact the witness dated back to 18 February 2009,⁵⁶ and he was unable to give the Chamber any precise, up-to-date information on the witness's security situation. Furthermore, in an annex to his Application for Admission, the Prosecutor indicates that the witness does not express any fears for his safety and that disclosure of his identity to the Defence would no longer put him at risk, [REDACTED].⁵⁷ Moreover, the information contained in his statement relates to [REDACTED], which – as is the case for Witness 47 – greatly diminishes the relevance of his evidence for the Defence teams of Germain Katanga and Mathieu Ngudjolo. Accordingly, the Chamber intends to disclose his identity to the Defence teams.

d. Witness 68

62. [REDACTED] was interviewed by the Office of the Prosecutor on 8 March 2005. He is the [REDACTED]. This witness lives in [REDACTED], but the Prosecutor has been unable to contact him, his last attempt having been on 13 March 2009.⁵⁸ Beyond the general considerations mentioned above, the Prosecutor has not shown that there is still a real and objective risk which would warrant protecting the witness's identity. The Chamber accepts that redactions to the name [REDACTED] are necessary to protect the witness's identity, while also noting that such redactions mean that the statement cannot be used by the Defence. Nevertheless, it is not satisfied that the redactions are warranted in this instance and, for the reasons set out above, it therefore contemplates disclosing this witness's identity.

e. Witness 113

63. [REDACTED] (Witness 113) was interviewed by the Office of the Prosecutor in 2005 and [REDACTED]. On 11 March 2009, the Prosecutor decided not to send an intermediary to the witness's place of residence for security reasons.⁵⁹ No evidence was given to support the claim that there persists a real and objective risk to this

⁵⁶ ICC-01/04-01/07-T-68-CONF-EXP-ENG ET 08-07-2009, p. 24, lines 15-16.

⁵⁷ ICC-01/04-01/07-986-Conf-Exp-Anx6A, p. 2.

⁵⁸ ICC-01/04-01/07-T-68-CONF-EXP-ENG ET 08-07-2009, p. 24, line 17.

⁵⁹ ICC-01/04-01/07-T-68-CONF-EXP-ENG ET 08-07-2009, p. 24, lines 18 to 21.

witness. The witness was [REDACTED]. The Chamber is not satisfied that the witness would be at risk if her identity were disclosed to the two accused in this case. Accordingly, it intends to disclose the witness's identity to the Defence.

f. Conclusion

64. According to the information provided by the Office of the Prosecutor to the Legal Adviser to the Trial Division,⁶⁰ these five witnesses, with the possible exception of Witness 23, were not granted any protective measures in the *Lubanga* case and their statements were not disclosed to the Defence for Thomas Lubanga; however, the Chamber is not aware of the precise reasons. If this is indeed the case, the Chamber can only express its surprise that the Prosecutor considers these statements to be useful to the Defence in this case, under rule 77 of the Rules, when, unless the Chamber is mistaken, his Office does not appear to have carried out such an assessment in the context of the *Lubanga* case. Similarly, the Chamber is curious as to the reasons why, in its own case, it is being asked to contemplate protective measures as drastic as non-disclosure of statements, whereas those of at least four of these witnesses principally concern the *Lubanga* case, and why the Prosecutor has been unable to update his information about the risks faced by those witnesses.

65. Before ordering the Prosecutor to disclose to the Defence the unredacted statements of the abovementioned witnesses, and despite the fact that the latter were thus not apparently made the subject of any protective measures in the *Lubanga* case, the Chamber considers that it must request Trial Chamber I to verify whether such disclosure could have a negative impact on these five witnesses in the context of its own case. In the Chamber's view, this is a basic precautionary measure, since, as has just been stated, the evidence given by at least four of these witnesses seems to concern principally the *Lubanga* case, and it has now been established that the accused in both cases communicate with each other at the detention centre. In the

⁶⁰ E-mail exchange between the Legal Adviser to the Trial Division and the Office of the Prosecutor dated 22 July 2009.

Chamber's view, such a precautionary measure appears indispensable, given the absolute necessity not to expose the various witnesses to any risks.

FOR THESE REASONS, the Chamber

NOTES that the Prosecutor has submitted to Trial Chamber I an application under regulation 42 of the Regulations of the Court concerning Witnesses 33, 178 alias 253, 179, 243, 271, 282 and 288 and **FINDS IT UNNECESSARY, AS MATTERS NOW STAND, TO RULE** on the protective measures proposed for these witnesses;

INSTRUCTS the Registry to grant Trial Chamber I access to the record of the *ex parte* hearing held on 8 July 2009, as well as to all of the filings submitted by the parties concerning the protection of the 21 witnesses who are the subject of the present Decision;

DECIDES *proprio motu*, pursuant to regulation 42(3) of the Regulations of the Court, to refer the situation of Witnesses 90, 169, 175, 178 alias 253 and 179 to Trial Chamber I;

INSTRUCTS the Prosecutor to renew his attempts to locate Witness 270 in order to satisfy himself that the witness's safety is still at risk and that he remains opposed to the disclosure of his identity;

ORDERS the Prosecutor to disclose to the Defence teams, pending a potential update on the risk faced by Witness 270, the redacted version of the witness's transcripts, as proposed by the Prosecutor;

ORDERS the Prosecutor to disclose to the Defence teams the redacted version of the transcripts of Witness 292, as modified in accordance with the modalities set out in paragraphs 46 to 48 of this Decision, and after having first submitted them to the Chamber by 4 p.m. on 10 August 2009;

DECIDES to stay its decision on the disclosure of the identity of Witness 337 until the said Chamber has ruled on the victims' applications for participation;

DISMISSES the Application for Admission;

INVITES the Prosecutor to apply to Trial Chamber I pursuant to regulation 42 of the Regulations of the Court concerning the situation of Witnesses 44 and 101;

DECIDES *proprio motu*, pursuant to regulation 42(3) of the Regulations of the Court, to refer the situation of Witness 37 to Trial Chamber I; and

SEEKS the opinion of Trial Chamber I on the appropriateness of disclosing the identities of Witnesses 23, 47, 52, 68 and 113 on the grounds set out in paragraph 65 of this Decision, and **INSTRUCTS** the Prosecutor, pursuant to articles 64(6)(e) and (f) and 68(1) of the Statute, to submit to it for this purpose any relevant information on the situation of the said witnesses.

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 Hans Peter Kaul

Dated this 24 July 2009
At The Hague, The Netherlands