



Original: **French**

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

Date: **25 March 2009**

TRIAL CHAMBER II

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF

THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI

Public Document

**Decision on the Prosecutor's Application for Protective Measures Pursuant to
Article 54(3)(f) of the Statute and Rule 81(4) of the Rules**

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

The Office of the Prosecutor

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

Counsel for Germain Katanga

Mr David Hooper
 Mr Andrea O'Shea
 Ms Caroline Buisman

Counsel for Mathieu Ngudjolo Chui

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

Legal Representatives of the Victims

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

Legal Representatives of the Applicants

**The Office of Public Counsel for
 Victims**

**The Office of Public Counsel for the
 Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Other

Pursuant to articles 54(3)(f), 64 and 67(2) of the *Rome Statute* (“the Statute”) and rules 77 and 81(4) of the *Rules of Procedure and Evidence* (“the Rules”), Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court”, respectively) decides:

I. Procedural background

1. This decision follows the Prosecutor’s 13 February 2009 application for protective measures pursuant to article 54(3)(f) of the Statute and rule 81(4) of the Rules.¹

2. The Prosecutor requests the Chamber to authorise the following protective measures:

- voice and facial distortion for various individuals appearing in two video recordings which have not yet been disclosed to the Defence (DRC-OTP-1002-0002 and DRC-OTP-1002-0006); and
- maintaining voice and facial distortion and non-disclosure of the name of an individual appearing in a video previously disclosed on 20 June 2008 (DRC-OTP-0155-0004).²

These video recordings must be disclosed in accordance with article 67(2) of the Statute or rule 77 of the Rules.

¹ Office of the Prosecutor, “Prosecution’s Application for Protective Measures pursuant to Article 54(3)(f) and Rule 81(4)”, 13 February 2009, ICC-01/04-01/07-899.

² ICC-01/04-01/07-899, paras. 4 to 6.

3. As stated by the Chamber on several occasions,³ any decisions in which it authorises non-disclosure to the Defence of part of a piece of evidence must be supported by sufficient reasoning, particularly in view of the submissions advanced by the Prosecutor in support of his application.⁴ The Chamber is under the obligation to balance the various interests at stake as stipulated in rule 81 of the Rules, whilst ensuring that the process includes safeguards that would protect the accused persons' interests so as to comply as far as possible with the requirements of adversarial proceedings and the principle of equality of arms.⁵

4. The Chamber reiterates⁶ the requirements articulated by the Appeals Chamber: 1) the existence of an objectively justifiable risk to the safety of the person concerned or which may prejudice ongoing or further investigations;⁷ 2) the existence of a link between the source of the risk and the accused persons;⁸ 3) the infeasibility or insufficiency of less restrictive protective measures;⁹ 4) an assessment of whether the requested redactions are prejudicial to or inconsistent with the rights

³ *Order Instructing the Registry to File Documents on the Influence that the Accused may have Retained in the DRC and on the Pressure that they Might Currently Exert on Victims and Witnesses*, 18 December 2008, ICC-01/04-01/07-800-Conf-tENG, para. 9; *Decision on the Redaction Process*, 12 January 2009, ICC-01/04-01/07-819-tENG, paras. 1 and 7; *Grounds for the Oral Decision on the Prosecutor's Application to Redact the Statements of Witnesses 001, 155, 172, 280, 281, 284, 312 and 323 and the Investigator's Note concerning Witness 176 (rule 81 of the Rules of Procedure and Evidence)*, 10 February 2009, ICC-01/04-01/07-888-tENG and ICC-01/04-01/07-889, para. 3

⁴ *Ordonnance enjoignant au Procureur de fournir des détails supplémentaires concernant sa requête aux fins d'expurger la seconde déclaration du témoin 280 (norme 28 du Règlement de la Cour)*, 19 December 2008, ICC-01/04-01/07-802-Conf-Exp, para. 3

⁵ ICC-01/04-01/07-819-tENG, para. 7

⁶ ICC-01/04-01/07-888 and ICC-01/04-01/07-889, para. 4.

⁷ Appeals Chamber, *Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"*, 13 May 2008, ICC-01/04-01/07-475, para. 71 and 97.

⁸ ICC-01/04-01/07-475, para. 71.

⁹ Appeals Chamber, *Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence"*, 13 October 2006, ICC-01/04-01/06-568, para. 37; Appeals Chamber, *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"*, 14 December 2006, ICC-01/04-01/06-773, para. 33.

of the accused and a fair and impartial trial;¹⁰ and 5) the obligation to periodically review the decision authorising the redactions should circumstances change.¹¹

II The Chamber's analysis

5. The Prosecutor's application is essentially seeking to obtain, on the basis of article 54(3)(f) of the Statute and rule 81(4) of the Rules, a decision authorising voice and facial distortion measures for various individuals in order to ensure their protection. He argues that these measures should enable them to remain anonymous and to avoid any risks.¹²

6. The Chamber notes the Prosecutor's observation that the individuals appearing in these recordings had been led to believe that they would remain anonymous. The makers of video recordings DRC-OTP-1002-0002 and DRC-OTP-1002-0006 attempted to avoid revealing the identities of the two individuals appearing therein by making them turn their backs to the camera. In video recording DRC-OTP-0155-0004, the person interviewed explicitly stated that he/she feared for his/her life.¹³

7. The Chamber notes that the Prosecutor does not intend to call the persons who are the subject of this application to testify as witnesses.¹⁴ It considers that they must be viewed as "persons at risk on account of the activities of the Court".¹⁵ Having thoroughly scrutinised the video recordings, the Chamber is of the opinion that there is indeed an objectively justifiable risk to these persons' security and that, as matters now stand, less restrictive protective measures do not exist since their identity is not known to the Prosecutor or the Court. Moreover, the Chamber notes

¹⁰ ICC-01/04-01/06-773, para. 34

¹¹ ICC-01/04-01/07-475, para. 73.

¹² ICC-01/04-01/07-899, para. 16 and ICC-01/04-01/07-899-corr.

¹³ *Ibid.*, para. 7.

¹⁴ *Ibid.*, para. 9.

¹⁵ ICC-01/04-01/07-475, para. 56.

that putting in place arrangements to enable their voices and faces to be distorted does not jeopardise the interests of the accused persons any more than it is prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

8. The Chamber notes that the Defence teams will have access to the transcripts of the recordings in their entirety, which will enable them to ascertain the contents of the information.¹⁶ The disclosure of the recordings in the proposed distorted form is therefore not likely to be prejudicial to the preparation of the Defence in the instant case and in no way compromises the rights of the accused persons.

FOR THESE REASONS, THE CHAMBER

- 1) **GRANTS** the Prosecutor's application and authorises:
 - a) the distortion of the voice and face of the relevant individual in the footage between 00:00:23 and 00:09:11 in video recording DRC-OTP-1002-0002;
 - b) the distortion of the voice of the person appearing in the footage between 00:52:33 and 01:53:52, 01:53:52 and 01:54:03, 01:54:30 and 01:54:32, 01:54:50 and 01:55:23, 01:55:46 and 01:55:56 and 01:56:09 and 01:56:15 and the blurring of the picture of the person appearing in the footage between 01:53:52 and 01:54:03, all of which is contained in video recording DRC-OTP-1002-0006; and
 - c) maintaining of voice distortion for the person appearing in the footage between 00:31:27 and 00:34:42, 00:34:42 and 00:57:30, 01:03:48 and 01:05:04 and 01:05:05 and 01:36:11, the blurring of the picture of the

¹⁶ ICC-01/04-01/07-899-Conf-Exp Anxs C1, C2, E, G, I-1 and I-2.

person appearing in the footage between 00:31:26 and 00:34:42 and 01:03:48 and 01:05:04 as well as the redaction of the name of the person appearing in the footage between 00:34:26 and 00:34:33, all of which is in video recording DRC-OTP-1002-0004.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Fumiko Saiga

Dated this 25 March 2009

At The Hague, The Netherlands