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TRIAL CHAMBER II

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI**

**Public redacted version of the *Decision on the Protection of Prosecution
Witnesses 267 and 353* of 20 May 2009 (ICC-01/04-01/07-1156-Conf-Exp)**

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

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**Victims Participation and Reparations
 Section Other**

Pursuant to articles 21, 54, 64(3)(c), 64(6)(e), 67, 68 and 69(3) of the *Rome Statute* (“the Statute”), rule 84 of the *Rules of Procedure and Evidence* (“the Rules”) and regulation 54 of the *Regulations of the Court*, Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively) issues the following decision.

I. Background

1. On 23 January 2009, the Chamber ordered the Prosecutor to disclose to the Defence, by 30 January 2009 at the latest,¹ as he had himself proposed,² the evidence on which he intends to rely at trial. At an *ex parte* hearing on 28 January 2009 with only the Prosecutor present, during which, *inter alia*, the issue of witness protection was raised, the Prosecutor recalled that he intended to call new prosecution witnesses³ at trial, in addition to the witnesses whose statements had been used at the confirmation hearing. He indicated that it was necessary to provide for protective measures for those additional witnesses, and on several occasions⁴ presented his proposed solutions.

2. At the Chamber’s request,⁵ the Prosecutor submitted his proposals in writing on 9 February 2009⁶ (“the Proposals”). The Defence teams⁷ and certain legal

¹ *Ordonnance fixant le calendrier de communication des éléments de preuve à charge et à décharge avant le procès et la date d’une conférence de mise en état (règle 132 du Règlement de procédure et de preuve)*, 23 January 2009, ICC-01/04-01/07-846, p. 8.

² Office of the Prosecutor, “*Réponse de l’Accusation à l’Ordonnance enjoignant aux participants et au Greffe de répondre aux questions de la Chambre de première instance II en vue de la conférence de mise en état (article 64-3-a du Statut)*’ du 13 novembre 2008”, 24 November 2008, ICC-01/04-01/07-764, p. 3; ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 46, lines 9-10, and p. 46, lines 24-25.

³ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 44, lines 2-20. See also, for example, ICC-01/04-01/07-T-54-CONF-EXP-ENG ET 28-01-2009, p. 75, lines 8-10.

⁴ ICC-01/04-01/07-T-54-CONF-EXP-ENG ET 28-01-2009, p. 77, lines 18 to 22; ICC-01/04-01/07-T-56-ENG CT WT 03-02-2009, p. 22, line 11 to p. 23, line 19.

⁵ ICC-01/04-01/07-T-56-ENG CT WT 03-02-2009, p. 26, lines 1 to 25.

⁶ Office of the Prosecutor, “*Prosecution’s Submissions on the Modalities of Disclosure Required for the Protection of Incriminating Witnesses*”, 9 February 2009, ICC-01/04-01/07-882.

⁷ Defence for Mathieu Ngudjolo, “*Réponse de la Défense aux ‘Mesures proposées par l’Accusation quant aux modalités de communication propres à assurer la protection des témoins à charge’*”, 20 February 2009, ICC-01/04-01/07-907; Defence for Germain Katanga, “*Defence Response to the Prosecution’s Submissions on the Modalities of Disclosure Required for the Protection of Incriminating Witnesses*”, 20 February 2009, ICC-01/04-01/07-909.

representatives of victims⁸ filed their observations on 20 February 2009. The Prosecutor subsequently gave more details on the situation of certain additional witnesses at the status conferences of 25 February⁹ and 16 March 2009.¹⁰ Furthermore, in exchanges between the Chamber's Legal Adviser and the Prosecutor from 31 March to 3 April 2009, the Prosecutor provided additional information about three prosecution witnesses.

3. On 8 April 2009, the Prosecutor filed an application specifically related to disclosure of the identity of Witnesses 267 and 353 ("the Application").¹¹ On 23 April 2009, at the Chamber's request,¹² the Victims and Witnesses Unit ("VWU") submitted to it a report commenting on the Proposals and discussing the specific arrangements for the protection of the two aforementioned witnesses ("the VWU Report").¹³ The Defence teams for Mathieu Ngudjolo¹⁴ and Germain Katanga¹⁵ submitted their observations on the Application on 27 April 2009. On 8 May 2009, the Chamber held

⁸ Legal Representatives of Victims a/0333/07 and a/0110/08, "*Réponse des représentants légaux des victimes a/0333/07 et a/0110/08 aux 'Prosecution's Submissions on the Modalities of Disclosure Required for the Protection of Incriminating Witness'*", 20 February 2009, ICC-01/04-01/07-908; Legal Representatives of the Victims, "*Observations des représentants légaux de victimes sur les mesures proposées par l'Accusation quant aux modalités de communication propres à assurer la protection des témoins à charge*", 20 February 2009, ICC-01/04-01/07-910.

⁹ ICC-01/04-01/07-T-60-CONF-EXP-ENG ET 25-02-2009.

¹⁰ ICC-01/04-01/07-T-62-CONF-EXP-ENG ET 16-03-2009.

¹¹ Office of the Prosecutor, "*Requête aux fins de divulgation différée de l'identité et des déclarations des témoins 0267 et 0353 et aux fins de communication à la Défense d'un résumé de leur déclaration dans l'intervalle*", 8 April 2009, ICC-01/04-01/07-1044-Conf-Exp. See also the public redacted version of the Application, ICC-01/04-01/07-1061.

¹² *Ordonnance aux fins de consultation de l'Unité d'aide aux victimes et aux témoins concernant la situation des témoins 219, 267 et 353*, 7 April 2009, ICC-01/04-01/07-1037-Conf-Exp.

¹³ Registry, "*Report pursuant to 'Ordonnance aux fins de consultation de l'Unité d'aide aux victimes et aux témoins concernant la situation des témoins 219, 267 et 353'*", 23 April 2009, ICC-01/04-01/07-1070-Conf-Exp. See also, Registry, "*Addendum to the Victims and Witnesses Unit's Report pursuant to 'Ordonnance aux fins de consultation de l'Unité d'aide aux victimes et aux témoins concernant la situation des témoins 229, 267 et 353'*", 28 April 2009, ICC-01/04-01/07-1084-Conf-Exp.

¹⁴ Defence for Mathieu Ngudjolo, "*Observations de la Défense de Mathieu Ngudjolo relatives à la requête de l'Accusation aux fins de divulgation différée de l'identité et des déclarations des témoins 0267 et 0353 et aux fins de communication à la Défense d'un résumé de leur déclaration dans l'intervalle*", 27 April 2009, ICC-01/04-01/07-1071.

¹⁵ Defence for Germain Katanga, "*Defence response to the public version of Prosecution's 'Requête aux fins de divulgation différée de l'identité et des déclarations des témoins 0267 et 0353 et aux fins de communication à la Défense d'un résumé de leur déclaration dans l'intervalle'*", 27 April 2009, ICC-01/04-01/07-1075.

an *ex parte* hearing with the Office of the Prosecutor and the VWU,¹⁶ following which the Prosecutor partially amended his Application.¹⁷

4. Before considering the Prosecutor's Proposals and analysing the merit of his Application, the Chamber must assess whether it is necessary to call the two witnesses 267 and 353 to give evidence at trial. They would thus be added to the list of "key witnesses" requested by Pre-Trial Chamber I and relied on by the Prosecutor for the purposes of the confirmation hearing.¹⁸ When questioned on this point at the hearing of 8 May 2009, the Prosecutor indicated, as he had already pointed out in his Application,¹⁹ that the testimony of these two witnesses is "very important"²⁰ and, in the case of one, even "unique".²¹

5. Firstly, Witness 267 is the only witness who claims to be in a position to testify in this case to describe [REDACTED]. Admittedly, [REDACTED] themselves are in a position to speak on this matter at trial, however, despite their personal experience, none of them may generally be considered [REDACTED].²² Furthermore, this witness describes very accurately the phenomenon of sexual violence and sexual slavery in Ituri and, in the Prosecutor's view, may viably corroborate other testimonies on this point.²³

¹⁶ *Ordonnance aux fins de convocation d'une audience ex parte sur la protection des témoins à charge 267, 353 et 219*, 5 May 2009, ICC-01/04-01/07-1106.

¹⁷ Office of the Prosecutor, "*Mémoire de l'Accusation aux fins d'informations additionnelles de la Chambre concernant les témoins W-267 et W-353 et aux fins de modification de la requête ICC-01/04-01/07-1044*", 15 May 2009, ICC-01/04-01/07-1141-Conf-Exp.

¹⁸ Pre-Trial Chamber I, *Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules*, 18 April 2008, ICC-01/04-01/07-411-Conf-Exp, paras. 78 to 83.

¹⁹ ICC-01/04-01/07-1044-Conf-Exp, paras. 26 and 33.

²⁰ ICC-01/04-01/07-T-64-CONF-EXP-ENG ET 08-05-2009, p. 37, line 12.

²¹ ICC-01/04-01/07-T-64-CONF-EXP-ENG ET 08-05-2009, p. 46, line 24.

²² ICC-01/04-01/07-T-64-CONF-EXP-ENG ET 08-05-2009, p. 37, lines 13 to 19.

²³ ICC-01/04-01/07-T-64-CONF-EXP-ENG ET 08-05-2009, p. 37, lines 19 and 20.

6. Secondly, as regards Witness 353, [REDACTED], which underscores the particular importance of his/her testimony.²⁴

7. In the Chamber's view, the Prosecutor's reasons given in support of adding these new witnesses are relevant. It considers that their testimony meets a genuine need and would thus contribute to a better understanding of the discussions. It finds them necessary for the determination of the truth.

II. The Prosecutor's Application

8. According to the Prosecutor, a distinction should be made between the situation of new witnesses who request coverage under the Court's protection programme or other non-judicial protective measures on the one hand, and on the other, witnesses who do not wish to take part in the programme or receive any other forms of protection. In this case, the two witnesses 267 and 353, on whose statements the Prosecutor intends to rely at trial and to whom the Application relates, come under the latter category.

9. For these witnesses, the Prosecutor proposes a system which, to his mind, strikes a fair balance between the need to ensure their safety and the Defence's acknowledged right to conduct its investigations into the credibility of prosecution witnesses.²⁵ In his view, the risk faced by these witnesses does not so much result from the disclosure of their identity by counsel for the Defence as from the possibility of the information being spread by persons they question during the investigations concerning their existence, status and possible role.²⁶

10. In the Prosecutor's opinion, this risk warrants deferring the disclosure of the identity of the witnesses in question until a later date – for Witness 353, between

²⁴ ICC-01/04-01/07-T-64-CONF-EXP-ENG ET 08-05-2009, p. 46, lines 4 to 6.

²⁵ ICC-01/04-01/07-882, para.6; ICC-01/04-01/07-T-54-CONF-EXP-ENG ET 28-01-2009, p. 77, lines 3 to 8.

²⁶ ICC-01/04-01/07-T-54-CONF-EXP-ENG ET 28-01-2009, p. 77, lines 3 to 10.

45 and 30 days prior to the date on which he/she is due to testify²⁷ and for Witness 267, 45 days prior to the commencement of the trial.²⁸ The Prosecutor nevertheless stresses that in the meantime he is prepared to disclose to the Defence a summarised or redacted version of their statement or transcript,²⁹ as the case may be, which he furthermore appended to his submissions.³⁰ Furthermore, he suggests applying rule 87(3)(b) of the Rules, which authorises the Chamber to prohibit counsel for the Defence from disclosing the identity of a witness to a third party.³¹ This suggestion, which appears only in his Proposals, was not expressly reiterated in his Application. Lastly, the Prosecutor requests that the Defence apply for the Chamber's leave or, at the very least, that it notify his Office,³² in the event that it wishes to interview these two witnesses.³³ Furthermore, he reserves the right to file additional applications for protective measures at an appropriate time.³⁴

III. Arguments of the parties

11. The Prosecutor submits that deferred disclosure of the identity of Witnesses 267 and 353 and their statements:

- 1) is authorised by the Statute;
- 2) meets the need to protect those witnesses against an objective risk; and
- 3) is necessary and consistent with the rights of the Defence.

The Chamber will set out the parties' claims in respect of each of these three arguments.

²⁷ ICC-01/04-01/07-882, para. 7; ICC-01/04-01/07-1044-Conf-Exp, paras. 4 and 52; ICC-01/04-01/07-1141-Conf-Exp, para. 21.

²⁸ ICC-01/04-01/07-1141-Conf-Exp, para. 14.

²⁹ ICC-01/04-01/07-882, para. 6, footnote 4; ICC-01/04-01/07-1044-Conf-Exp, para. 4.

³⁰ ICC-01/04-01/07-1044-Conf-Exp, annexes E and F; ICC-01/04-01/07-1141-Conf-Exp, annexes A and B.

³¹ ICC-01/04-01/07-882, para. 9.

³² ICC-01/04-01/07-1044-Conf-Exp, para. 51.

³³ *Ibid.*, paras. 5 and 52.

³⁴ *Ibid.*, para. 5, footnote 8.

A) Conformity of deferred disclosure with the Statute

12. The Prosecutor relies on articles 54(3)(f), 64(2), 64(6)(e) and 68(1) of the Statute to submit that disclosure of information to the accused must not place witnesses in danger. He recalls the decision issued by Trial Chamber I in *Lubanga*, which considered in relation to exculpatory evidence that the right of endangered witnesses to protection and of the accused to a fair trial are immutable and that neither can be diminished because of the need to cater for other interests. The Prosecutor submits that similar reasoning should be applied in the case of prosecution witnesses for whom deferred disclosure of their identity may be warranted for security reasons. In his view, such disclosure does not violate the Defence's right to know the identity of the witnesses whom the Prosecutor intends to call or the accused persons' right to have adequate time to prepare their case.³⁵ Furthermore, the Prosecutor recalls rule 81(4) of the Rules, and submits that the use of the word "including" in that provision authorises the implementation of other solutions, such as non-disclosure of the identity of witnesses outside the pre-trial period.³⁶

13. The Defence for Germain Katanga submits that the right of the accused to prepare his defence in an effective manner, which includes access to the results of the investigations conducted by the Office of the Prosecutor, is of great importance and that it takes precedence over the right of witnesses to protection.³⁷ It therefore objects to the introduction of a general rule establishing deferred disclosure.³⁸

14. It contends that, if such a protective measure were granted, the specific circumstances of each testimony should be examined in order to determine the need for such an exceptional measure of protection as that proposed.³⁹ The Prosecutor should also demonstrate that less restrictive measures could not be adopted.

³⁵ ICC-01/04-01/07-1044-Conf-Exp, paras. 16 and 17.

³⁶ *Ibid.*, para. 19.

³⁷ ICC-01/04-01/07-909, para. 4.

³⁸ *Ibid.*, para. 4.

³⁹ ICC-01/04-01/07-1075, paras. 14 and 15.

15. The Defence for Germain Katanga states that, in this instance, the Prosecutor has failed to take advantage of the time available to him to put in place alternative protective measures. In its view, such delay should not be allowed to prejudice the Defence's fundamental right to conduct investigations.⁴⁰

16. The Defence for Mathieu Ngudjolo considers, essentially, that the Prosecutor's position does not take any account of the right granted to the Defence to know the identity of prosecution witnesses and that it thus contravenes the provisions of articles 64(3)(c) and 67(1)(b) of the Statute as well as rule 76 of the Rules.⁴¹ It submits that deferred disclosure of the identity of prosecution witnesses and disclosure of mere summaries – which, in its view, is not laid down by any provision in the Statute or Rules⁴² – are inconsistent with article 67(1)(a) of the Statute.⁴³ It challenges the Prosecutor's intended interpretation of rule 81(4) of the Rules and considers that that provision cannot authorise the Prosecutor to defer disclosure.⁴⁴ Lastly, in its view, the decisions of the ad hoc tribunals to which the Prosecutor refers are irrelevant in the current matter.⁴⁵

B) Existence of an objective risk

17. The Prosecutor first stresses that, once the identity of Witnesses 267 and 353 is known, the Defence teams will carry out verifications and conduct interviews *in situ* with persons who are not bound by any confidentiality obligations. He also recalls [REDACTED] and that several of those witnesses or their family members have already been threatened or pressurised. Lastly, the Prosecutor draws the Chamber's attention to the instability of the situation in Ituri which, he alleges, makes it susceptible to the

⁴⁰ ICC-01/04-01/07-909, para. 7.

⁴¹ ICC-01/04-01/07-1071, para. 8

⁴² *Ibid.*, para. 16.

⁴³ *Ibid.*, para. 9.

⁴⁴ *Ibid.*, para. 10.

⁴⁵ *Ibid.*, paras. 12, 13, 15 and 18.

commission of reprehensible acts, and stresses that the two witnesses concerned [REDACTED].⁴⁶

18. The Defence for Germain Katanga recalls that its team members are professionals and do not intend to disclose the witnesses' identity.⁴⁷ Furthermore, it stresses that the risk faced by certain witnesses does not automatically translate into a risk for Witnesses 267 and 353. The Prosecutor must therefore produce evidence that those two witnesses are actually under threat. Moreover, he has not established any link between the accused and the *Front populaire pour la justice au Congo* (FPJC). Furthermore, the prevailing insecurity in Ituri does not in itself justify deferred disclosure.⁴⁸

19. The Defence for Mathieu Ngudjolo challenges the Prosecutor's allegation that there is a risk linked to disclosing the names of Witnesses 267 and 353 to third parties not bound by any confidentiality obligations. It submits that, in the current matter, failure to disclose evidence, even for a limited time, would disproportionately prejudice the rights of the Defence.⁴⁹

C) Need for deferred disclosure and whether it is consistent with the rights of the Defence

20. The Prosecutor considers that, given the characteristics of this case, the measures he is seeking are proportionate to the intended objective – protection – and do not prejudice the right of the accused to have adequate time to prepare their defence. In this regard, he cites the “practice” of the ad hoc tribunals, which considered that a period of 20 to 30 days between deferred disclosure of witnesses' identity and their testifying at trial was consistent with the right of the accused to prepare his defence effectively.⁵⁰ The Prosecutor stresses that the number of

⁴⁶ ICC-01/04-01/07-1044-Conf-Exp, paras. 20 to 25.

⁴⁷ ICC-01/04-01/07-1075, para. 16.

⁴⁸ *Ibid.*, paras. 17 to 19.

⁴⁹ ICC-01/04-01/07-1071, para. 15.

⁵⁰ ICC-01/04-01/07-1044-Conf-Exp, para. 44.

witnesses affected is limited, that the summaries will enable the Defence to have a “fairly accurate” idea of the content of the statements, and that the incriminating information provided by the two witnesses in question is close to that contained in statements and documents already disclosed to the Defence.⁵¹

21. The Defence for Germain Katanga submits that the prejudice caused in the event of deferred disclosure is real, not merely academic. It submits that if the identity of the witnesses was not disclosed to it until 30 days prior to their *testimony*, as proposed, it would not have sufficient time to conduct its own investigations. Once the trial is underway, Counsel for the Defence must be in The Hague, and it would not be feasible for him to delegate investigations to his team, which is a small one.⁵² It submits that the witnesses’ identity must be disclosed at least 45 days prior to the commencement of the *trial*,⁵³ the minimum time period, to be authorised by the Chamber only when the Prosecutor proves that deferring disclosure is strictly necessary.⁵⁴

22. Thus, in its view, the identity of a prosecution witness is very important information which must be disclosed to the Defence, since it enables it to investigate the credibility of the said witness and the facts alleged in his or her statement.⁵⁵ Furthermore, it should be borne in mind that investigations must be viewed as a whole and that it is rare for a witness to give evidence on an aspect of the case that may be wholly independent of the subjects handled by the other testimonies.⁵⁶ It submits that it should be free to contact witnesses, unless they refuse.⁵⁷ It concedes

⁵¹ *Ibid.*, paras. 45 to 48.

⁵² ICC-01/04-01/07-909, para. 12; ICC-01/04-01/07-1075, para. 20.

⁵³ ICC-01/04-01/07-909, para. 18.

⁵⁴ ICC-01/04-01/07-1075, para. 22.

⁵⁵ ICC-01/04-01/07-909, para. 5.

⁵⁶ *Ibid.*, para. 6; ICC-01/04-01/07-1075, para. 21.

⁵⁷ ICC-01/04-01/07-1075, para. 26.

that it may be appropriate for it to inform the Prosecutor of its intention to contact witnesses and is prepared to discuss the modalities of such contact.⁵⁸

23. The Defence for Germain Katanga further submits that the use of summaries prior to disclosure of the witnesses' identity is not an adequate measure. It states that it prefers statements – even if heavily redacted – to summaries which will make it difficult to use the witnesses' statements.⁵⁹

24. Like the Defence for Germain Katanga, the Defence for Mathieu Ngudjolo considers that a time period of 30 to 45 days prior to the date of testimony is not adequate for it to be able to prepare, given its limited human and financial resources as well as the difficulties it is encountering in conducting investigations.⁶⁰ Furthermore, it also submits that no incriminating evidence can be examined in isolation⁶¹ and stresses that, to prepare for trial, it cannot make do with “[TRANSLATION] ideas, even if specific” or “[TRANSLATION] information said to be similar”.⁶²

III. The Chamber's Analysis

25. The question raised in the Application is whether deferred disclosure constitutes an admissible response to the need for the Chamber to reconcile the two competing interests: the right of victims and witnesses to be protected and the Defence's right to have adequate time and facilities for its preparation.

26. The Chamber does not intend to issue a general rule on the lawfulness and appropriateness of the temporary use of summaries, but intends to determine, in the only two situations submitted to it, whether such a measure would enable the aforementioned competing requirements to be reconciled. It will thus attempt to

⁵⁸ *Ibid.*, para. 27.

⁵⁹ *Ibid.*, paras. 24 and 25.

⁶⁰ ICC-01/04-01/07-1071, para. 19.

⁶¹ *Idem.*

⁶² ICC-01/04-01/07-1071, para. 26.

answer this question only in light of the evidence disclosed to it and the observations, both general and specific, formulated by the parties.

27. To do so, it should first rule on whether or not the right of the accused to have the identity of prosecution witnesses disclosed to them prior to the commencement of the hearings on the merits is an absolute right.

28. Pursuant to article 21(1) of the Statute, the Chamber must first apply the relevant provisions of the Statute and the Rules. In this respect, it notes that the Statute considers the rights of the accused to be essential. Under article 67(1)(b), the accused must “have adequate time and facilities for the preparation of the defence” and, under rule 76(1), receive disclosure from the Prosecutor in the pre-trial phase of “the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses”. That same rule adds that the Prosecutor must discharge this disclosure obligation “sufficiently in advance to enable the adequate preparation of the defence”. These provisions highlight the importance given by the drafters of the Statute to the need for the Defence to have sufficiently in advance all the information to enable it to effectively prepare – the identity of witnesses undoubtedly being information that is essential for effective preparation.

29. Nevertheless, the Chamber must consider other provisions of the Basic Texts which show the equally essential concern of the drafters to ensure the protection of victims and witnesses. In this respect, under article 68(1) of the Statute, the Court must take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, while nevertheless ensuring that such measures are not “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. Rule 81(4) of the Rules authorises the Chamber to restrict the evidence disclosure obligation to protect the safety of witnesses, victims and members of their families, “including by authorizing the non-disclosure of their identity prior to the commencement of the trial”.

30. Furthermore, article 64(2) of the Statute provides that “[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”. Paragraph 3(c) of the same article recalls that the Chamber must provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial – “[s]ubject to any other relevant provisions of th[e] Statute”.

31. Reading all of these provisions allows the Chamber to assert that fair-trial principles require that the interests of the Defence be balanced with those of witnesses or victims called to give evidence. Early disclosure dictated solely by a concern to better protect the rights of the Defence would, however, contravene the spirit and the purpose of the Statute if this resulted in witnesses called to give evidence facing real risks. The Chamber considers that the Defence’s right to have evidence disclosed – essential as this may be – cannot be considered to be absolute. Where the protection of victims and witnesses is at stake, the Chamber must seek a solution which strikes a fair balance between the equally legitimate rights of the accused, on the one hand, and of the victims and witnesses on the other.

32. Moreover, this interpretation of the basic documents is consistent with internationally recognised human rights. In *Dowsett v. The United Kingdom*, the European Court of Human Rights (ECHR), recalling established case law,⁶³ thus held that “the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or to keep secret police methods of investigating crime, which must be weighed against the rights of the accused [...]. In some cases it may be necessary to withhold certain evidence from the defence so as

⁶³ ECHR, *Rowe and Davis v. The United Kingdom*, Judgment of 16 February 2000, para. 61; *Doorson v. The Netherlands*, Judgment of 26 March 1996, para. 70.

to preserve the fundamental rights of another individual or to safeguard an important public interest".⁶⁴

33. Nevertheless, the non-absoluteness of the disclosure obligation does not exempt the Chamber from ensuring that the Defence has an adequate and proper opportunity to challenge an incriminating testimony.⁶⁵ The right to an adversarial criminal trial means that both the Prosecutor and the Defence must be given the opportunity to have knowledge of the observations of and the evidence adduced by the other party.⁶⁶ The Chamber concurs with the conditions imposed by the ECHR, that is, that measures restricting the rights of the Defence must be strictly necessary and that any difficulties thereby caused to the Defence must be sufficiently counterbalanced by other procedural measures.⁶⁷

34. In the current matter, the Chamber will analyse the Proposals set out by the Prosecutor in his Application by responding to the following questions:

a) Is deferred disclosure of the identity of witnesses strictly necessary? This question will lead the Chamber to assess the existence of an objective risk for Witnesses 267 and 353 and to satisfy itself that less restrictive measures have previously been contemplated; and

b) If deferred disclosure is strictly necessary, is the restriction of the rights of the Defence sufficiently counterbalanced by the opportunity afforded to it to have access, for a limited time, to either summaries of statements or redacted versions of the transcripts of the two witnesses? On reviewing each of the two individual situations submitted to it, the Chamber will determine the date until which deferred disclosure of the identifying information may reasonably be contemplated and the type of information which may be disclosed in the interim.

⁶⁴ ECHR, *Dowsett v. The United Kingdom*, Judgment of 24 June 2003, para. 42.

⁶⁵ ECHR, *Kostovski v. The Netherlands*, Judgment of 20 November 1989, para. 41 and *Windisch v. Austria*, Judgment of 27 September 1990, para. 26.

⁶⁶ ECHR, *Brandstetter v. Austria*, Judgment of 28 August 1991, para. 67; and *Rowe and Davis*, para. 60.

⁶⁷ ECHR, *Rowe and Davis*, para. 61.

a) Strict necessity to resort to deferred disclosure in the current matter

35. The Chamber must first assess, on the basis of their specific situation, the risk faced by each of the two witnesses concerned by the Application. It must look beyond any mere feeling of insecurity they may have and assess whether they are actually facing an objective and precisely identified risk. The VWU was invited to file its Report to assist the Chamber in this assessment. Furthermore, in order to be able to assess more specifically the existence of a real risk to the witnesses, the Chamber considered it necessary to organise the aforementioned *ex parte* hearing.⁶⁸

36. The Prosecutor sets forth the situation of Witness 267, [REDACTED]. He/she is willing to come to give evidence, under certain conditions pursuant to rule 87 of the Rules,⁶⁹ and wishes to discuss both [REDACTED]. [REDACTED] and where, according to what the Prosecutor asserts, instability is still great. His/her [REDACTED] profile [REDACTED]. He/she agreed to his/her identity being disclosed to the Defence, while stating that he/she wished it to happen as late as possible. In the Prosecutor's view, he/she actually fears [REDACTED]. Again in the view of the Prosecutor, [REDACTED]. Lastly, it should be noted that this witness further indicated that, prior to his/her identity being disclosed, [REDACTED].⁷⁰ Invited by the Chamber to clarify the exact intentions of the witness on this last point, the Prosecutor informed it that [REDACTED].

37. The Prosecutor then describes the situation of Witness 353, [REDACTED] was in Bogoro at the time of the attack, [REDACTED]. [REDACTED]. [REDACTED] agreed to his/her identity being disclosed,⁷¹ while stating – as did Witness 267 – that he/she wished such disclosure to take place as late as possible. According to the Prosecutor, [REDACTED]. Lastly, [REDACTED]. In the Prosecutor's view, the feeling of insecurity –

⁶⁸ See paragraph 3 of this decision.

⁶⁹ ICC-01/04-01/07-T-54-CONF-EXP-ENG ET 28-01-2009, p. 91, lines 11 to 20; ICC-01/04-01/07-T-60-CONF-EXP-ENG ET 25-02-2009, p. 23, lines 24 to 25 and p. 24, lines 1 to 14.

⁷⁰ Correspondence between the Legal Advisor of the Chamber and the Prosecutor on 31 March 2009.

⁷¹ ICC-01/04-01/07-T-54-CONF-EXP-ENG ET 28-01-2009, p. 76, lines 24 to 25.

admittedly subjective, but expressed by a person living locally who therefore knows the local situation and its distinctive features well – must be taken into consideration.

38. According to the Prosecutor, these witnesses thus risk being the target of pressure and threats, especially since they [REDACTED], which the Chamber can understand, given the very restrictive and destabilising effect of such a measure on family and work life.⁷² Accordingly, the Prosecutor considers that deferred disclosure of the identity of Witnesses 267 and 353 is the only measure which can be taken to effectively ensure their protection, given, *inter alia*, [REDACTED].⁷³

39. The VWU Report concludes that deferred disclosure would be a useful complement to the [REDACTED] both witnesses [REDACTED]. It sets forth the following arguments:

- In order to prevent any malicious intent towards witnesses and any negative influence on their testimony, it is necessary to protect any information which may identify them;⁷⁴

- A security situation which is fragile and consequently might deteriorate is conducive to malicious intent being acted upon;⁷⁵

- In Ituri, the presence of MONUC and the dismantling of the majority of armed groups have improved the security situation. The departure from Ituri in November 2007 of the three main militia leaders, Cobra Matata (*Forces de résistance patriotiques en Ituri*), Peter Karim (*Front des nationalistes intégrationnistes*) and Mathieu Ngudjolo (*Mouvement révolutionnaire congolais*), has been considered a milestone for the stability of Ituri;⁷⁶

⁷² ICC-01/04-01/07-1044-Conf-Exp, para. 25.

⁷³ *Ibid.*, paras. 30, 31, 38 and 39.

⁷⁴ ICC-01/04-01/07-1070-Conf-Exp, para. 9.

⁷⁵ *Ibid.*, para. 10.

⁷⁶ *Ibid.*, para. 11.

– However, several years after disarmament began, the risk of violence has not totally disappeared and some dissident militia groups are still active in certain areas of the district. Armed wings of the FNI and of the FRPI are still refusing to disarm in Irumu and Djugu territories, and new militia groups appeared in 2008, such as the *Front populaire pour la justice au Congo* south of Bunia. The local elections, the district's potential transformation into a province and the unfair sharing of revenues from exploitation of natural resources all constitute factors of instability;⁷⁷

– [REDACTED] but relatively stable. [REDACTED] an upsurge in criminal activities that can be explained by a combination of different factors such as [REDACTED] presence [REDACTED], uncontrolled (potentially armed) former militia members unable to adjust to Congolese society, logistic and financial problems and recurrent misconduct of security forces, as well as rising inflation in the DRC and unemployment;⁷⁸

– Consequently, it is in the interest of an effective protection regime to disclose sensitive information as late as possible to reduce the overall risk to the persons concerned and to protect them effectively.⁷⁹

40. As regards the risks faced by witnesses as a result of investigations conducted by the Defence, the VWU states that it is not in a position to evaluate how the Defence intends to conduct its investigations in this case. Nevertheless, it stresses that any investigation activity, insofar as it is directed towards the opposing party's witnesses, inherently entails exposing the respective witnesses to a certain extent.⁸⁰

41. Lastly, the VWU adds that neither of the witnesses has been threatened as a result of their interaction with the Court,⁸¹ but that a cautious approach, as advocated

⁷⁷ *Ibid.*, para. 12.

⁷⁸ *Ibid.*, para. 13.

⁷⁹ *Ibid.*, para. 14.

⁸⁰ *Ibid.*, para. 18.

⁸¹ *Ibid.*, para. 2.

by the Prosecutor by means of deferred disclosure, would reduce the risks to the witnesses.⁸²

42. At the *ex parte* hearing of 8 May 2009, the Chamber assessed all the alternative measures to the Prosecutor's proposals of deferred disclosure, such as [REDACTED], as well as other medium-term measures currently being assessed and which may be set up by the VWU.

43. During the hearing, the Prosecutor confirmed that, even though the witnesses had not thus far been the subject of specific direct threats, immediate disclosure of their identity would expose them to a real risk. As far as they were concerned, the VWU representatives did not challenge those statements. In respect of Witness 267, it was recalled that this risk is faced [REDACTED].⁸³ As regards Witness 353, the Prosecutor once again stressed [REDACTED] suffered.⁸⁴ The Prosecutor reiterated the objective danger which would result from premature disclosure of the identity of these two witnesses in the report he submitted to the Chamber following the hearing.⁸⁵

44. In light of all of the information gathered, the Chamber accepts that there is an objective risk linked to the immediate disclosure of the identity of Witnesses 267 and 353 and finds that, in this matter, there are no less restrictive measures which would respond effectively to the dangers they face. In their particular situation, deferred disclosure thus constitutes, in the Chamber's view, a strictly necessary measure. Where applicable, it must include additional operational protective measures which the VWU, as it itself proposed,⁸⁶ will have to implement if it deems them indispensable.

⁸² *Ibid.*, para. 8.

⁸³ ICC-01/04-01/07-T-64-CONF-EXP-ENG ET 08-05-2009, p. 31, line 9 to 14.

⁸⁴ ICC-01/04-01/07-T-64-CONF-EXP-ENG ET 08-05-2009, p. 45, line 24 to p. 46, line 7.

⁸⁵ ICC-01/04-01/07-1141-Conf-Exp, paras. 10 and 17.

⁸⁶ ICC-01/04-01/07-T-64-CONF-EXP-ENG ET 08-05-2009, p. 59, line 21 to p. 60, line 13.

45. The Chamber must now satisfy itself that the resulting limitation on the rights of the Defence is sufficiently counterbalanced by the proposed procedural measures.

b) Arrangement of deferred disclosure and compensatory measures proposed, in this instance, for the Defence

i) Date on which identity may be disclosed

46. After the *ex parte* hearing of 8 May 2009, the Prosecutor considered that it was in fact possible in the case of Witness 267, who actually accepts the principle, to schedule disclosure of his/her identity to the Defence 45 days prior to the commencement of the trial.⁸⁷ However, he maintains his request to delay disclosure of the identity of Witness 353 until the period of 45 to 30 days prior to his/her testimony.⁸⁸

47. Without underestimating the difficulty which deferred disclosure of a witness's identity represents to the Defence, the Chamber considers that, in the case of Witness 267, postponing the time limit, granted on an exceptional basis, until 45 days prior to the commencement of the trial, allows it to prepare under acceptable conditions and would not reasonably prejudice the accused.

48. As regards Witness 353, the Chamber is aware that a postponement of the time limit for disclosure until 45 days prior to his/her testimony constitutes a particularly exceptional procedural measure for the Defence. Nevertheless, it considers that the situation of the witness in question is truly exceptional, taking account of the factors which are very specific to him/her and which fall within the provisions of article 68(1) of the Statute, such as [REDACTED], [REDACTED]. Such a conclusion must inevitably lead the Chamber to accept the proposed protective measures, as drastic as they may be, recalling that only one victim out of all those whom the Prosecutor intends to call during the hearings on the merits is affected by this exceptional measure. In any event, the Chamber must stress that, at the

⁸⁷ ICC-01/04-01/07-1141-Conf-Exp, para. 14.

⁸⁸ *Ibid.*, para. 21.

commencement of the hearings on the merits, the Defence will know the identity of all of the prosecution witnesses, with the only exception of Witness 353.

49. The Chamber must state to the Defence that it is prepared to consider, during the hearings on the merits, any application for which it may reasonably provide grounds, should it become apparent that it requires additional time to complete any investigations it may have conducted into Witness 353. Furthermore, in order to limit any difficulties caused to the Defence by deferred disclosure and, more generally, in the interest of the proper administration of justice, the Chamber will, as announced,⁸⁹ see to it that the Prosecutor states sufficiently in advance the order in which prosecution witnesses will be called and the expected duration of their testimony. A status conference will be held to this effect in good time.

ii) Information disclosed to the Defence in the interim

50. The Prosecutor considers that, pending disclosure of the identity of Witness 267, the only feasible measure is disclosure of a summary, which, in his view, is authorised by article 68(1) of the Statute.⁹⁰ Furthermore, he states that, to his mind and in the current circumstances, it is not possible to prepare a redacted version of his/her statement, since it would involve so many redactions that it would make the statement unreadable.⁹¹

51. After a careful reading of this witness's statement, the Chamber finds that redacting it does indeed appear to be unfeasible, unless the statement is to be made completely unusable by the Defence. Thus, it considers it may authorise disclosure of a summary, in this specific case and on an exceptional basis. This summary will incorporate the suggestions made by the Chamber to the Prosecutor during the *ex parte* hearing in order, *inter alia*, to include in it information that is useful for the

⁸⁹ *Decision on a number of procedural issues raised by the Registry*, 14 May 2009, ICC-01/04-01/07-1134, para. 24.

⁹⁰ ICC-01/04-01/07-1044-Conf-Exp, para. 41.

⁹¹ *Ibid.*, paras. 40 and 41.

Defence.⁹² The version of the summary annexed to the Application has been amended by the Prosecutor accordingly. The Chamber confirms that the content of the summary it now intends to disclose reflects – in a sufficiently exhaustive and accurate manner – the information contained in the witness’s statement and that it may therefore be used effectively by the Defence as of now. Moreover, the information it contains will be included and arranged in the table of incriminating evidence which will shortly be disclosed to the Defence.

52. Lastly, as regards Witness 353, the Chamber indicated at the *ex parte* hearing on 8 May 2009 that, as far as possible, it intended to give preference to disclosure of redacted statements or transcripts rather than to summaries, since, in its view, the rights of the Defence are affected less by the former than the latter procedure. At the Chamber’s request, and although he initially envisaged disclosing only a summary, the Prosecutor transmitted to it a redacted version of the transcripts of that witness’s interview. The Chamber indicates that the redactions do not cover the part written in Swahili, which the Prosecutor himself also notes.⁹³ It appears to the Chamber that disclosure of more than 250 pages of transcripts – even redacted – which are, in addition, listed and ordered in the table of incriminating evidence due to be filed shortly, allows the Defence to evaluate immediately the content and precise scope of the statement and any potential deficiencies or inconsistencies and to determine the nature of the investigations, if any, it will have to undertake.

53. Generally, the Chamber would recall that the procedures it is authorising today on an exceptional basis, on account of the very specific situation of the two witnesses concerned, does not pave the way for similar applications which are repeated all too frequently. Nor should they constitute a generally accepted practice to which the Prosecutor might refer when interviewing witnesses in order to propose to them an alternative solution to disclosure of their identity to the Defence. Only the Chambers of the Court may use measures of this nature, at the Prosecutor’s request,

⁹² ICC-01/04-01/07-1141-Conf-Exp, paras. 5 and 12.

⁹³ *Ibid.*, para. 9, footnote 5.

on an exceptional, case-by-case basis, after having weighed the competing interests recalled at paragraph 25 of this decision.

FOR THESE REASONS, the Chamber

ORDERS the Prosecutor to complete, no later than 12 (twelve) noon on 27 May 2009, the redaction of the transcripts of the interview of Witness 353 in accordance with paragraph 52 above;

INSTRUCTS the Prosecutor to disclose to the Defence as soon as possible the amended summary of the statement of Witness 267 and the duly redacted version of the transcripts of the interview of Witness 353;

ORDERS the Prosecutor to incorporate the information contained in the abovementioned summary and transcripts into the table of incriminating evidence;

RULES that the time limit set at 4 p.m. on 20 May 2009 for the filing of the said table shall be postponed until 27 May 2009 at 12 (twelve) noon;

INSTRUCTS the VWU to report to the Chamber on the operational protective measures in addition to the deferred disclosure which it considers must be implemented to improve the protection of Witnesses 267 and 353; and

ORDERS the Prosecutor to disclose to the Defence, 45 days prior to the commencement of the trial, the unredacted version of the statement of Witness 267 and, 45 days prior to [REDACTED] testimony, the unredacted version of the transcripts of the interview of Witness 353.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Hans-Peter Kaul

Dated this 28 May 2009,

At The Hague, The Netherlands