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Date: **22 February 2010**

TRIAL CHAMBER I

Before: **Judge Adrian Fulford, Presiding Judge**
Judge Elizabeth Odio Benito
Judge René Blattmann

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF THE PROSECUTOR v .THOMAS LUBANGA DYILO

Public

Redacted Decision on the prosecution's applications to vary protective measures under Regulation 42 of 14 July and 17 August 2009

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

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Other
Trial Chamber II

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of The Prosecutor v. Thomas Lubanga Dyilo, ("Lubanga case") delivers the following decision ("Decision") on the "Prosecution's Request 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)",[1] and the "Prosecution's Submission further to the Trial Chamber's 'Order on the prosecution's applications to vary protective measures under Regulation 42'":[2]

I. Background and submissions

1. On 9 April 2009, the Trial Chamber authorised the non-disclosure of the identity of several individuals pursuant to Article 68 of the Rome Statute ("Statute") and Rule 81(4) of the Rules of Procedure and Evidence ("Rules") that had been sought by the Office of the Prosecutor ("prosecution").[3] The authorised redactions not only covered identifying details of Witnesses 169, 175, 178/253, 179, 243, 271, 282, 288, family members, guardians and victims, but also those present during interviews, interview locations, intermediaries, prosecution sources and internal documents prepared by the prosecution. The Pre-Trial Chamber also authorised redactions to the statement of Witness 33 (who is considered below), in a Decision of 20 September 2006 in the Lubanga case.[4] All these individuals are prosecution witnesses in both the Lubanga case and the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui ("Katanga and Ngudjolo case") before Trial Chamber II.

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[1] 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.
[2] Prosecution's Submission further to the Trial Chamber's 'Order on the prosecution's applications to vary protective measures under Regulation 42', 17 August 2009, ICC-01/04-01/06-2083.
[3] Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" of 5 December 2008, 9 April 2009, ICC-01/04-01/06-1814-Conf; Decision issuing corrected and redacted versions of "Decision on the 'Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information' of 5 December 2008", 2 June 2009, ICC-01/04-01/06-1924.
[4] Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, 20 September 2006, ICC-01/04-01/06-453-Conf-Exp.

2. Given that in the Lubanga case, Trial Chamber I has ordered protective measures for these witnesses, whose statements are also to be disclosed in the Katanga and Ngudjolo case, on 8 July 2009 Trial Chamber II requested the prosecution to seek permission from Trial Chamber I to vary the protective measures, pursuant to Regulation 42 of the Regulations of the Court.[5]

3. On 14 July 2009, the prosecution filed its "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)", which is the subject of this Decision.[6] [REDACTED].[7] [REDACTED].[8] [REDACTED].[9] [REDACTED].[10] The prosecution proposes to disclose the statements of Witness 169 in the Katanga and Ngudjolo case with the same redactions as approved by this Chamber.[11] Furthermore, it informs the Chamber that it is seeking identical redactions to the statement of Witness 90 from Trial Chamber II, as requested in a pending application to the Chamber.[12] Therefore, Witness 90 and the witnesses addressed in the prosecution's application of 14 July 2009 will be dealt with in this Decision.

4. On 22 July 2009, Trial Chamber II acted on the prosecution's requests for variation of protective measures to Trial Chamber I and *proprio motu* referred the situation of several witnesses, including Witnesses 90, 169, 175, 178/253 and 179, to Trial Chamber I under Regulation 42(3) of the Regulations of the Court, and simultaneously made available to Trial Chamber I the relevant

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[5] Transcript of hearing on 8 July 2009, ICC-01/04-01/07-T-68-CONF-EXP-ENG-ET, page 46, line 21 to page 70, line 7; page 72, line 17 to page 79, line 11; page 94, line 13 to page 95, line 24; page 98, line 22 to page 100, line 11.
[6] 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.
[7] ICC-01/04-01/06-2047, paragraph 5.
[8] ICC-01/04-01/06-2047, paragraph 5.
[9] ICC-01/04-01/06-2047, paragraph 6.
[10] ICC-01/04-01/06-2047, paragraph 6.
[11] ICC-01/04-01/06-2047, paragraph 7.
[12] ICC-01/04-01/06-2047, paragraph 8. The pending application is Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts, 4 February 2009, ICC-01/04-01/06-1664 and confidential *ex parte* Annexes 9 and 10, ICC-01/04-01/06-Conf-Exp-Anx9 and ICC-01/04-01/06-Conf-Anx10.

transcript of the *ex parte* hearing (8 July 2009), along with the entirety of the submissions advanced by the parties in the Katanga and Ngudjolo Chui case on the relevant protection issues.[13]

5. [REDACTED].[14]

6. On 27 July 2009, Trial Chamber I issued an "Order on the prosecution's application to vary protective measures under Regulation 42", which, *inter alia*, instructed the Registry to notify the defence teams in the Katanga and Ngudjolo Chui case of filing ICC-01/04-01/06-2047 and which invited the defence teams in the two trials to file written submissions on filing ICC-01/04-01/06-2047. The Chamber instructed the prosecution to file a single, comprehensive document addressing (1) the security situation of the affected witnesses, (2) the relevance of the redacted information to the defence in the Lubanga and the Katanga and Ngudjolo cases, (3) the proposed variations (in greater detail), and (4) the feasibility of implementing inconsistent disclosure regimes between the two cases. It also invited the parties and participants in the Lubanga case to file written submissions on the interpretation and application of Regulation 42 of the Regulations of the Court.[15]

7. On 12 August 2009, the Lubanga defence informed the Chamber that it did not intend to respond to either the filing of the prosecution or the order of the Chamber.[16]

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[13] Décision sur la protection de 21 témoins relevant de l'article 67-2 du Statut et/ou de la règle 77 du Règlement de procédure et de preuve, 22 July 2009, ICC-01/04-01/07-1329-Conf-Exp, paragraph 55 and page 31; the public redacted version was issued on 24 July 2009, ICC-01/04-01/07-1332, page 27. Trial Chamber II referred the treatment of redactions relating to additional witnesses to Trial Chamber I, which will be addressed in separate decisions. The present decision only addresses those witnesses the prosecution identified in filing ICC-01/04-01/06-2047, some of whom overlap with the witnesses referred to Trial Chamber I by Trial Chamber II.
[14] [REDACTED].
[15] Order on the prosecution's applications to vary protective measures under Regulation 42, 27 July 2009, ICC-01/04-01/06-2068.
[16] Email communication from the defence to the Trial Chamber through the Legal Advisor to the Trial Division on 12 August 2009.

8. On 13 August 2009, senior counsel of the Office of Public Counsel for Victims ("OPCV") and the legal representatives informed the Chamber that they did not intend to respond to filing ICC-01/04-01/06-2047 of the prosecution.[17]

9. On 17 August 2009, Germain Katanga's defence ("Katanga defence") submitted observations on the prosecution's request for variation of protective measures,[18] in which it refers to its filing on the general interpretation of Regulation 42 of the Regulations of the Court.[19] The Katanga defence indicated that it does not object, *a priori,* to the protective measures sought in the prosecution's request, but that it is unable to make detailed submissions due to the general wording of the request.[20] It invites the Chamber to undertake a case-by-case assessment of the risks that will be posed to the witnesses if their identities are disclosed to Germain Katanga.[21] It also requests the Chamber to bear in mind that the risk-assessment and the relevance of the information may differ greatly between the two cases.[22] In view of the date of commencement of the Katanga trial, the Katanga defence further informs the Chamber that it seeks disclosure of all the transcripts and statements of the witnesses in the Lubanga case that are relevant to the preparation of the defence – in particular the non-redacted transcripts of the evidence of the witnesses who are relied on by the prosecution in the Katanga and Ngudjolo case – in order to prepare for cross-examination.[23] The Chamber observes that this application is not the subject matter of this Decision. It is for the prosecution to identify and disclose the material that is relevant to the

[17] Email communication from the OPCV to the Trial Chamber through the Legal Advisor to the Trial Division on 13 August 2009; email communication from Luc Walleyn to the Trial Chamber through the Legal Advisor to the Trial Division on 13 August 2009; email communication from Carine Bapita to the Trial Chamber through the Legal Advisor to the Trial Division on 13 August 2009.
[18] Defence Observations on the 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) (ICC-01/04-01/06-2047), 17 August 2009, ICC-01/04-01/06-2081. A Corrigendum was issued the next day, 18 August 2009, ICC-01/04-01/06-2081-Corr.
[19] ICC-01/04-01/06-2081-Corr, paragraph 6.
[20] ICC-01/04-01/06-2081-Corr, paragraph 7.
[21] ICC-01/04-01/06-2081-Corr, paragraph 7.
[22] ICC-01/04-01/06-2081-Corr, paragraph 7.
[23] ICC-01/04-01/06-2081-Corr, paragraph 8; reference is made to a request pending before Trial Chamber II, footnote 12.

Katanga and Ngudjolo case (given it is in possession of all the relevant transcripts and statements), and, if necessary, to make applications for disclosure of information to enable it to discharge its obligations.

10. On 17 August 2009, Mathieu Ngudjolo Chui's defence ("Ngudjolo defence") submitted observations on the request of the prosecution, to which it annexed certain earlier submissions by the parties and participants in the Katanga and Ngudjolo proceedings on the general interpretation of Regulation 42 of the Regulations of the Court.[24] The Ngudjolo defence reiterates its submission that Trial Chamber II is not bound by redactions authorised by Trial Chamber I in the Lubanga case.[25] It is suggested that the term "*mutatis mutandis*" in the Regulation allows a Chamber, on the basis of the particular circumstances of the case it is dealing with, to review and revise protective measures ordered by another Chamber.[26] Given the impending trial, the Ndugjolo defence criticises the additional requested redactions, and refers to the procedure instituted by Trial Chamber II.[27] It strongly opposes the disclosure of Witness 169's statement in the Katanga and Ngudjolo proceedings with the redactions ordered by Trial Chamber I, arguing that Trial Chamber II is not bound by Decisions of Trial Chamber I, and should itself make a Decision or Decisions based on the issues raised in the Katanga and Ngudjolo proceedings.[28] Noting the lack of preparation time before the trial, the Ngudjolo defence strongly opposes a procedure whereby Trial Chamber I is to decide on the circumstances of disclosure for the statement of Witness 90, and it submits that this is a matter to be decided substantively by Trial Chamber II.[29]

11. On 17 August 2009, in response to the Chamber's order, the prosecution

[24] Observations de la Défense de Mathieu Ngudjolo sur la requête ICC-01/04-01/06-2047 du Procureur, 17 August 2009, ICC-01/04-01/06-2078.
[25] ICC-01/04-01/06-2078, paragraph 13.
[26] ICC-01/04-01/06-2078, paragraph 13.
[27] ICC-01/04-01/06-2078, paragraphs 14 – 16.
[28] ICC-01/04-01/06-2078, paragraphs 17 – 20.
[29] ICC-01/04-01/06-2078, paragraphs 21 – 23.

submitted its "Prosecution's Submission further to the Trial Chamber's 'Order on the prosecution's applications to vary protective measures under Regulation 42'".[30] The prosecution informed the Chamber that the statements of the eight witnesses for which it seeks a variation of protective measures, and the statements of the two witnesses that it will disclose in the Katanga and Ngudjolo proceedings with the same redactions as granted by Trial Chamber I, are relevant to the Katanga and Ngudjolo case as they contain information that merits disclosure under Article 67(2) of the Statute or Rule 77 of the Rules.[31] It attached a detailed review of the proposed variations and the security risks relating to each witness in an *ex parte* annex, and notes that it is suggesting additional redactions to those requested on 14 July 2009, pursuant to Article 54(3)(f) of the Statute.[32] It also refers the Chamber to its two submissions that detail the security risks posed to these witnesses in the Katanga and Ngudjolo case.[33] [REDACTED][34] The prosecution acknowledges the risks inherent in a disclosure regime that differs between two cases; it notes that certain safeguards will need to be imposed; and it informs the Chamber that it will seek a confidentiality order in the Katanga and the Ngudjolo case to minimise the risk of disclosure between the accused in the two trials.[35] Last, the prosecution refers the Chamber to its submission on the interpretation of Regulation 42 of the Regulations of the Court in the Katanga

[30] ICC-01/04-01/06-2083.
[31] ICC-01/04-01/06-2083, paragraph 1.
[32] ICC-01/04-01/06-2083, paragraphs 4 and 5; Annex A to Prosecution's Submission further to the Trial Chamber's 'Order on the prosecution's applications to vary protective measures under Regulation 42', 17 August 2009ICC-01/04-01/06-2083-Conf-Exp-AnxA.
[33] ICC-01/04-01/06-2083, paragraph 3, referring to 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 282 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-Conf-Exp-Corr and 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.
[34] Annex B 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 282 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-Conf-Exp-AnxB, paragraph 1.
[35] ICC-01/04-01/06-2083, paragraph 8.

and Ngudjolo case.[36]

12. On 21 August 2009, the prosecution submitted its "Prosecution's notice that it will lift redactions to names of interpreters and interview locations".[37] In accordance with a previous Decision of the Chamber permitting the prosecution to lift Rule 81(2) redactions, having notified the Chamber, the prosecution sets out that it intends to lift redactions to the names of two interpreters and to withdraw pending requests for redactions to their names. The interpreters are [REDACTED] and [REDACTED].[38] Furthermore, the prosecution withdraws its pending requests to redact the names of the following interpreters: [REDACTED].[39] The prosecution notifies the Chamber that it is lifting the redactions to the interview location of [REDACTED].[40] The prosecution indicated that a list of the documents affected by the notice will be provided as soon as practicable.[41]

13. On 10 September 2009 the prosecution filed its "Prosecution's Updated Requests of filings # 1567 and # 1664 for Non-Disclosure of Information in the Statements of Individuals providing Rule 77 Information", setting out that it maintains its original request for non-disclosure.[42]

II. Applicable Law and relevant Decisions

14. The following provisions of the Statute, Rules and Regulations of the Court are relevant in considering this Application:

[36] ICC-01/04-01/06-2083, paragraph 9; Prosecution's Submissions regarding Interpretation of Regulation 42, 19 June 2009, ICC-01/04-01/07-1231-Conf-Exp.
[37] Prosecution's Notice that it will lift redactions to names of interpreters and interview locations, 21 August 2009, ICC-01/04-01/06-2089-Conf.
[38] ICC-01/04-01/06-2089-Conf, paragraphs 1 and 3, referring to Transcript of hearing on 4 December 2007, ICC-01/04-01/06-T-62-ENG-ET, page 23, lines 2 – 20; ICC-01/04-01/06-2089-Conf, footnote 2.
[39] ICC-01/04-01/06-2089-Conf, paragraph 4 and footnote 3.
[40] ICC-01/04-01/06-2089-Conf, paragraph 5 and footnotes 4 – 6.
[41] ICC-01/04-01/06-2089-Conf, paragraph 6.
[42] Prosecution's Updated Requests of filings # 1567 and # 1664 for Non-Disclosure of Information in the Statements of Individuals providing Rule 77 Information, 10 September 2009, ICC-01/04-01/06-2111, paragraph 9.

Article 54

Duties and powers of the Prosecutor with respect to investigations

[...]
3. The Prosecutor may:
[...]
(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 64

Functions and powers of the Trial Chamber

[...]
6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:
[...]
(e) Provide for the protection of the accused, witnesses and victims.
(f) Rule on any other relevant matters.
[...]

Article 68

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
[...]

Rule 81

Restrictions on disclosure

[...]
2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an ex parte basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.
[...]
4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.

[...]

Regulation 42

Application and variation of protective measures

1. Protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court and shall continue after proceedings have been concluded, subject to revision by a Chamber.
2. When the Prosecutor discharges disclosure obligations in subsequent proceedings, he or she shall respect the protective measures as previously ordered by a Chamber and shall inform the defence to whom the disclosure is being made of the nature of these protective measures.
3. Any application to vary a protective measure shall first be made to the Chamber which issued the order. If that Chamber is no longer seized of the proceedings in which the protective measure was ordered, application may be made to the Chamber before which a variation of the protective measure is being requested. That Chamber shall obtain all relevant information from the proceedings in which the protective measure was first ordered.
4. Before making a determination under sub-regulation 3, the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made.

15. The Appeals Chamber has established criteria which are to be applied when a Chamber is considering authorising, in exceptional circumstances, non-disclosure of the identities of witnesses to the defence. It held that three of the most important considerations are (1) the danger to the witness or his or her family members that disclosure may entail, (2) the necessity for the protective measures and (3) an assessment of whether the measures will be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[43] The Appeals Chamber additionally required an investigation into the sufficiency and feasibility of less restrictive protective measures.[44] Although these criteria were established in the course of pre-trial proceedings, in the assessment of the Chamber, they are equally applicable to the trial stage of the case.

16. In the Katanga and Ngudjolo case, the Appeals Chamber has held that "persons other than witnesses, victims and members of their families, may, at

[43] 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, paragraphs 21 – 23.
[44] ICC-01/04-01/06-773, paragraph 33.

this stage of the proceedings, be protected through the non-disclosure of their identities by analogy with other provisions of the Statute and the Rules. The aim is to secure protection of individuals at risk. Thus, by necessary implication, Rule 81(4) should be read to include the words 'persons at risk on account of the activities of the Court' so as to reflect the intention of the States that adopted the Statute and the Rules of Procedure and Evidence, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect people at risk."[45] The Appeals Chamber emphasised that non-disclosure of information for the protection of those at risk on account of the activities of the Court requires "a careful assessment [...] on a case by case basis, with specific regard to the rights of the [accused]."[46]

17. In the Chamber's assessment, this approach of the Appeals Chamber extending protection for the groups expressly provided for in Rule 81(4) of the Rules – i.e. witnesses, victims and members of their families – to the "*other persons at risk on account of the activities of the Court*" is to be applied during trial proceedings. Therefore, the Trial Chamber's responsibility under Article 64(6)(e) of the Statute to "[p]rovide for the protection of the accused, witnesses and victims" includes providing for the protection of other persons at risk on account of the activities of the Court.[47]

18. Further, the Trial Chamber has previously authorised the permanent redaction of the names of persons referred to as third parties, intermediaries and NGOs (together with their field staff) when, *inter alia*, the information was irrelevant to the known issues in the case, so long as this course did not

[45] Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, paragraph 56.
[46] ICC-01/04-01/07-475, paragraph 2.
[47] ICC-01/04-01/06-1814-Conf, paragraph 34; corrected version: ICC-01/04-01/06-1924-Conf-Anx1, paragraph 34; public redacted version: ICC-01/04-01/06-1924-Anx2, paragraph 34.

render the document in any way unintelligible or unusable.[48] With the same reasoning, it also specifically authorised redactions relating to family members of witnesses and prosecution sources.[49]

19. The Chamber has previously set out its approach concerning Rule 81(1) as follows:

> 31. Rule 81(1) of the Rules explicitly excludes from disclosure the internal documents ("reports, memoranda or other internal documents") prepared by "a party, its assistant or representatives" in connection with the investigation or preparation of the case. It is of note that the ICTY Rules of Procedure and Evidence contain an almost identical provision: Rule 70(A). It would be unhelpful to attempt in the context of this decision to define the material covered by this provision, but it includes, inter alia, the legal research undertaken by a party and its development of legal theories, the possible case strategies considered by a party, and its development of potential avenues of investigation. The Chamber further ensured that the relevant material was limited only to internal documents of the prosecution, and redactions were only authorised if the information was not of a kind that required disclosure under the Statute. It is to be stressed that the material covered by this provision can be entire documents or parts thereof. Furthermore, the Chamber ensured the redactions did not change the substance of the relevant parts of the documents, and in each instance they remained intelligible and usable.[50]

The Chamber has applied this approach to the redactions made by the prosecution on the basis of Rule 81(1) in this Decision.

III. Analysis

General comments

20. The Chamber has already considered the operation of Regulation 42(1) of the Regulations of the Court in the context of an application to disclose the identity of an intermediary in the Katanga and Ngudjolo trial which had been withheld by Trial Chamber I in the Lubanga case.[51] The Chamber, faced with

[48] Transcript of hearing on 13 December 2007, ICC-01/04-01/06-T-65-ENG-ET, page 3, lines 3 – 15; Order granting prosecution's application for non-disclosure of information provided by a witness, 31 January 2008, ICC-01/04-01/06-1146-Conf-Exp, paragraph 8; confidential redacted version, 11 March 2008, ICC-01/04-01/06-1221-Conf-Anx1, paragraph 8.
[49] ICC-01/04-01/06-1814-Conf, paragraphs 34 and 35.
[50] ICC-01/04-01/06-1814-Conf, paragraph 31.
[51] Decision on the application to disclose the identity of intermediary 143, 18 November 2009, ICC-01/04-01/06-2190-Conf-Exp.

those facts, observed:

> 26. Although Trial Chamber I is clearly able to make a decision on the protective measures necessary for 143, and the need or otherwise to disclose his identity, in the context of the Lubanga trial (conducting the judgment required under Rule 81(2)), it is realistically unable to undertake the same exercise of judgment for Trial Chamber II. For instance, do the matters described by Trial Chamber II (summarised in the preceding paragraph) result in the conclusion that the identity must be disclosed to the defence (under Rule 81(2)), or are there other, lesser measures which would secure fairness for the accused? This requires a detailed understanding of the facts and issues in the Katanga trial, leading to a nuanced decision, which Trial Chamber I is ill-equipped to make. And does a decision on disclosure need to be made at this stage, or can it be delayed to see how the evidence and issues evolve? Only the judges of Trial Chamber II can sensibly answer these questions, and in those circumstances the words of Regulation 42(3) take on real significance: "Any application to vary a protective measure shall first be made to the Chamber which issued the order." Certainly in cases such as the present, in order for this provision to operate in a way which ensures that justice will be done in both cases, the two Chambers must arrive at their own separate conclusions as to whether the protective measures shall be varied, depending on the issues which need to be balanced in the different cases.
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> 27. In these circumstances, the Chamber which originally issued the non-disclosure order, logically, should first deal with the issue, providing an analysis to assist the second Chamber, and the latter Chamber will undoubtedly take into account any security concerns that are indicated.

21. Although there are differences in the circumstances of the present Decision and those of 18 November 2009, there are no sustainable reasons for diverting from the approach the Chamber adopted in the latter case.

22. Therefore, the Chamber needs to reassess the position on a case-by-case basis to the extent that this application affects the Lubanga Trial. [REDACTED].[52] [REDACTED].[53] [REDACTED].[54]

23. [REDACTED].[55] [REDACTED].[56] [REDACTED].[57] [REDACTED].[58]

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[52] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 1.
[53] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 1.
[54] Page 1 of the tables contained in confidential *ex parte* Annexes to 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-Conf-Exp-AnxA2, ICC-01/04-01/06-2047-Conf-Exp-AnxB2, ICC-01/04-01/06-2047-Conf-Exp-AnxC2, ICC-01/04-01/06-2047-Conf-Exp-AnxD2, ICC-01/04-01/06-2047-Conf-Exp-AnxE2, ICC-01/04-01/06-2047-Conf-Exp-AnxF2, ICC-01/04-01/06-2047-Conf-Exp-AnxG2, ICC-01/04-01/06-2047-Conf-Exp-AnxH2 and ICC-01/04-01/06-2047-Conf-Exp-AnxI2.
[55] Décision sur la requête de la Défense de Thomas Lubanga aux fins de se voir communiquer la décision rendue par la Chambre le 24 juillet 2009, 17 September 2009, ICC-01/04-01/07-1476-Conf-Exp.

[REDACTED].[59] [REDACTED].

24. [REDACTED].[60] [REDACTED].[61] [REDACTED],[62] [REDACTED].[63] [REDACTED].

Internal Documents

25. The Chamber takes note of the internal documents that the prosecution has withheld in accordance with Rule 81(1) of the Rules. This step does not require authorisation by the Chamber.

Lifting redactions

26. Although the Chamber endorses the important process of reviewing and, where appropriate, removing unnecessary redactions, it is concerned that some redactions in the Lubanga case were seemingly never justified. Although the Chamber exercises its own judgment on each request, it is to an important extent dependent on the information and assessment provided by the prosecution. It is critical that the material provided to the Chamber is accurate, properly researched and sustainable.

Witness DRC-OTP-WWWW-0033[64]

27. Witness 33 was a soldier in the Union of Congolese Patriots/ Patriotic Force

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[56] Transcript of hearing on 1 October 2009, ICC-01/04-01/06-T-213-CONF-EXP-ENG-ET, page 4, lines 19 – 21.
[57] ICC-01/04-01/06-T-213-CONF-EXP-ENG-ET, page 4, line21 to page 5, line 2. The defence refers to ICC-01/04-01/07-1476-Conf-Exp.
[58] ICC-01/04-01/06-T-213-CONF-EXP-ENG-ET, page 5, lines 20 – 24.
[59] ICC-01/04-01/06-T-213-CONF-EXP-ENG-ET, page 5, line 24 to page 6, line 10.
[60] Submission of a New Report on Alleged Conduct of the Resource Person of Thomas Lubanga Dyilo's Defence Team, 26 August 2009, ICC-01/04-01/06-2091-Conf-Exp.
[61] ICC-01/04-01/06-2091-Conf-Exp, page 4.
[62] Annex to Submission of a New Report on Alleged Conduct of the Resource Person of Thomas Lubanga Dyilo's Defence Team, 26 August 2009, ICC-01/04-01/06-2091-Conf-Exp-Anx.
[63] ICC-01/04-01/06-2091-Conf-Exp, page 5.
[64] DRC-OTP-0113-0279 – DRC-OTP-0113-0284 (English original); Annex A1 to 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-Conf-Exp-AnxA1; DRC-OTP-0160-0489–DRC-OTP-0160-0494 (French translation).

for the Liberation of the Congo ("UPC/FPLC") in 2002/2003.[65] [REDACTED].[66] In July 2009, efforts to contact Witness 33 were unsuccessful and as a result, the prosecution has not obtained his consent to disclose his identity in the Katanga and Ndugjolo case; nor has it provided him with information as to the applicable emergency security measures if his identity is disclosed.[67] The prosecution submits that different considerations apply in the Katanga and Ngudjolo case than in the Lubanga trial, [REDACTED], rendering additional redactions necessary.[68] The prosecution refers to a decision by Trial Chamber II[69] which included the finding [REDACTED].[70] Therefore, the prosecution requests that the current redactions to his identity remain in place,[71] noting that due to the lack of contact, he has not been referred to the Victims and Witnesses Unit ("VWU") for protection.[72]

28. The Investigative Note, disclosed as incriminating evidence in the Lubanga case, is potentially relevant in the Katanga and Ngudjolo case under Rule 77 of the Rules as it refers to the role of foreign powers.[73] The prosecution submits that Witness 33 can provide information on the presence of child soldiers in the UPC/FPLC training camps, on UPC/FPLC attacks and on the involvement of foreign forces.[74]

29. The prosecution sets out that redactions to this witness's statement were first authorised by the Pre-Trial Chamber on 20 September 2006.[75] The prosecution

[65] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 4.
[66] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 7.
[67] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 7.
[68] ICC-01/04-01/06-2047-Conf-Exp-AnxA2, page 1 of the table.
[69] Décision sur la requête 1200 du Procureur aux fins de mesures d'interdictions et de restrictions de contacts avec l'extérieur comme au sein de l'établissement pénitentiaire contre Mathieu Ngudjolo, 24 June 2009, ICC-01/04-01/07-1243-Conf-Exp.
[70] ICC-01/04-01/06-2047-Conf-Exp-AnxA2, page 4 of the table.
[71] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 7.
[72] ICC-01/04-01/06-2083-Conf-Exp-AnxA, footnote 7.
[73] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 4.
[74] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 4.
[75] ICC-01/04-01/06-2083-Conf-Exp-AnxA, footnote 7; Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, 20 September 2006, ICC-01/04-01/06-453-Conf-Exp; See

subsequently re-applied for leave not to disclose information to protect the witness's identity and the interview location before Trial Chamber I,[76] whilst simultaneously informing the Chamber that it was lifting all the existing Rule 81(2) redactions.[77] The Chamber temporarily granted the request on 18 January 2009 to maintain redactions until 31 January 2008 (ICC-01/04-01/06-T-71, page 5, lines 9 – 17).[78] The prosecution also made Rule 81(1) redactions to the Investigator's Note to protect its internal documents.[79]

30. The Chamber notes that in its Decision of 30 January 2008, it suspended the deadline for final disclosure until issues relating to security and disclosure had been resolved.[80] Thereafter, this witness was removed from the prosecution's list of trial witnesses,[81] and as a result no further Decision was made as regards the existing redactions.

31. In the present application, the prosecution seeks to withhold this witness's identity,[82] whilst accepting certain redactions can be lifted, namely: (1) the location of the interview, namely the [REDACTED], at paragraph 2 of page DRC-OTP-0113-0279; (2) Rule 77 information: [REDACTED], at paragraph 13 of page DRC-OTP-0113-0280; and (3) Rule 77 information, namely [REDACTED] and [REDACTED], at paragraph 29 on page DRC-OTP-0113-0283.[83] In its view, disclosing this information will neither reveal the identity

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also Annex 8 to the Prosecution's Application pursuant to Rules 81(2) and 81(4), 18 August 2006, ICC-01/04-01/06-341-Conf-Exp-Anx8.

[76] Annexes 2 and 3 to the Prosecution's Application for Lifting of Redactions, Non-Disclosure of Information and Disclosure of Summary Evidence, 12 December 2007, ICC-01/04-01/06-1081-Conf-Exp-Anx2 and ICC-01/04-01/06-1081-Conf-Exp-Anx3.

[77] Annex 75 to the Prosecution's Application for Lifting of Redactions, Non-Disclosure of Information and Disclosure of Summary Evidence, 12 December 2007, ICC-01/04-01/06-1081-Conf-Exp-Anx75, page 3 of the table.

[78] ICC-01/04-01/06-2083-Conf-Exp-AnxA, footnote 7.

[79] ICC-01/04-01/06-2083-Conf-Exp-AnxA, footnote 7.

[80] Decision suspending deadline for final disclosure, 30 January 2008, ICC-01/04-01/06-1141.

[81] ICC-01/04-01/06-2083-Conf-Exp-AnxA, footnote 7.

[82] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 7.

[83] ICC-01/04-01/06-2047-Conf-Exp-AnxA2, pages 4 and 5 of the table. The last page number indicated in the table is "0493", which appears to be a typographical error as the correct page number is "0283"; see also ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 5.

of the witness nor compromise ongoing investigations, at this stage.[84]

32. Additionally, the prosecution seeks redactions in paragraph [REDACTED].[85] [REDACTED] are currently redacted and the prosecution submits that revealing [REDACTED] may tend to reveal the identity of the witness; further, the proposed redactions are irrelevant to the known issues in the Katanga and Ngudjolo case.[86]

33. Trial Chamber II, having noted that Trial Chamber I previously dealt with protective measures for this witness, referred the matter back to Trial Chamber I, in accordance with Regulation 42 of the Regulations of the Court.[87]

34. The Chamber notes that the prosecution has not submitted an explanation as to why Witness 33 is at risk in the Katanga and Ngudjolo case, but instead simply maintains that he cannot be contacted in order to obtain his consent to disclose his identity.[88] For the purposes of the Lubanga trial, Trial Chamber I accepts the proposals for redactions advanced by the prosecution, and observes that there is no basis for ordering more extensive disclosure in the present case, given he is no longer a witness for the prosecution and the relevant information was incriminatory in nature. It is for Trial Chamber II to assess the risks to the witness if his identity is disclosed in the Katanga and Ngudjolo case (including the fact that he cannot be contacted), and to determine whether disclosure is necessary, and, if so, its extent.

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[84] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 5.
[85] ICC-01/04-01/06-2047-Conf-Exp-AnxA2, pages 3 and 4 of the table; ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 6.
[86] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 6.
[87] ICC-01/04-01/07-1332, paragraph 52.
[88] Annex 2A to 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-Anx2A contains a short witness profile, yet does not indicate any specific risks; ICC-01/04-01/06-2047-Conf-Exp-AnxA1; ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 7.

Witness DRC-OTP-WWWW-0169[89]

35. Witness 169 is a former child soldier who was forcibly conscripted by the Front for Patriotic Resistance of Ituri ("FRPI"), served at the FRPI Ngiti military camp [REDACTED], and participated in attacks.[90] At the time of the screening for the Katanga and Ngudjolo case in 2005, he was living in [REDACTED] with friends of his own age as [REDACTED] and he had [REDACTED].[91] The current whereabouts of the witness are not known and efforts by a local intermediary to locate him on behalf of the prosecution in February 2009 were unsuccessful.[92] [REDACTED].[93] Furthermore, this potentially exculpatory witness is vulnerable and, given his age and situation, the prosecution requests that the protective measures remain in place.[94]

36. On 9 April 2009 the Chamber authorised the non-disclosure of this witness's identity, and the two-page unsigned Investigator's Note was disclosed as Rule 77 information in the Lubanga case.[95] The witness can provide information relevant to the Katanga and Ngudjolo case regarding his forced conscription into the FRPI at the age of 11 years, training at an Ngiti military camp and his participation in various battles.[96] The Investigator's Note contains Rule 77 information material to the Katanga and Ngudjolo case on the role of Uganda in the Ituri conflict.[97] The prosecution submits the witness provides information potentially relevant under Rule 77 of the Rules, as he states that in 2002 – 2003, FRPI forces fought the Ugandans at Boga and

[89] DRC-OTP-0150-0150 – DRC-OTP-0150-0151; Annex B1 to 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-Conf-Exp-AnxB1. This witness was also referred to the Chamber by Trial Chamber II in its decision ICC-01/04-01/07-1329-Conf-Exp of 22 July 2009 (public redacted version: ICC-01/04-01/07-1332 of 24 July 2009).
[90] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 10; ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 4.
[91] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 3.
[92] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 3; ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 11.
[93] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 7.
[94] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 3; ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraphs 10 and 11.
[95] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 8; ICC-01/04-01/06-2047-Conf-Exp-AnxB2, page 1 of the table, referring to ICC-01/04-01/06-1814-Conf, paragraph 55 (see corrected and redacted versions, ICC-01/04-01/06-1924) and ICC-01/04-01/06-1814-Conf-Exp-Anx, pages 8 – 10.
[96] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 10.
[97] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 8.

Ugandan forces were "occupying" Zitono; furthermore, he states that FRPI combatants at [REDACTED] were told they were fighting to protect the tribe of Ituri as the intention of the Hema was to eradicate all other races.[98] The prosecution submits that the Investigator's Note also contains Article 67(2) information for the Katanga and Ngudjolo case,[99] insofar as the witness recounts that during an attack on Boga, they were told not to kill civilians but only combatants who could be easily distinguished, because UPC personnel wore military uniforms.[100]

37. The prosecution seeks to disclose the Investigator's Note in the Katanga and Ngudjolo case with similar redactions to those authorised by Trial Chamber I.[101] It proposes disclosing alternative evidence to address the Rule 77 and Article 67(2) information provided by the witness.[102]

38. In its Decision of 22 July 2009, Trial Chamber II notes that the witness expressed security concerns in 2005, but now, four years later, the Chamber has no information about the risks he faces today or where he lives.[103] Trial Chamber II has not received information that demonstrates a real and objective risk posed to this witness if his identity is disclosed in the Katanga and Ngudjolo case,[104] and, over the last four years the prosecution has been out of touch with the witness.[105] Against this background, Trial Chamber II envisages full disclosure,[106] although it accepts the risk for the witness should his identity becomes known by Thomas Lubanga and his associates, for

[98] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 5.
[99] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 8.
[100] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 5.
[101] ICC-01/04-01/06-2047, paragraph 7; ICC-01/04-01/06-2047-Conf-Exp-AnxB2; ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 9.
[102] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 9, referring to ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraphs 3 – 7. See also the chart with the proposed alternative evidence in ICC-01/04-01/07-985-Conf-Exp-AnxC.
[103] ICC-01/04-01/07-1329-Conf-Exp, paragraph 25; ICC-01/04-01/07-1332, paragraph 25.
[104] ICC-01/04-01/07-1329-Conf-Exp, paragraph 26; ICC-01/04-01/07-1332, paragraph 26.
[105] ICC-01/04-01/07-1329-Conf-Exp, paragraph 26; ICC-01/04-01/07-1332, paragraph 26.
[106] ICC-01/04-01/07-1329-Conf-Exp, paragraph 26; ICC-01/04-01/07-1332, paragraph 26.

instance if there is communication in the detention centre.[107] Under Regulation 42(3) of the Regulations of the Court, Trial Chamber II has referred the issue to Trial Chamber I.[108]

39. In its submission of 21 August 2009, the prosecution informed the Chamber that it intended to lift certain Rule 81(2) redactions, including the interview location [REDACTED].[109] The Chamber notes that the witness was interviewed at this location and the redaction to the interview location in paragraph 2 of the document should be lifted in the Lubanga trial and the information disclosed.

40. For the Lubanga case, Trial Chamber I accepts the prosecution's approach to disclosure, which includes providing information on [REDACTED], and observes that there is no basis for ordering more extensive disclosure in the present case. It is for Trial Chamber II to assess the risks to the witness if his identity is disclosed for the purposes of the Katanga and Ngudjolo case (including the fact that he has been out of contact for four years), and to determine whether disclosure is necessary, and, if so, its extent. It is for Trial Chamber II to decide whether redactions are necessary or appropriate, and whether any alternative evidence proposed by the prosecution in that case justifies non-disclosure.

41. To assist Trial Chamber II, the Chamber notes that the witness provides, in the main, overwhelmingly incriminatory evidence in relation to the Katanga and Ngudjolo case, whereas in the Lubanga case the information he provided was essentially relevant to Rule 77. [REDACTED].[110] [REDACTED].[111]

[107] ICC-01/04-01/07-1329-Conf-Exp, paragraph 26; ICC-01/04-01/07-1332, paragraph 26.
[108] ICC-01/04-01/07-1329-Conf-Exp, paragraph 26; ICC-01/04-01/07-1332, paragraph 26.
[109] ICC-01/04-01/06-2089-Conf, paragraph 5.
[110] ICC-01/04-01/06-1814-Conf-Exp-Anx, page 8.
[111] ICC-01/04-01/06-1814-Conf-Exp-Anx, page 9.

[REDACTED].[112]

Witness DRC-OTP-WWWW-0175[113]

42. Witness 175 is a former child soldier, who joined the Lendu militia and was in a camp [REDACTED].[114] In 2005, he was living in [REDACTED] with [REDACTED] former Nationalist Integrationist Front ("FNI")/FRPI soldiers, but his current whereabouts are unknown.[115] Efforts to contact the witness in August 2008 and January 2009 were unsuccessful.[116] Given this witness's age and vulnerability, the prosecution requests that the existing protective measures remain in place.[117] The prosecution submits that Witness 175 is at particular risk if his identity is disclosed to the two accused in the Katanga and Ngudjolo case, because he primarily provides incriminatory information, and therefore could be viewed as a traitor.[118] He has not consented to disclosure of his identity and he is not within the Court's protection programme.[119]

43. The Investigator's Note was disclosed as Rule 77 information in the Lubanga case with redactions to protect the identity of this witness.[120] The witness provides incriminating information on his (voluntary) enlistment into the Lendu militia, the use of child soldiers at the FNI camps, Mathieu Ngudjolo's role, the latter's communications with other commanders, including Cobra

[112] ICC-01/04-01/06-1814-Conf-Exp-Anx, page 9.
[113] DRC-OTP-0150-0183 – DRC-OTP-0150-0185; Annex C1 to 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-Conf-Exp-AnxC1. This witness was also referred to the Chamber by Trial Chamber II in its decision ICC-01/04-01/07-1329-Conf-Exp of 22 July 2009 (public redacted version: ICC-01/04-01/07-1332 of 24 July 2009).
[114] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 14 and the information given in the note, DRC-OTP-0150-0183.
[115] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 14.
[116] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 22.
[117] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 15.
[118] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraphs 23 and 26.
[119] ICC-01/04-01/06-2047-Conf-Exp-AnxC2, page 1 of the table.
[120] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 12 and footnote 16, referring to ICC-01/04-01/06-1814-Conf (Corrigendum: ICC-01/04-01/06-1924). The redactions also cover internal work products of the prosecution.

Matata and Unega, and his orders to attack.[121] [REDACTED].[122] [REDACTED].[123] [REDACTED].[124] [REDACTED].[125] The prosecution has proposed alternative evidence to cover the Rule 77 and Article 67(2) information provided by the witness.

44. In addition to the existing protective measures ordered by the Chamber, the prosecution seeks to add further redactions in [REDACTED] and [REDACTED] of the document.[126] In [REDACTED] the prosecution proposes redacting [REDACTED], the [REDACTED] of the witness, as well as the [REDACTED].[127] Although the redaction to the [REDACTED],[128] the prosecution submits that he should continue to be protected in order to safeguard ongoing or future investigations, as well as his personal safety and the safety of his family. It refers to previous Decisions of the Chamber in which [REDACTED] were protected, and to threats made to NGOs that, in its view, reflect the dangers faced by all [REDACTED] and prosecution sources.[129] The prosecution also seeks to redact the [REDACTED]of the witness, as set out in [REDACTED] of the Investigator's Note.[130] In the cover filing, when addressing the redaction proposals, the prosecution submits that it seeks to withhold additional information in [REDACTED], relating to [REDACTED], given that the accused in the Katanga and Ngudjolo case may be able to identify the witness.[131] The prosecution submits that the additional proposed redactions are limited to identifying details and are not relevant to

[121] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 14; ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 23.
[122] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 23.
[123] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 12.
[124] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 24.
[125] ICC-01/04-01/06-2047-Conf-Exp-AnxC1; DRC-OTP-0150-0184, paragraph 9.
[126] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 13.
[127] ICC-01/04-01/06-2047-Conf-Exp-AnxC2, pages 4 – 6 of the table; ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 13.
[128] [REDACTED].
[129] ICC-01/04-01/06-2047-Conf-Exp-AnxC2, pages 4 – 5 of the table.
[130] ICC-01/04-01/06-2047-Conf-Exp-AnxC2, page 7 of the table.
[131] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 13.

the known issues in the Katanga and Ngudjolo case.[132]

45. [REDACTED].[133] [REDACTED][134] [REDACTED].[135] [REDACTED].[136]

46. The Chamber notes that in its submission of 21 August 2009, the prosecution informed the Chamber that it intended to lift certain Rule 81(2) redactions, including the interview location [REDACTED].[137] The Chamber confirms that the redaction to the interview location in paragraph 2 of the document should be lifted and the information disclosed in the Lubanga trial.

47. The Chamber has not assessed the alternative evidence submitted for the purposes of the Katanga and Ndugjolo case, as this exercise is for Trial Chamber II. However, it notes *en passant* that the information provided by this witness does not have the same relevance in the Lubanga case as it does in the Katanga and Ngudjolo case.

48. For the purposes of the Lubanga trial, Trial Chamber I accepts the prosecution's approach to disclosure, which includes providing information on [REDACTED] whilst redacting the name [REDACTED], the [REDACTED] of the witness, as well as the [REDACTED], and observes that there is no basis for ordering more extensive disclosure in the present case. It is for Trial Chamber II to assess the risks to the witness if his identity and the other information that has been withheld is disclosed for the purposes of the Katanga and Ngudjolo case, and to determine whether disclosure is necessary, and, if so, its extent. It is for Trial Chamber II to decide whether redactions are necessary or appropriate, and whether any alternative evidence proposed by the prosecution in that case justifies non-disclosure.

[132] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 13.
[133] ICC-01/04-01/07-1329-Conf-Exp, paragraph 29; ICC-01/04-01/07-1332, paragraph 29.
[134] ICC-01/04-01/07-1329-Conf-Exp, paragraph 30; ICC-01/04-01/07-1332, paragraph 30.
[135] ICC-01/04-01/07-1329-Conf-Exp, paragraph 30; ICC-01/04-01/07-1332, paragraph 30.
[136] ICC-01/04-01/07-1329-Conf-Exp, paragraph 30; ICC-01/04-01/07-1332, paragraph 30.
[137] ICC-01/04-01/06-2089-Conf, paragraph 5.

49. As regards the additional proposed redactions relating to the [REDACTED], the Chamber notes, however, that [REDACTED].[138] [REDACTED].[139] As a result, [REDACTED]. This information may be of assistance to Trial Chamber II.

Witness DRC-OTP-WWWW-0178/0253[140]

50. Witness 178 (alias 253) is a former child soldier of both the UPC and the FNI, who is an [REDACTED], and who was living with [REDACTED] other former FNI child soldiers in [REDACTED] when the prosecution was last able to contact him (in December 2005).[141] He [REDACTED] during the war.[142] Efforts to contact the witness in February 2009 failed.[143] At the time of the screening, the witness did not consent to the disclosure of his identity and he is not within the protection programme provided by the Court.[144] The prosecution submits that there is a real risk [REDACTED].[145] Given his age and vulnerability, the prosecution requests that the current protective measures remain in place.[146] The prosecution submits that the fact that he [REDACTED] at [REDACTED], which increases the risk of his identification in the Katanga and Ngudjolo case.[147]

51. The Investigator's Note was disclosed as Rule 77 information in the Lubanga

[138] See Transmission by the Registry of the closed session transcript of the testimony of Witness 15 to the Defence teams in the Katanga case pursuant to Trial Chamber I's Decision n°ICC-01/04-01/06-2123-Conf, 18 September 2009, ICC-01/04-01/06-2133-Conf.
[139] [REDACTED].
[140] DRC-OTP-0149-0026 – DRC-OTP-0149-0027; Annex D1 to 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-Conf-Exp-AnxD1. This witness was also referred to the Chamber by Trial Chamber II in its decision ICC-01/04-01/07-1329-Conf-Exp of 22 July 2009 (public redacted version: ICC-01/04-01/07-1332 of 24 July 2009).
[141] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraphs 8 and 9; ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 18.
[142] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 18.
[143] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 19.
[144] ICC-01/04-01/06-2047-Conf-Exp-AnxD2, page 1 of the table.
[145] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 14.
[146] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 19.
[147] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 17.

case with redactions to the identity of the witness.[148] It contains information on Rwandan support to the UPC/FPLC that the prosecution maintains is also relevant in the Katanga and Ngudjolo case under Rule 77.[149] As with the previous two witnesses, the statement contains information on instructions given by the FNI commanders not to target civilians (but not in the context of the attack on Bogoro), which is potentially Article 67(2) information in the Katanga and Ngudjolo case.[150] He provides incriminating information in the Katanga and Ngudjolo case regarding his enlistment into the FNI, the use of child soldiers at the FNI camp at Zumbe (Mathieu Ngudjolo's base), Ngudjolo's use of child soldiers as his escorts, his participation in battles at [REDACTED], the FNI/FRPI alliance and [REDACTED].[151]

52. The prosecution further seeks to redact [REDACTED] in [REDACTED], the [REDACTED] in [REDACTED] and specific information on the [REDACTED].[152] As with Witness 175, the prosecution seeks further redactions to the [REDACTED], in [REDACTED].[153] The prosecution submits that the additional redactions are not relevant to the known issues in the Katanga and Ngudjolo case.[154]

53. Trial Chamber II notes that during the status conference in the Katanga and Ngudjolo case on 8 July 2009, the prosecution was unable to provide information on the precise nature of the risk faced by the witness and merely relied on general considerations related to the circumstances in Ituri and the

[148] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 16, referring to ICC-01/04-01/06-1814-Conf-Exp-Anx, pages 15 – 17. [REDACTED].
[149] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 16.
[150] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 16; ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 11.
[151] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 18; ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 10.
[152] ICC-01/04-01/06-2047-Conf-Exp-AnxD2, pages 6 and 7 of the table; ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 17.
[153] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 17; ICC-01/04-01/06-2047-Conf-Exp-AnxD2, pages 4 and 5 of the table.
[154] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 17.

general risk caused by any testimony.[155] [REDACTED].[156] [REDACTED], in the view of Trial Chamber II general references to the security situation in the East of the Congo do not suffice to justify measures that may affect the rights of the accused.[157] [REDACTED][158] [REDACTED].[159] Under Regulation 42(3) of the Regulations of the Court, Trial Chamber II has referred the issue to Trial Chamber I.[160] [REDACTED].[161] [REDACTED].[162] [REDACTED].[163]

54. The Chamber notes that in its submission of 21 August 2009, the prosecution informed the Chamber that it intended to lift certain Rule 81(2) redactions, including the interview location [REDACTED].[164] The Chamber confirms that the redaction to the interview location in paragraph 2 of the document should be lifted and the information disclosed in the present trial.

55. The Chamber notes that the information provided by Witness 178/253 does not have the same relevance in the Lubanga case as it does in the Katanga and Ngudjolo case, and arguably the risk to this witness if his identity is disclosed may be greater in the latter case.

56. For the purposes of the Lubanga trial, Trial Chamber I accepts the prosecution's approach to disclosure, which includes providing information on [REDACTED] and observes that there is no basis for ordering more extensive disclosure in the present case. It is for Trial Chamber II to assess the risks to the witness if his identity is disclosed for the purposes of the Katanga and Ngudjolo case (including the fact that he has not been contacted since 2005 and particularly could not be located in 2009), and to determine whether

[155] ICC-01/04-01/07-1329-Conf-Exp, paragraph 20; ICC-01/04-01/07-1332, paragraph 20.
[156] ICC-01/04-01/07-1329-Conf-Exp, paragraph 20; ICC-01/04-01/07-1332, paragraph 20.
[157] ICC-01/04-01/07-1329-Conf-Exp, paragraph 20; ICC-01/04-01/07-1332, paragraph 20.
[158] ICC-01/04-01/07-1329-Conf-Exp, paragraph 21; ICC-01/04-01/07-1332, paragraph 21.
[159] ICC-01/04-01/07-1329-Conf-Exp, paragraph 21; ICC-01/04-01/07-1332, paragraph 21.
[160] ICC-01/04-01/07-1329-Conf-Exp, paragraph 21; ICC-01/04-01/07-1332, paragraph 21.
[161] ICC-01/04-01/07-1329-Conf-Exp, paragraph 22; ICC-01/04-01/07-1332, paragraph 22.
[162] ICC-01/04-01/07-1329-Conf-Exp, paragraph 22; ICC-01/04-01/07-1332, paragraph 22.
[163] ICC-01/04-01/07-1329-Conf-Exp, paragraph 22; ICC-01/04-01/07-1332, paragraph 22.
[164] ICC-01/04-01/06-2089-Conf, paragraph 5.

disclosure is necessary, and, if so, its extent. It is for Trial Chamber II to decide whether redactions are necessary or appropriate, and whether any alternative evidence proposed by the prosecution in that case justifies non-disclosure.

57. As set out above, [REDACTED].[165] The Chamber rehearses its earlier observations on this issue.

Witness DRC-OTP-WWWW-0179[166]

58. Witness 179 is a female former child soldier in a group that she claims consisted of a Lendu militia.[167] She was forcibly recruited in 2003 and participated in the attack on [REDACTED] in 2003.[168] In 2008, she was living in [REDACTED].[169] She was contacted in August 2008 to discuss the disclosure of her identity to the accused and strongly refused consent, stating that she was afraid (without giving concrete reasons).[170] She is not under the protection programme of the Court and the prosecution submits that the particular circumstances of the Katanga and Ngudjolo case would make it easier to identify her, [REDACTED].[171] [REDACTED].[172] She is a vulnerable witness,[173] and as she provides primarily incriminating information against the two accused in the Katanga and Ngudjolo case, the risk of harm may increase if her identity is disclosed.[174]

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[165] See ICC-01/04-01/06-2133-Conf.
[166] DRC-OTP-0149-0035 – DRC-OTP-0149-0037; Annex E1 to 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-Conf-Exp-AnxE1. This witness was also referred to the Chamber by Trial Chamber II in its decision ICC-01/04-01/07-1329-Conf-Exp of 22 July 2009 (public redacted version: ICC-01/04-01/07-1332 of 24 July 2009).
[167] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 15. The prosecution submitted she was member of the FNI/FRPI, but this is not apparent from the Investigator's Note.
[168] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 17.
[169] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 16; ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 23.
[170] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 16; ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 24.
[171] ICC-01/04-01/06-2047-Conf-Exp-AnxE2, pages 1, 2 and 6 of the table.
[172] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 20.
[173] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 15.
[174] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 23.

59. The unsigned Investigator's Note was disclosed as Rule 77 material in the Lubanga case without the identity of the witness being disclosed.[175] It contains information on attacks between Lendu-Ngiti militias and the lack of involvement of the FNI in Bogoro, a factor that is relevant in the Katanga and Ngudjolo case as Article 67(2) material.[176] The witness saw Germain Katanga [REDACTED], and states that there were many children at this military camp.[177] She confirms that sexual violence was common [REDACTED] and that many women there were taken by force.[178] [REDACTED] gave orders for combatants to abduct women from [REDACTED] and the village roads.[179]

60. In addition to upholding the non-disclosure of the witness's identity, the prosecution seeks to lift redactions in paragraph 2 to the words [REDACTED] and [REDACTED], which are not necessary to protect the location of the interview, which remains protected through other redactions in the same paragraph.[180] According to the table with the proposed additional redactions from filing 2047, but not mentioned in filing 2083, the prosecution further seeks to redact [REDACTED] in [REDACTED] of the Investigator's Note.[181]

61. Trial Chamber II notes that during the status conference in the Katanga and Ngudjolo case of 8 July 2009, the prosecution was unable to provide information on the precise nature of the risk faced by the witness and merely relied on general considerations relating to the circumstances in Ituri and the general risk caused by any such testimony.[182] [REDACTED].[183] [REDACTED], in the view of Trial Chamber II general references to the security situation in

[175] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 21, referring to ICC-01/04-01/06-1814-Conf-Exp-Anx, pages 17 – 18. Internal work products of the prosecution were also redacted, ICC-01/04-01/06-2083-Conf-Exp-AnxA, footnote 29.
[176] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 21.
[177] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 17.
[178] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 17.
[179] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 17.
[180] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 22.
[181] ICC-01/04-01/06-2047-Conf-Exp-AnxE2, page 6 of the table.
[182] ICC-01/04-01/07-1329-Conf-Exp, paragraph 20; ICC-01/04-01/07-1332, paragraph 20.
[183] ICC-01/04-01/07-1329-Conf-Exp, paragraph 20; ICC-01/04-01/07-1332, paragraph 20.

the East of the Congo do not suffice to justify measures that may affect the rights of the accused.[184] [REDACTED][185] [REDACTED].[186] Under Regulation 42(3) of the Regulations of the Court, Trial Chamber II has referred the issue to Trial Chamber.[187] [REDACTED].[188] [REDACTED].[189] [REDACTED].[190]

62. The Chamber notes that in its submission of 21 August 2009, the prosecution informed the Chamber that it intended to lift certain Rule 81(2) redactions, including the interview location [REDACTED].[191] The Chamber confirms that the redaction to the interview location in paragraph 2 of the document should be lifted and the information disclosed in the Lubanga trial.

63. Given that the information provided by this witness focuses on her involvement with the Lendu militias, it is of greater relevance for the Katanga and Ngudjolo case than for the Lubanga case, in which it was disclosed as *tu quoque* material. In light of this information, the risk potentially facing this witness if her identity is disclosed is may be more substantial in the Katanga and Ngudjolo case.

64. For the purposes of the Lubanga trial, Trial Chamber I accepts the prosecution's approach to disclosure for this witness who provides *tu quoque* material, which includes information on [REDACTED], and lifting redactions in paragraph 2 to the words [REDACTED] and [REDACTED] and the additional redaction to [REDACTED] in [REDACTED] of the Investigator's Note. Otherwise, there is no basis for ordering more extensive disclosure in the present case. It is for Trial Chamber II to assess the risks to the witness if his identity is disclosed for the purposes of the Katanga and Ngudjolo case,

[184] ICC-01/04-01/07-1329-Conf-Exp, paragraph 20; ICC-01/04-01/07-1332, paragraph 20.
[185] ICC-01/04-01/07-1329-Conf-Exp, paragraph 21; ICC-01/04-01/07-1332, paragraph 21.
[186] ICC-01/04-01/07-1329-Conf-Exp, paragraph 21; ICC-01/04-01/07-1332, paragraph 21.
[187] ICC-01/04-01/07-1329-Conf-Exp, paragraph 21; ICC-01/04-01/07-1332, paragraph 21.
[188] ICC-01/04-01/07-1329-Conf-Exp, paragraph 22; ICC-01/04-01/07-1332, paragraph 22.
[189] ICC-01/04-01/07-1329-Conf-Exp, paragraph 22; ICC-01/04-01/07-1332, paragraph 22.
[190] ICC-01/04-01/07-1329-Conf-Exp, paragraph 22; ICC-01/04-01/07-1332, paragraph 22.
[191] ICC-01/04-01/06-2089-Conf, paragraph 5.

and to determine whether disclosure is necessary, and, if so, its extent. It is for Trial Chamber II to decide whether redactions are necessary or appropriate, and whether any alternative evidence proposed by the prosecution in that case justifies non-disclosure.

65. For the reasons set out above, the Chamber has concerns about the additional redactions to the details relating to the [REDACTED].

Witness DRC-OTP-WWWW-0243[192]

66. Witness 243 is a victim of sexual violence who was raped [REDACTED] by an armed [REDACTED] militiaman from [REDACTED].[193] [REDACTED].[194] The prosecution submits that additional redactions to those already in place are necessary to cover information that could identify this witness in the Katanga and Ngudjolo case.[195] The prosecution highlights the fact that the witness is [REDACTED].[196] The witness provides information about events that directly relate to [REDACTED].[197] The prosecution submits that these factors increase the risk that the witness may be identified and contacted in the Katanga and Ngudjolo case.[198] In January 2009, the witness was unwilling to agree to disclosure of her identity to the accused in the Katanga and Ngudjolo case, citing concerns for her safety due to the apparent atmosphere of suspicion and fear in [REDACTED] towards those who are believed to have cooperated with the Court.[199]

67. The prosecution submits that the witness's statement contains potentially exculpatory information under Article 67(2) for the accused Germain

[192] DRC-OTP-1013-0045 – DRC-OTP-1013-0054; Annex F1 to 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-Conf-Exp-AnxF1.
[193] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 26.
[194] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 26.
[195] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 26.
[196] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 27.
[197] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 27.
[198] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 27.
[199] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 28.

Katanga, [REDACTED].[200]

68. The witness's statement was disclosed in the Lubanga case as Rule 77 information with redactions protecting the identity of the witness and third parties, as authorised by Trial Chamber I on 9 April 2009.[201] In a Decision of 25 March 2009 Trial Chamber II also granted redactions,[202] which were not brought to the attention of Trial Chamber I by the prosecution. In July 2009, the prosecution requested additional redactions from Trial Chamber II, on this occasion failing to inform Trial Chamber II of the protective measures that had been ordered by Trial Chamber I in April 2009. On the basis of Regulation 42 of the Regulations of the Court, the prosecution thereafter filed a request before Trial Chamber I on 14 July 2009, [REDACTED].[203] Having noted that the prosecution had made an application to Trial Chamber I for protective measures for Witness 243 (on the basis of Regulation 42 of the Regulations of the Court), Trial Chamber II did not resolve the situation of Witness 243 in its Decision of 22 July 2009.[204] The Chamber notes the apparent confusion within the prosecution's position since it has included this witness in its request to maintain redactions before Trial Chamber II, dated 10 August 2009.[205]

69. For the purposes of the Lubanga trial, Trial Chamber I accepts the prosecution's approach to disclosure for this witness, and observes that there is no basis for ordering more extensive disclosure in the present case, given the witness's statement was disclosed as Rule 77 information, with redactions protecting his identity and that of third parties. The Chamber has no reason to

[200] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 25.
[201] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 25. Reference is made to ICC-01/04-01/06-1814-Conf-Exp-Anx, page 32.
[202] Décision concernant trois requêtes du Procureur aux fins de maintien des suppressions ou de rétablissement de passages supprimés (ICC-01/04-01/07-859, ICC-01/04-01/07-860 et ICC-01/04-01/07-862), 25 March 2009, ICC-01/04-01/07-987-Conf-Exp.
[203] See ICC-01/04-01/06-2047-Conf-Exp-AnxF1 and ICC-01/04-01/06-2047-Conf-Exp-AnxF2.
[204] ICC-01/04-01/07-1329-Conf-Exp (public redacted version: ICC-01/04-01/07-1332).
[205] Requête sollicitant le maintien de versions expurgées d'éléments de preuve, 10 August 2009, ICC-01/04-01/07-1359-Conf-Exp.

alter its Decision of 9 April 2009. It is for Trial Chamber II to assess, pursuant to its decision of 25 March 2009, the risks to the witness and others if their identities are disclosed for the purposes of the Katanga and Ngudjolo case, and to determine whether disclosure is necessary, and, if so, its extent. It is for Trial Chamber II to decide whether redactions are necessary or appropriate, and whether any alternative evidence proposed by the prosecution in that case justifies non-disclosure.

Witness DRC-OTP-WWWW-0271[206]

70. Witness 271 is a victim of sexual violence who was abducted from [REDACTED].[207] She currently [REDACTED], where she resides with her family and her child, [REDACTED].[208] The prosecution submits that in March 2009, Witness 271 [REDACTED] expressed concerns about their security and refused consent for disclosure of her identity to the accused before Trial Chamber II.[209] Specifically, they [REDACTED] and fears that she will be physically targeted if her identity is disclosed.[210] [REDACTED].[211] [REDACTED].[212] [REDACTED], the prosecution submits that [REDACTED] redactions [REDACTED] granted by Trial Chamber I in April 2009 are warranted in the Katanga and Ngudjolo case to ensure that her identity remains protected.[213]

71. In the Lubanga case, the Chamber granted leave not to disclose the witness's

[206] DRC-OTP-1004-0094 – DRC-OTP-1004-0113; Annex G1 to 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-Conf-Exp-AnxG1.
[207] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 40.
[208] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 41.
[209] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 41; ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 31.
[210] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 41; ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 31.
[211] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 31.
[212] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 47.
[213] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 30.

identity, and her statement was disclosed as Rule 77 material.[214] It contains information that is relevant in the Katanga and Ngudjolo case under both Article 67(2) of the Statute and Rule 77 of the Rules. The prosecution submits that the Article 67(2) information relates to (1) the apparent lack of child soldiers in the FNI/FRPI or incidents of sexual violence; (2) the loss of the battle of Bogoro by the Ngiti; and (3) the drugs and alcohol taken by the soldiers.[215] The Chamber notes that in the previous filing of the prosecution before Trial Chamber II, the prosecution more precisely submitted that the potentially exculpatory information related to the witness having not seen either child soldiers amongst Germain Katanga's escorts or other women raped and sexually enslaved (although she assumed this had happened to others).[216] The Rule 77 material addresses the support of Uganda.[217] Otherwise, the information provided by this witness is largely incriminatory. [REDACTED].[218] [REDACTED].[219] [REDACTED]. She can provide information on her use as a sexual slave, [REDACTED], the use of child soldiers at FRPI camps, the delivery of weapons and the attack at Bogoro.[220] The prosecution proposes disclosing alternative evidence to cover the Article 67(2) and Rule 77 information provided by the witness.[221]

72. The prosecution proposes a large number of additional redactions because it is said the witness faces an enhanced risk of being identified by the accused Germain Katanga and Mathieu Ngudjolo Chui.[222] These proposals cover certain [REDACTED] such as the [REDACTED], the place of [REDACTED] and details of her [REDACTED], all of which it is suggested may help to identify her. Additionally, the prosecution seeks to withhold the identities of

[214] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 29; ICC-01/04-01/06-1814-Conf-Exp-Anx, pages 27 and 28.
[215] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 29.
[216] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 45.
[217] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 29.
[218] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 30.
[219] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 30.
[220] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 30.
[221] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 30.
[222] ICC-01/04-01/06-2047-Conf-Exp-AnxG2, page 1 of the table.

the people [REDACTED], because they may identify the [REDACTED], along with details of [REDACTED].[223]

73. The prosecution also seeks to lift certain redactions that would not identify the witness or put her at risk.[224] In addition, some of the information which is currently redacted has been communicated to the defence as part of a summary.[225] The prosecution submits that, if disclosed, this information will not compromise the integrity of the redactions presently in place.[226]

74. Trial Chamber II has noted that for several of the witnesses, including Witness 271, no proof has been provided of instances of threats,[227] although it was acknowledged that the prosecution's submission is that if the relevant identities are disclosed, the witnesses all face a risk of retaliation [REDACTED].[228]

75. For the purposes of the Lubanga trial, Trial Chamber I accepts the prosecution's approach to disclosure for this witness, and observes that there is no basis for ordering more extensive disclosure in the present case, given the witness's statement was disclosed as Rule 77 information, with redactions protecting his identity and that of third parties. [REDACTED]. It is for Trial Chamber II to assess the risks to the witness and others if their identities are disclosed for the purposes of the Katanga and Ngudjolo case, and to determine whether disclosure is necessary, and, if so, its extent. It is for Trial Chamber II to decide whether redactions are necessary or appropriate, and whether any alternative evidence proposed by the prosecution in that case justifies non-disclosure.

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[223] ICC-01/04-01/06-2047-Conf-Exp-AnxG2, pages 5 – 11 of the table.
[224] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 30; the details are set out in the table contained in ICC-01/04-01/06-2047-Conf-Exp-AnxG2, pages 12 – 15 of the table.
[225] ICC-01/04-01/06-2047-Conf-Exp-AnxG2, pages 12 – 15 of the table.
[226] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 30.
[227] ICC-01/04-01/07-1329-Conf-Exp, paragraph 11; ICC-01/04-01/07-1332, paragraph 11.
[228] ICC-01/04-01/07-1329-Conf-Exp, paragraph 11; ICC-01/04-01/07-1332, paragraph 11.

76. Finally, in its submission of 21 August 2009, the prosecution informed the Chamber that it intended to apply to lift, or withdraw its application for, certain Rule 81(2) redactions, including the interview location [REDACTED] and the name of the interpreter [REDACTED].[229] In the absence of any good reason for maintaining them, the interview location and the name of the interpreter in the statement can be disclosed.

Witness DRC-OTP-WWWW-0282[230]

77. Witness 282 is a former child soldier with the FNI/FRPI.[231] He was based at an FNI military camp at [REDACTED].[232] In March 2007 the witness was living in [REDACTED] village with his parents and [REDACTED] siblings.[233] It is difficult to contact the witness because he does not own a telephone and because [REDACTED].[234] The witness's current whereabouts are not known with certainty.[235] In its table detailing the redactions, the prosecution indicated that it unsuccessfully tried to locate the witness and it submits his identity should not be divulged without his consent.[236] Furthermore, the witness is not under the protection programme of the Court and alternative measures are not available.[237] [REDACTED].[238] [REDACTED] redactions, [REDACTED], are necessary in the Katanga and Ngudjolo case as this witness provides primarily incriminating information against the two accused in the latter case.[239]

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[229] ICC-01/04-01/06-2089-Conf, paragraphs 4 and 5.
[230] DRC-OTP-1007-1108 – DRC-OTP-1007-1112; Annex H1 to 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-Conf-Exp-AnxH1.
[231] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 34.
[232] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 27.
[233] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 34; ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 28.
[234] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 34; ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 28.
[235] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 28.
[236] ICC-01/04-01/06-2047-Conf-Exp-AnxH2, page 5 of the table.
[237] ICC-01/04-01/06-2047-Conf-Exp-AnxH2, page 5 of the table.
[238] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 32.
[239] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraphs 34 and 35.

78. The witness's statement was disclosed in the Lubanga case as Rule 77 information after redactions had been authorised by Trial Chamber I on 9 April 2009 to protect the identity of the witness and third parties.[240] The witness provides incriminating information in the Katanga and Ngudjolo case pertaining to his enlistment and child soldiers at camps under Mathieu Ngudjolo's control.[241] He participated in the [REDACTED] attack and indicates that child soldiers were in his group.[242] The witness claims that many civilians were killed at Bogoro and [REDACTED] pillaged houses before burning them.[243] However, the statement also contains potentially exculpatory information on instructions that were given not to target civilians during the [REDACTED] attack.[244] He claims that [REDACTED] was the chief at the military camp at [REDACTED], Mathieu Ngudjolo was the chief and gave them the order to attack Kasenyi (an action against the UPC and the Ugandans).[245] Additionally, the prosecution submits that by referring to the attack against the UPC and the Ugandans at Kasenyi, and by stating that UPC soldiers received training in Uganda in May 2003, the witness provides potential Rule 77 information[246] (as well as by referring to voluntary enlistment).[247]

79. The prosecution seeks both to lift and to add redactions.[248] The prosecution wishes to lift the name of the forensic psychotherapist, [REDACTED], who was present at the interview (on the cover page and in paragraph 1 of the

[240] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 32, referring to ICC-01/04-01/06-1814-Conf-Exp, pages 24 – 25.
[241] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 34.
[242] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 29.
[243] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 29.
[244] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 30; ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 32.
[245] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 29.
[246] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 30.
[247] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 32.
[248] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 33, referring to ICC-01/04-01/06-2047, paragraphs 5 and 6.

statement).[249] It submits that the psychotherapist is not a local staff member and that Trial Chamber II would not allow the redaction of her name based on what is said to be the objectively assessed risk of harm.[250] In its table detailing the redactions, the prosecution submits that [REDACTED] would not be at risk if her identity is disclosed to the defence.[251] Additionally, the prosecution seeks to lift the redaction of the words "nous avons marché" in paragraph 8 of the statement as they will not reveal the identity of the witness.[252] Otherwise, it proposes alternative evidence for the Rule 77 and Article 67(2) information.[253]

80. Trial Chamber II observed that there is no proof of any actual threats to this witness.[254] However, it pointed out that the prosecution emphasised generally that if the identities of witnesses are disclosed, they all face the objective risk of retaliation [REDACTED].[255] [REDACTED].[256]

81. The information provided by this witness does not have the same relevance in the Lubanga case as it does in the Katanga and Ngudjolo case, and he may be at greater risk if his identity is disclosed in the latter case.

82. The Chamber notes that the name of the interpreter is [REDACTED]. In view of the prosecution's filing of 21 August 2009 informing the Chamber of the proposal to lift certain Rule 81(2) redactions,[257] it confirms that the interpreter's name in the statement given by Witness 282 can be disclosed. The Chamber also notes that Rule 81(2) redactions to the name of the

[249] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 33; ICC-01/04-01/06-2047-Conf-Exp-anxH2, page 4 of the table.
[250] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 33.
[251] ICC-01/04-01/06-2047-Conf-Exp-anxH2, page 4 of the table.
[252] DRC-OTP-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 33.
[253] DRC-OTP-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 35, with reference to ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 30.
[254] ICC-01/04-01/07-1329-Conf-Exp, paragraph 11; ICC-01/04-01/07-1332, paragraph 11.
[255] ICC-01/04-01/07-1329-Conf-Exp, paragraph 11; ICC-01/04-01/07-1332, paragraph 11.
[256] ICC-01/04-01/07-1329-Conf-Exp, paragraph 11; ICC-01/04-01/07-1332, paragraph 11.
[257] ICC-01/04-01/06-2089-Conf, paragraph 3.

psychotherapist [REDACTED] have been lifted.

83. For the purposes of the Lubanga trial, Trial Chamber I accepts the prosecution's approach to disclosure for this witness, and observes that there is no basis for ordering more extensive disclosure in the present case, given the witness's statement was disclosed as Rule 77 information, with redactions protecting his identity and that of third parties. The only exception is that the Chamber authorises the limited additional disclosure of the names, and the different roles of, [REDACTED], and the words "nous avons marché", given that these redactions can no longer be justified. It is for Trial Chamber II to assess the risks to the witness and others if their identities are disclosed for the purposes of the Katanga and Ngudjolo case, and to determine whether disclosure is necessary, and, if so, its extent. It is for Trial Chamber II to decide whether redactions are necessary or appropriate, and whether any alternative evidence proposed by the prosecution in that case justifies non-disclosure.

Witness DRC-OTP-WWWW-0288[258]

84. Witness 288 is a victim of sexual violence who was captured by Ngiti milita in [REDACTED] and was taken to an FNI/FRPI military camp [REDACTED], where she remained for [REDACTED].[259] The witness, aged 14 at the time, was raped by Ngiti soldiers at the camp and by one commander.[260] By October 2008, Witness 288 was known to be [REDACTED].[261] The prosecution submits that it is not possible to contact her [REDACTED].[262] Moreover, she is a vulnerable witness and [REDACTED].[263] The witness has not consented to the disclosure of her identity and she is not within the protection programme

[258] DRC-OTP-1013-0185 – DRC-OTP-1013-0199; Annex I1 to 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-Conf-Exp-AnxI1.
[259] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 39.
[260] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 39.
[261] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 49.
[262] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 49.
[263] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraphs 48 and 54.

of the Court.[264] The prosecution submits that there is a real risk [REDACTED].[265] It requests that the non-disclosure of the witness's identity is maintained for the entire duration of the trial and submits that there is no less intrusive protection measure available.[266]

85. The witness's statement was disclosed as Rule 77 material in the Lubanga case after Trial Chamber I authorised, on 9 April 2009, the non-disclosure of Witness 288's identity and the interview location.[267] In addition to the incriminatory information concerning the attack at [REDACTED], the abduction and rape of the witness and her position as a forced labourer, and the role of Germain Katanga, the prosecution submits that the statement contains Rule 77 information on APC involvement in the attack at [REDACTED], together with potentially exculpatory information [REDACTED].[268] The Chamber observes that the name of the camp referred to in the witness's statement where this was said was Camp [REDACTED] (not [REDACTED]).[269]

86. The prosecution seeks both to lift and to add redactions.[270] The name of the interpreter, [REDACTED], and the psychotherapist, [REDACTED], are to be lifted in accordance with the order of Trial Chamber II that the names are to be disclosed at least 30 days before trial, since they are not based in the DRC.[271] In addition, the prosecution seeks to lift redactions in paragraphs 15, 23, 26 and 40 that, it is submitted, will not compromise the effectiveness of the

[264] ICC-01/04-01/06-2047-Conf-Exp-AnxI2, pages 1 and 6 of the table.
[265] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraph 55.
[266] ICC-01/04-01/06-2047-conf-Exp-AnxI2, pages 1 and 6 of the table.
[267] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraphs 36 and 37, referring to ICC-01/04-01/06-1814-Conf-Exp-Anx, pages 28 – 30.
[268] ICC-01/04-01/07-985-Conf-Exp-AnxB, paragraphs 50 and 51; ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraphs 37 and 39.
[269] ICC-01/04-01/06-2047-Conf-Exp-AnxI1; DRC-OTP-1013-0185 at paragraphs 39 and 40 on page DRC-OTP-1013-0191.
[270] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 38, referring to ICC-01/04-01/06-2047, paragraphs 5 and 6.
[271] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 38; ICC-01/04-01/06-2047-Conf-Exp-AnxI2, page 10 of the table.

remaining redactions.[272] In the table set out in ICC-01/04-01/06-2047-Conf-Exp-AnxI2, the prosecution indicates that the redaction to the words "Il nous a mises dans sa maison, pour que nous ne soyons pas derangées par les combatants." in paragraph 40 should be lifted as this is potentially exonerating information or information that could be material to the preparation of the defence.[273] The table also lists the names and initials of the interpreter and psychotherapist, neither of whom, as set out above, are based in the DRC, as material that can be disclosed.[274] However, the other redactions the prosecution seeks to lift in [REDACTED] are not set out. Having compared the recently submitted statement with the earlier version in Annex R1 to the prosecution's application ICC-01/04-01/06-1545-Conf-Exp, the Chamber observes that these paragraphs now contain more, rather than fewer, redactions.

87. The prosecution seeks [REDACTED][275] which it submits are necessary to protect the identity of the witness following disclosure in the Katanga and Ngudjolo case.[276] The prosecution has proposed alternative evidence.[277]

88. Although there is no evidence before the Chamber of threats to this witness,[278] the prosecution emphasises the general risk of retaliation [REDACTED].[279] [REDACTED].[280]

89. The interview location [REDACTED] and [REDACTED] on the cover page and in paragraph 4 and the name of the interpreter [REDACTED] (on the

[272] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 38.
[273] ICC-01/04-01/06-2047-Conf-Exp-AnxI2, pages 9 and 10 of the table.
[274] ICC-01/04-01/06-2047-Conf-Exp-AnxI2, page 10 of the table.
[275] ICC-01/04-01/06-2047-Conf-Exp-AnxI2, pages 6 – 9 of the table.
[276] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 39.
[277] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 39; the Chamber also takes note of the correction to the redactions in footnote 49 of the filing ICC-01/04-01/06-2083-Conf-Exp-AnxA, which indicates that the initials of the witness's brother, "DKN", should remain redacted on the cover page.
[278] ICC-01/04-01/07-1329-Conf-Exp, paragraph 11; ICC-01/04-01/07-1332, paragraph 11.
[279] ICC-01/04-01/07-1329-Conf-Exp, paragraph 11; ICC-01/04-01/07-1332, paragraph 11.
[280] ICC-01/04-01/07-1329-Conf-Exp, paragraph 11; ICC-01/04-01/07-1332, paragraph 11.

cover page only) are to be disclosed (see the prosecution's filing of 21 August 2009 regarding the removal of certain Rule 81(2) redactions,[281] and the request to lift the redaction to the interpreter's name). Moreover, the Rule 81(2) redactions to the name of the psychotherapist, [REDACTED] and to the words identified by the prosecution in paragraph 40 of the statement are to be lifted.

90. For the purposes of the Lubanga trial, Trial Chamber I accepts the prosecution's approach to disclosure for this witness, and observes that there is no basis for ordering more extensive disclosure in the present case, given the witness's statement was disclosed as Rule 77 information, with redactions protecting his identity and that of the interview location. The only exceptions are that the Chamber authorises the limited additional disclosure of the interview location [REDACTED] and [REDACTED] on the cover page and in paragraph 4; the name of the interpreter [REDACTED]; the name of the psychotherapist, [REDACTED]; and the words identified by the prosecution in paragraph 40 of the statement, given that these redactions can no longer be justified. It is for Trial Chamber II to assess the risks to the witness and others if their identities are disclosed for the purposes of the Katanga and Ngudjolo case, and to determine whether disclosure is necessary, and, if so, its extent. It is for Trial Chamber II to decide whether redactions are necessary or appropriate, and whether any alternative evidence proposed by the prosecution in that case justifies non-disclosure.

Witness DRC-OTP-WWWW-0090[282]

91. A request for protective measures in relation to this witness is already pending before Trial Chamber I, and the prosecution informs the Chamber that it is seeking the same Rule 81(4) redactions before Trial Chamber II.[283] On

[281] ICC-01/04-01/06-2089-Conf, paragraphs 4 and 5.
[282] DRC-OTP-0113-0260 – DRC-OTP-0113-0264; ICC-01/04-01/06-1664-Conf-Anx10. This witness was also referred to the Chamber by Trial Chamber II in its decision ICC-01/04-01/07-1329-Conf-Exp of 22 July 2009 (public redacted version: ICC-01/04-01/07-1332 of 24 July 2009).
[283] ICC-01/04-01/06-2047, paragraph 8, referring to ICC-01/04-01/06-1664.

10 September 2009 the prosecution informed the Chamber that it maintains its original request for non-disclosure,[284] that relates to information which may lead to the identification of the witness under Rule 81(4); the filing also informs the Chamber of the proposed redaction to an internal document under Rule 81(1) of the Rules in paragraph 28 of the Investigator's Note.[285]

92. According to the Investigator's Note, the witness worked under the [REDACTED] Thomas Lubanga's UPC/FPLC. The witness referred to himself as [REDACTED]. Witness 90 has not been admitted into the protection programme of the Court.[286] The prosecution informs the Chamber that the witness resided in [REDACTED] at the time of his interview in May 2005, but that attempts to contact him in February 2009 in order to obtain his consent as regards disclosure of his identity and to provide him with contact information have been unsuccessful.[287] In consequence, the prosecution seeks to redact references to the identity of the witness and to disclose the redacted Investigator's Note to the defence.[288]

93. The prosecution submits that the Investigator's Note contains both Article 67(2) and Rule 77 information on the role and involvement of outside actors in the conflict in Ituri that is of relevance for the Lubanga case.[289] In the submission of the prosecution, the Investigator's Note also contains information relevant to the Katanga and Ngudjolo case under Rule 77 on the role of foreign powers.[290] The prosecution proposes disclosing alternative evidence for the information provided by Witness 90 in both the Katanga and

[284] ICC-01/04-01/06-2111, paragraph 9.
[285] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 41.
[286] ICC-01/04-01/06-1664-Conf-Exp-Anx9; ICC-01/04-01/06-1664-Conf-Anx10 (ERN: DRC-OTP-0113-0260 – DRC-OTP-0113-0264).
[287] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 42.
[288] Annex A to Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts, 4 February 2009, ICC-01/04-01/06-1664-Conf-Exp-AnxA, paragraphs 30 and 31.
[289] ICC-01/04-01/06-1664, paragraph 29; ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 41.
[290] ICC-01/04-01/06-2083-Conf-Exp-AnxA, paragraph 41.

Ngudjolo case[291] and in the Lubanga case.[292]

94. To replace the information provided by the witness, the prosecution proposes the following admissions of fact in the Lubanga case:[293]

> (i) Rwandaphones held posts in the UPC/FPLC.
> (ii) External actors were involved in the conflict in Ituri.
> (iii) There was a Pro-Rwanda faction led by DIDO within the PUSIC and a pro-Kinshasa faction led by KAHWA and inclined towards UGANDA.

95. The Chamber notes that the proposed redactions make it slightly more difficult to follow part of the statement, thereby adversely affecting its intelligibility and usablitly. However, in relation to the Lubanga case, the potentially exculpatory information to the effect that decisions were made elsewhere and the Rule 77 information that Rwandaphones held senior positions in the UPC are clearly and comprehensibly set out in paragraph 19 of the statement. The Rule 77 information in paragraph 20 concerning Rwandan influence in the UPC is also wholly understandable, as are the references to the two separate factions in paragraph 23.

96. The Chamber has only reviewed the alternative evidence identified by the prosecution that relates to the Lubanga case.

97. The alternative evidence that key UPC decisions were taken elsewhere comprises a 30 page UN report entitled "Ituri Follow-Up,[294] two pages of

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[291] The alternative evidence for the Katanga and Ngudjolo case is listed in ICC-01/04-01/07-985-Conf-Exp-AnxC, pages 2 – 4 of the table.
[292] The alternative evidence for the Lubanga case is listed in Annex 12 to Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts, 4 February 2009, ICC-01/04-01/06-1664-Conf-Exp-Anx12, with the items attached as Annexes 26 – 34 to the filing.
[293] ICC-01/04-01/06-1664-Conf-Exp-AnxA, paragraphs 34 and 35.
[294] Annex 26 to Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed

notes and comments provided by email relating to [REDACTED],[295] an 87 page witness statement of Witness DRC-OTP-WWWW-0012,[296] and a 32 page publication entitled "Les Coulisses".[297] The Chamber observes that the first three documents contain relevant potentially exculpatory information suggesting that Thomas Lubanga did not make the key decisions. Although the Chamber cannot locate this element in the last item, it notes that it may be set out on either the first or last page (or, more likely, both), which are identical in the copies provided. On these pages there is an illegible reference to Thomas Lubanga.[298] Given that the Chamber could not identity the information indicated by the prosecution, the Chamber has not taken this last item of alternative evidence into account. However, it is satisfied that the remaining items provide sufficient potentially exculpatory information, comparable to that provided by the witness.

98. In addition, the prosecution has submitted four items of alternative evidence that relate to the Rule 77 information provided by the witness, namely that Rwandaphones occupied senior posts within the UPC. These include a nine page note on a "Fieldtrip to Kinshasa II",[299] the 11 page internet report

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Facts, 4 February 2009, ICC-01/04-01/06-1664-Conf-Anx26 (ERN: DRC-OTP-0044-0333 – DRC-OTP-0044-0362), at DRC-OTP-0044-0343.

[295] Annex 27 to Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts, 4 February 2009, ICC-01/04-01/06-1664-Conf-Anx27 (ERN: DRC-OTP-0151-0669 – DRC-OTP-0151-0670), at DRC-OTP-0151-0669.

[296] Annex 20 to Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts, 4 February 2009, ICC-01/04-01/06-1664-Conf-Anx20 (ERN: DRC-OTP-0105-0085 – DRC-OTP-0105-0171), at DRC-OTP-0105-0112, paragraph 150; DRC-OTP-0105-0118, paragraph 177; DRC-OTP-0105-0119, paragraph 182.

[297] Annex 28 to Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts, 4 February 2009, ICC-01/04-01/06-1664-Conf-Anx28, (ERN: DRC-OTP-0134-0862–DRC-OTP-0134-0893).

[298] ICC-01/04-01/06-1664-Conf-Anx28 (ERN: DRC-OTP-0134-0862 – DRC-OTP-0134-0893) at DRC-OTP-0134-0862 and DRC-OTP-0134-0893.

[299] Annex 19 to Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts, 4 February 2009, ICC-01/04-01/06-1664-Conf-Anx19 (ERN: DRC-OTP-0181-0459 – DRC-OTP-0181-0467), at DRC-OTP-0181-0460.

"Current situation: Exploitation, arms flow and trends" mentioned above,[300] a 104 page witness statement given by witness DRC-OTP-WWWW-0014,[301] and a 101 page Amnesty International report.[302] Viewed together with the proposed admission of fact that "Rwandaphones held posts in the UPC/FPLC", the Chamber is satisfied that the alternative evidence provides sufficient Rule 77 information, replacing the relevant evidence provided by the witness.

99. The Chamber also reviewed the Rule 77 items of alternative evidence submitted by the prosecution to the effect that outside actors influenced the UPC. These items comprise the 87 page witness statement of Witness DRC-OTP-WWWW-0012,[303] a 35 page witness statement from witness DRC-OTP-WWWW-0026,[304] and a 12 page witness statement from DRC-OTP-WWWW-0095.[305] The prosecution furthermore submitted two items of alternative evidence that address the influence of Rwanda within the UPC. The 11 page internet report "Current situation: Exploitation, arms flow and trends"[306] describes how Rwanda supported the UPC and used it to challenge the

[300] Annex 16 to Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts, 4 February 2009, ICC-01/04-01/06-1664-Conf-Anx16 (ERN: CAR-OTP-0005-0381 – CAR-OTP-0005-0391) at CAR-OTP-0005-0384 – CAR-OTP-0005-0385.

[301] Annex 25 to Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts, 4 February 2009, ICC-01/04-01/06-1664-Conf-Anx25 (ERN: DRC-OTP-0165-0999 – DRC-OTP-0165-1102), at DRC-OTP-0165-1030 – DRC-OTP-0165-1031, paragraphs 133 – 135; DRC-OTP-0165-1052, paragraphs 233 and 236.

[302] Annex 24 to Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts, 4 February 2009, ICC-01/04-01/06-1664-Conf-Anx24 (ERN: DRC-OTP-0074-0526 – DRC-OTP-0074-0626), at DRC-OTP-0074-0572 *et seq.*

[303] ICC-01/04-01/06-1664-Conf-Anx20 (ERN: DRC-OTP-0105-0085–DRC-OTP-0105-0171), at DRC-OTP-0105-0112, paragraph 150; DRC-OTP-0105-0118, paragraph 177; DRC-OTP-0105-0119, paragraph 182.

[304] Annex 23 to Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts, 4 February 2009, ICC-01/04-01/06-1664-Conf-Anx23 (ERN: DRC-OTP-0109-0065 – DRC-OTP-0109-0099), at DRC-OTP-0109-0086, paragraph 74.

[305] Annex 29 to Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts, 4 February 2009, ICC-01/04-01/06-1664-Conf-Anx29 (ERN: DRC-OTP-0152-0144 – DRC-OTP-0152-0155), at DRC-OTP-0152-0151 *et seq.*, referring to both witnesses DRC-OTP-WWWW-0297 and DRC-OTP-WWWW-0082.

[306] ICC-01/04-01/06-1664-Conf-Anx16 (ERN: CAR-OTP-0005-0381 – CAR-OTP-0005-0391) at CAR-OTP-0005-0384 *et seq.* and CAR-OTP-0005-0389.

"Ugandan and Kinshasa-linked networks for control over one of the potentially wealthiest regions within the DRC", and the 104 page witness statement given by witness DRC-OTP-WWWW-0014[307] indicates that the Rwandans ordered the UPC to attack Bunia in March 2003. They do not, however, contain information about the Rwandans possibly providing the Lendu with arms through the UPC. Given the proposed admission of fact that "[e]xternal actors were involved in the conflict in Ituri", the defence is able to advance the accused's case on that basis and even if the details of the items of alternative evidence do not fully coincide with the material provided by the witness, sufficient Rule 77 material has been provided to the defence. The Chamber finds, therefore, that the Rule 77 information on the influence of outside actors, including Rwanda, within the UPC is sufficient given the service of the redacted statement, the items of alternative evidence and the proposed admission of fact.

100. Finally, the Chamber has reviewed the numerous items of alternative evidence identified by the prosecution for the Rule 77 material relating to a pro-Rwandan faction, led by Dido, within the Party for Unity and Safeguarding of the Integrity of Congo ("PUSIC") and which advocated reunification with the UPC, and a pro-Kinshasa faction led by Kahwa, which was more inclined towards Uganda. These alternative items are an 87 page witness statement of Witness DRC-OTP-WWWW-0012,[308] a 25 page report on Rwandan and Ugandan influence,[309] a 33 page ICG report,[310] a one page

[307] ICC-01/04-01/06-1664-Conf-Anx25 (ERN: DRC-OTP-0165-0999 – DRC-OTP-0165-1102), at DRC-OTP-0165-1053, paragraphs 238 and 239.
[308] ICC-01/04-01/06-1664-Conf-Anx20 (ERN: DRC-OTP-0105-0085 – DRC-OTP-0105-0171), at DRC-OTP-0105-0161, paragraph 417 and DRC-OTP-0105-0168, paragraph 460.
[309] Annex 30 to Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts, 4 February 2009, ICC-01/04-01/06-1664-Conf-Anx30 (ERN: DRC-OTP-0203-0002 – DRC-OTP-0203-0026), at DRC-OTP-0203-0021, footnote 74 and DRC-OTP-0203-0026.
[310] Annex 17 to Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts, 4 February 2009, ICC-01/04-01/06-1664-Conf-Anx17 (ERN: DRC-OTP-0003-0424 – DRC-OTP-0003-0456), at DRC-OTP-0003-0426 (the chart mistakenly indicates 0429) and DRC-OTP-0003-0432.

newspaper article,[311] a five page collection of short news articles,[312] a 55 page list of documents with comments provided by a witness,[313] a 104 page witness statement given by witness DRC-OTP-WWWW-0014,[314] and a 34 page slide presentation on arms supply.[315] The Chamber is satisfied that, read together, these documents address all the material areas provided by the witness. Moreover, the Chamber notes that the prosecution's proposed admission of fact that "[t]here was a Pro-Rwanda faction led by DIDO within the PUSIC and a pro-Kinshasa faction led by KAHWA and inclined towards UGANDA" only excludes the reference to the pro-Rwandan faction which advocated reunification with the UPC. With the admission, the defence need not prove that there was a pro-Rwandan and a pro-Ugandan faction within the UPC, and the Chamber notes this is the most important element in the context of the influence of outside actors on the UPC. The items of alternative evidence furthermore provide additional important contextual material. The Chamber finds that the Rule 77 information on the two separate factions has been made available to the defence in a sufficient form, by way of the redacted statement, the items of alternative evidence and the proposed admission of fact.

101. The situation of this witness was examined by Trial Chamber II together with numerous other witnesses that are relevant in both the Katanga and Ngudjolo case and the Lubanga case. It observed that there is no evidence

[311] Annex 31 to Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts, 4 February 2009, ICC-01/04-01/06-1664-Conf-Anx31 (ERN: CAR-OTP-0013-0042).
[312] Annex 32 to Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts, 4 February 2009, ICC-01/04-01/06-1664-Conf-Anx32 (ERN: DRC-OTP-0037-0072 – DRC-OTP-0037-0076), at DRC-OTP-0037-0073.
[313] Annex 33 to Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts, 4 February 2009, ICC-01/04-01/06-1664-Conf-Anx33 (ERN: DRC-OTP-0105-0222 – DRC-OTP-0105-0276), at DRC-OTP-0105-0268.
[314] ICC-01/04-01/06-1664-Conf-Anx25 (ERN: DRC-OTP-0165-0999 – DRC-OTP-0165-1102), at DRC-OTP-0165-1062, paragraph 280 and DRC-OTP-0165-1052, paragraphs 233 and 236.
[315] Annex 34 to Prosecution's Request for Non-Disclosure of Information in the Statements of Five Individuals providing Rule 77 Information and Request for an Order on Sufficiency of Admissions Regarding Undisputed Facts, 4 February 2009, ICC-01/04-01/06-1664-Conf-Anx34 (ERN: DRC-OTP-0002-0262 – DRC-OTP-0002-0262), at DRC-OTP-0002-0289.

before the Chamber of threats to this witness.[316] [REDACTED].[317] [REDACTED].[318]

102. The Chamber notes that the witness appears to [REDACTED], who had an important function in the UPC, [REDACTED]. This [REDACTED] may expose him to the risk of reprisals given he cooperated with the Court. The Chamber also notes that in contrast to some of the other witnesses addressed above, this witness has more relevance for the Lubanga case and the risk of retaliations in that case may be greater than in the Katanga and Ngudjolo case. The witness is not in the protection programme of the Court, and the prosecution has been unable to locate and warn him that his identity may be disclosed. The witness has, therefore, not been informed about the security measures he is able to take with the help of the Immediate Response System, if he receives threats; indeed, he may be completely unaware that his identity may be disclosed and of the attendant dangers that may arise therefrom. Given the personal circumstances of the witness, the Chamber is persuaded that it can only fulfil its obligation to protect the safety of witnesses pursuant to Article 68(1) of the Statute by authorising the non-disclosure of his identity. In relation to the Lubanga case, the Chamber is satisfied that the disclosure of the redacted document, together with the alternative evidence and the admissions of fact, wholly ensures the rights of the accused Thomas Lubanga. It authorises the non-disclosure of the witness's identity and the redactions pertaining to the identity of the witness pursuant to Articles 64(6)(e) and 68(1) of the Statute and Rule 81(4) of the Rules. It is for Trial Chamber II to assess the risks to the witness if his identity is disclosed for the purposes of the Katanga and Ngudjolo case, and to determine whether disclosure is necessary, and, if so, its extent. It is for Trial Chamber II to decide whether redactions are necessary or appropriate, and whether any alternative evidence

[316] ICC-01/04-01/07-1329-Conf-Exp, paragraph 11; ICC-01/04-01/07-1332, paragraph 11.
[317] ICC-01/04-01/07-1329-Conf-Exp, paragraph 11; ICC-01/04-01/07-1332, paragraph 11.
[318] ICC-01/04-01/07-1329-Conf-Exp, paragraph 11; ICC-01/04-01/07-1332, paragraph 11.

proposed by the prosecution in that case justifies non-disclosure.

103. While the Chamber authorises the redactions for this witness, it notes with concern that this document contains potentially exculpatory information that has been in the possession of the prosecution since May 2005.

104. [REDACTED].

105. The disclosure request set out in paragraph 9 above (*viz.* for all the transcripts and statements of the witnesses in the Lubanga case that are relevant to the preparation of the Katanga and Ngudjolo case) is a matter for Trial Chamber II; it is not for Trial Chamber I to rule on the proper ambit of disclosure in another trial, and any request for disclosure should be addressed to the Chamber by the judges of Trial Chamber II rather than by counsel in that case.

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

Judge Adrian Fulford

Judge Elizabeth Odio Benito

Judge René Blattmann

Dated this 22 February 2010

At The Hague, The Netherlands