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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 CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public

Defence Response to the *Requête de l'Accusation demandant l'adoption de mesures de protection aux termes des règles 87 et 88 pour certains témoins cité à comparaître par l'Accusation* (ICC-01/04-01/07-1440)

Source: Defence for Mr Germain Katanga

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The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mr Eric Macdonald, Senior Trial Lawyer

Counsel for the Defence for Germain Katanga

Mr David Hooper
Mr Andreas O'Shea

Counsel for the Defence for Mathieu Ngudjolo Chui

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

Legal Representatives of Victims

Ms Carine Bapita Buyangandu
Mr Joseph Keta
Mr Jean-Louis Gilissen
Mr Hervé Diakiese
Mr Jean Chrysostome Mulamba
Nsokoloni
Mr Fidel Nsita Luvengika
Mr Vincent Lurquin
Ms Flora Mbuyu Anjelani
Mr Richard Kazadi Kabimba
Mr Magah Pirard
Mr Dieudonné Kaluba Didwa
Mr: Lievin Ngondji Ongombe

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. On 28 August 2009, the Prosecution filed the '*Requête de l'Accusation demandant l'adoption de mesures de protection aux termes des règles 87 et 88 pour certains témoins cité à comparaître par l'Accusation*',¹ ("Motion") by which it requests:
 - a) That witnesses 2, 12, 28, 30, 132, 157, 159, 160, 161, 166, 219, 233, 238, 249, 250, 267, 268, 279, 280, 287, 323 and 353 be referred to throughout the proceedings by their witness number in order to prevent the disclosure of their identity to the public;
 - b) That these witnesses testify with face and voice distortion pursuant to Rule 87-3-c;
 - c) That a curtain or a screen be used to hide them from the public gallery;
 - d) That any part of their testimony that could lead to their identification be held in closed session;
 - e) That the Defence and the representatives of victims do not reveal the identity of these witnesses to third persons;
 - f) That the testimony of victims of sexual violence be given through closed circuit video link, and that they be accompanied if they so desire; and
 - g) That the witnesses be notified of the Prosecution's request for protective measures only on the day of their arrival at the seat of the Court and that if a witness does not then wish for a protective measure to be put in place, that the Chamber adapts its decision. Alternatively, that the witnesses in the ICCPP program be informed of the Prosecution's request for protective measures by the VWU.

2. It is to be noted that the Motion relates to all Prosecution witnesses, save only those of a technical nature. None of the requests emanates from a witness. The Defence for Germain Katanga ("Defence") submits for the reasons set out below that the application is unnecessarily broad and should be rejected.

¹ ICC-01/04-01/07-1440.

Applicable Law

3. The Rome Statute and the Rules of Procedure and Evidence require that a trial be held in public.² Protective measures should be granted for witnesses only in exceptional circumstances, on a case-by-case basis, and provided the measures do not prejudice or are inconsistent with the rights of the accused and a fair and impartial trial.³ Consent by the individual in question to such measures shall be sought whenever possible,⁴ and any request for protective measures affecting a particular individual be served on him.⁵

² Article 64 (Functions and powers of the Trial Chamber) (7): “The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence”.

³ Article 67 (Rights of the accused) (1): “In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality [...]”; 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 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”; Article 68(2): “As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness”; Rule 87 (Protective measures) reads in relevant part: (1) “Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2 [...] (2) A motion or request under sub-rule 1 shall be governed by rule 134, provided that: [...] (b) A request by a witness or by a victim or his or her legal representative, if any, [...] (c) A motion or request affecting a particular witness or a particular victim shall be served on that witness or victim or his or her legal representative, if any [...]; (3) A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*: (a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber; [...] That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness [...]”. See also Rule 88 (Special measures), which reads in relevant part that “Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2. [...] Taking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation [...]”.

⁴ According to Rule 87(1), “the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure”. Rule 88(1) similarly provides that “the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure”.

⁵ Rule 87(2)(c) provides that “A motion or request affecting a particular witness or a particular victim shall be served on that witness or victim or his or her legal representative, if any, in addition to the other party, each of whom shall have the opportunity to respond”.

Submissions

The Motion Disregards the Criteria Required in Granting Protective Measures

4. While there are individuals for whom protective measures may be necessary, the Defence is opposed to protective measures being applied in a routine manner and as a blanket provision in disregard of the governing articles and rules. As stipulated by the applicable texts⁶, protective measures remain the exception⁷ and are to be applied on a case by case basis with due consideration of the individual circumstances of each and every witness. In *Lubanga*, for example, the Trial Chamber has defined guidelines about protective measures and underlined, in particular, that they will be applied on a witness by witness basis (the presumption being that witnesses will give evidence by way of live testimony in court).⁸ Blanket measures to protect witnesses are not permitted.⁹

5. Furthermore, protective measures may be granted only when they are both necessary and proportionate,¹⁰ and must be sufficiently founded.¹¹ That protective measures

⁶ See para. 3, *supra*.

⁷ See, for instance, *Prosecution v. Lubanga*, ICC-01/04-01/06-T-124-ENG, 11 February 2009, p. 63:

15 PRESIDING JUDGE FULFORD: An application has been made by
 16 Ms. Samson for a further a protective measure to be implemented, namely,
 17 that the witness should be screened from the accused so that Mr. Lubanga
 18 will only see the witness by looking at a television screen.
 19 In our view, implementing a protective measure of this kind is
 20 something that should not take place routinely but should be exceptional
 21 and should be reserved for those situations where for good reason it is
 22 necessary to implement it to protect truly vulnerable witnesses.

⁸ *Prosecution v. Lubanga*, ICC-01/04-01/06-1140, (TCI) Decision on various issues related to witnesses' testimony during trial, 29 January 2008: "31. [...] the Trial Chamber will apply the following guidelines on a witness-by-witness basis.

41. The Chamber accepts the submissions of the parties that the presumption is that witnesses will give evidence by way of live in-court testimony, in accordance with Article 69(2) of the Statute [...]"

⁹ See *Prosecutor v. Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness R, Case No. IT-94-1-T, 31 July 1996, p. 4.

¹⁰ *Prosecution v. Lubanga*, ICC-01/04-01/06-T-113-ENG, 30 January 2009, p. 21:

17 Given the allegations of past threats, the current and long-term
 18 instability in the DRC and the present apprehensions of the witness, the
 19 Bench is persuaded that these measures are appropriate and most
 20 particularly because of the real risks that this witness will face if it
 21 becomes well known that he has given evidence against the accused in this
 22 trial. The Defence are fully aware of his identity, and accordingly, the
 23 accused's fair trial rights are not in any real sense undermined. The
 24 restriction as regards the public is in our view necessary and
 25 proportionate.

See also *Prosecution v. Lubanga*, ICC-01/04-01/06-T-156-ENG, 26 March 2009, p. 4, l. 1-17:

1 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Biju-Duval.

2 This witness is an expert in Congolese affairs who works from time to

3 time in Ituri. He is concerned that if his image is freely available via
 4 the television link, when he next goes to the DRC he will be at risk of
 5 reprisals from anyone who has seen his face and who resents his
 6 participation in this case. Therefore, he requests that his image is not
 7 broadcast over the live stream and that his image is "marbled."
 8 Otherwise, his identity and everything he says will be wholly public.
 9 For the Prosecution, Ms. Samson has indicated that their position
 10 is one of neutrality; and the Defence have not raised any opposition to
 11 this request. In our judgement, this is a reasonable and proportionate
 12 request. The concerns that the expert expresses are understandable and,
 13 most importantly, they do not -- the request that is made does not
 14 undermine the essential public nature of the evidence which he is going
 15 to give. Nothing in this trial could conceivably turn on the appearance
 16 of this witness. Accordingly, we grant the application that has been
 17 made for this protective measures.

¹¹ *Prosecution v. Lubanga*, ICC-01/04-01/06-T-153-ENG, 24 March 2009
 P. 62:

24 In our judgement, this application for in-Court protective
 25 measures is insufficiently founded. As we have just summarised, the
 p. 63:

1 evidence of this witness is mainly focused on his arrest in 2002,
 2 although, as we have also set out in detail, he will be asked about
 3 certain other important issues. We do not consider that these matters
 4 will affect the neutrality of his position in any significant way, and we
 5 do not understand his evidence as in any way materially attacking or
 6 criticising either the president or the present government of the DRC.
 7 Following his arrest, he has not experienced any difficulties within the
 8 DRC and he has continued with his professional work, albeit he is
 9 awaiting a new appointment.
 10 The accused has known for some time that this witness will form
 11 part of the Prosecution's evidence and, as we've just stressed, no
 12 threats have been made to him. He is well-placed to be given any support
 13 or assistance that he considers he needs by the present government, and
 14 where he is appointed to serve as a judge is of course within the
 15 discretion of the Ministry of Justice. The Chamber considers that the
 16 principle of open justice is of high importance and requests for
 17 anonymity should not be lightly granted. This witness is in a very
 18 different category from the previous witnesses in this trial who have
 19 enjoyed a high level of protection, and it is important that these
 20 applications are not routinely made in the expectation that they will be
 21 routinely granted. Instead, they must be founded on a solid basis and
 22 reasons must be provided in support of applications of this kind that go
 23 beyond the personal preferences or subjective fears of individual
 24 witnesses, although those are matters that the Chamber will take into
 25 consideration along with all of the objective reasons. No sufficient
 p. 64:

1 justification for these proposed steps exist for this witness. The
 2 suggested precarious position of the witness and his family have not been
 3 objectively substantiated, and for these reasons this application is
 4 refused.

See also *Prosecution v. Lubanga*, ICC-01/04-01/06-T-124-ENG, 11 February 2009, p. 64:

1 We have asked our Court Officer to inquire of the witness as to
 2 what his position is as regards the configuration of the courtroom. When
 3 first asked whether he minded giving his evidence as the courtroom was
 4 originally configured, he indicated that he did not mind continuing with
 5 his evidence in the way that the court was set up when he first entered.
 6 However, it is right to say that when he was told that there was an
 7 option of a screen being interposed between him and the accused, he
 8 indicated that he thought that might be better.
 9 In our judgement that does not provide anything approximating to
 10 a sufficient justification for implementing the measure. We repeat:

should be strictly necessary implies that less restrictive measures, if they can secure the required protection, be applied.¹²

6. The Defence submits, in light of the criteria required in granting protective measures, that the Chamber should adopt the least restrictive measures for the required protection of a victim or witness¹³ where necessary, and based on the particular circumstances of each individual. Of particular note in this regard is the failure by the Prosecution to explain, on a case-by-case basis, why less restrictive measures otherwise available¹⁴ do not suffice. Of note too, is the lack of specification why the circumstances of each individual for whom protection is sought warrants such a curtailment of Mr. Katanga's rights.
7. The granting of protection to a witness is primarily and necessarily limited by the respect of the right of Mr. Katanga to a fair trial, and to the right to a public trial in particular. Whilst his right to a fair and public trial, and to cross-examine witnesses, must be balanced with the rights of witnesses to protection, the hierarchy of these interests is clearly in favour of the defence. Article 64 provides that the rights of the accused are to be given "full respect", while the protection of the witnesses is to be

¹¹ This is something which should be reserved for those who are truly

¹² vulnerable, and expressing a preference for a screen without any further

¹³ justification being produced is simply insufficient. Therefore, for

¹⁴ these reasons, this application is refused.

¹² See e.g., *Visser v. Netherlands*, wherein the European Court of Human Rights held that "Any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied". *Visser v. Netherlands*, Judgment, 14 February 2002, para. 58.

¹³ See, e.g., *Prosecutor v. Bagosora*, ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga (TC), 13 September 1999, para. 28, reiterated in *Prosecutor v. Nyiramasuhuko et al*, No. ICTR-98-42-T, Decision on Nyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses, 1 March 2005, para. 8.

¹⁴ The Defence note in particular that the following protective measures need not be applied conjunctively. Where appropriate and if required, individual measures may be sought. Rule 87(3) provides in relevant part that a Chamber may hold an in-camera hearing in order "to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity of the location of a victim, a witness, or other person at risk on account of testimony given by a witness by ordering, inter alia: (a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber; (b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party; (c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular video conferencing and closed-circuit television, and the exclusive use of the sound media; (d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or (e) That a Chamber conduct part of its proceedings in camera".

given “due regard”.¹⁵ This priority is further confirmed by the wording of Article 68, which allows a Chamber to order protective measures; such measures, however, “shall not be prejudicial to or inconsistent with the rights of the accused” and a fair trial.¹⁶

8. In short, protective measures should remain the exception, subordinate to the rights of Mr. Katanga, and not become the norm, as the Prosecution measures sought in effect suggest. Indeed, the Defence is particularly concerned that the Prosecution has requested protective measures for *all* its incriminating witnesses of fact. The assumption on behalf of the Prosecution presumes not only that all such witness must be protected, but also, that they would all agree to such measures. Furthermore and insofar as the Defence can ascertain, no effort has been made by the Prosecution to seek the express consent of the witnesses for whom the protective measures are sought.

Reasonable Protective Measures, if Required and on the Basis of the Governing Text and Rules, Should Instead be Granted

9. If necessary, reasonable protective measures, including facial and/or voice distortion may be provided based on the individual circumstances of each and every witness. However, even when confined to public viewing, such measures deprive the public of the ability to evaluate the demeanor of the witness and thus reduce the transparency of justice. Such measures should be highly exceptional and therefore must necessarily depend on the individual case of the witness.
10. With regard to testimony by means of closed-circuit video link, the Defence recalls that the Trial Chamber in *Lubanga* held that requests of closed-circuit video link should be dealt with on a case-by-case basis, taking into account the views and

¹⁵ Article 64 (Functions and powers of the Trial Chamber) (2): “The 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”. See also Article 54 (Duties and powers of the prosecutor with respect to investigations) (1)(c): “The Prosecutor shall ... Fully respect the rights of persons arising under this Statute”. See Pascale Chifflet, ‘The Role and Status of the Victim’, in: Gideon Boas and William A. Schabas, *International Criminal Law Developments in the Case Law of the ICTY*, Martinus Nijhoff Publishers: Leiden (2003), p. 79 (A similar argument is made with regard to the applicable ICTY Rules of Procedure and Evidence and the ICTY Statute). See also *idem.*, pp 76-87.

¹⁶ Article 68 (Protection of the victims and witnesses and their participation in the proceedings) (1).

concerns of the witness, the parties and, where relevant, the participants.¹⁷ The jurisprudence of the ICTR confirms that protective measures should be granted on a case-by-case basis only,¹⁸ and that witnesses shall, in principle, be heard directly by Chambers.

11. The Defence does not object to the testimony of victims of sexual violence being given through a closed-circuit video link, where it is appropriate, but that the necessity of this kind of protective measure should not be assumed in the absence of a specific request by the victim concerned.

12. If the Chamber orders the non-disclosure of the identity of a witness to the public, the Defence agrees to closed session testimony only for those parts that may identify the protected witnesses, and to the redactions, as limited as possible, of the excerpts of the transcripts of testimonies given in open court that may identify them. However, such redactions should be granted by the Court on a case-by-case basis.¹⁹ As the experience

¹⁷ *Prosecution v. Lubanga*, ICC-01/04-01/06-1140, (TCI) Decision on various issues related to witnesses' testimony during trial, 29 January 2008:

31. [...] the Trial Chamber will apply the following guidelines on a witness-by-witness basis.

41. The Chamber accepts the submissions of the parties that the presumption is that witnesses will give evidence by way of live in-court testimony, in accordance with Article 69(2) of the Statute. However, the Chamber will authorise the use of audio or video-link whenever necessary (see particularly Article 68 of the Statute), having ensured "that the venue chosen for the conduct of the audio or video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness" (Rules 67(3)). This will be dealt with on a case-by-case basis, taking into account the views and concerns of the witness, the parties and, where relevant, the participants.

42. If a party or a participant seeks to introduce evidence via audio or video link technology from a remote location (e.g. Democratic Republic of Congo), they shall file a request with the Chamber, whilst simultaneously informing the Victims and Witnesses Unit, not less than 35 days before the relevant testimony is due to be heard. Whenever audio or video-link technology is to be used for a witness giving evidence at the seat of the Court, the parties and participants shall file a request with the Chamber, whilst simultaneously informing the Victims and Witnesses Unit, at the earliest opportunity. However, no strict time-limit is imposed, given that unforeseen circumstances may arise.

¹⁸ As noted in *Prosecutor v. Simba*, No. ICTR-2001-76-I, *Decision on Defence Request for Protection of Witnesses* (25 August 2004), para. 5: "Established jurisprudence requires that the witnesses for whom protective measures are sought must have a real fear for the safety of the witness or her or his family, and there must be an objective justification for this fear. Measures for protection of witnesses are granted on a case-by-case basis. In granting protective measures, the Chamber must also take into consideration the fairness of the trial and the equality of the parties" (with reference to *Gacumbitsi*, Decision on Defence Motion for Protection of Witnesses (TC), 25 August 2003, para. 8; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, paras 2, 4.).

¹⁹ *Prosecution v. Lubanga*, ICC-01/04-01/06-T-105-ENG, 22 January 2009.

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17 [...] However, it needs to be

18 emphasised that redactions to information that absent security concerns

19 would have received wider publication in this trial is a procedural issue

20 of importance which is, at all times, to be controlled by the court.

of the *ad hoc* Tribunals has demonstrated, it is preferable, so far as is practicable, to deal with identifying features at one specific point in the evidence.

The Motion Disregards any Sense of a Transparent and Public Administration of Justice

13. The public administration of justice must be considered. In fact, the Court's rules oblige that it operate with a degree of transparency,²⁰ the importance of which the Trial Chamber in *Lubanga* has clearly emphasised:

The Chamber recognises the importance of truly open justice as enshrined in the Statute. By Article 67(1), the accused is "entitled to a public hearing, having regard to the provisions of (the) Statute." The importance of this principle has been emphasised by the European Court of Human Rights in its repeated observations that the public character of proceedings is an essential element of a fair hearing. Any derogation from that principle must be for good reason, and the proceedings must remain fair.²¹

14. The right to a public hearing is an essential safeguard of criminal procedure. As the European Court of Human Rights has stated,

Public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6§1, namely a fair trial.²²

21 Although this decision outlines the approach that is to be taken
22 in general terms, the detail of any proposals that apply to individual
23 witnesses are to be given to the court in advance of each relevant
24 witness's testimony, and to the extent that this is not reasonably
25 possible, at appropriate stages whilst the evidence is being presented or
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1 after its conclusion. The court will, therefore, make fact-specific
2 decisions on any proposals.

3 Therefore, although we approve the generality of the measures
4 that are proposed, we will look in detail at the particular circumstances
5 that relate to individual victims and witnesses in due course.

On pages 55-60 of this transcript the Chamber details the criteria that it will use to assess the necessity to redact records of public hearings.

²⁰ The accused is entitled pursuant to Article 67(1), to a public hearing.

²¹ ICC-01/04-01/06-T-104-ENG, 16 January 2009 (Status Conference), p. 3:

Reiterated in *Prosecution v. Lubanga*, ICC-01/04-01/06-T-105-ENG, 22 January 2009, p. 52, l. 25, to p. 53, l. 9. See also *Prosecution v. Lubanga*, ICC-01/04-01/06-T-153-ENG, 24 March 2009, p. 62:

15 [...] The Chamber considers that the
16 principle of open justice is of high importance and requests for
17 anonymity should not be lightly granted.

²² *Werner v. Austria*, Reports 1997-VII, para. 45. See also *Sutter v. Switzerland*, Series A, Vol. 74, para. 26 ("By rendering the administration of justice visible, publicity

This principle of open justice and publicity is especially important for an international court where the removal of a sense of impunity for crimes is an objective. The people of Ituri wish to follow such a trial, as made clear by the following extract:

“Villagers in Ituri province in north-eastern Democratic Republic of Congo, DRC, which has suffered years of ethnic fighting, have voiced concerns about the use of anonymous witnesses in the trial of Thomas Lubanga at the International Criminal Court, ICC. [...]

[P]eople in Bogoro [...] say they need to know the identities of people testifying in trials. [...]

Concealing witness identities has contributed to local suspicion that the ICC trials are unfair, with some claiming that witness testimony is manipulated by payment from either the prosecution or defence. [...]

"We want to know who these witnesses are," Jean de Dieu Ngabu Safari, a teacher in Bogoro, told ICC prosecutor Luis Moreno-Ocampo, when he visited the region between July 8 and 11. "They are from Kinshasa and other provinces, but speak on behalf of Bogoro and other places in Ituri." [...]

One resident of Bogoro, Mateso, told IWPR, "We want to know who the parents of these witnesses are and if possible their village or town ... If the ICC continues working in this way, we will request that the trial be transferred here."

Mateso warned about the dangers of a return to conflict if the ICC is not perceived to be conducting its trials in a fair and transparent way.

"Our prisoners, whether they are from the Lendu or Hema tribes, do not know those witnesses who are hiding themselves behind the curtain and changing their voices," he said. "This injustice is hurting us a lot." [...]

Jean-Bosco Lalo, president of the Civil Society of Bunia, pointed out that witnesses who publicly testified in previous trials held in Bunia, involving people who were allegedly directly responsible for committing crimes on the ground, did not face any problems. [...]

Van Woudenberg of Human Rights Watch thinks that more could be done to alleviate the fears of local villages that justice is not being done by making the trials easier to follow.

"I have seen proceedings, with voice and face distortion measures in place, that are almost impossible to follow," she said. "The French voice-over is often too fast and uses language that is too complex. This has no doubt contributed to the overall sense of injustice." [...].²³

See also *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion to Remove Confidentiality from Portions of the Prosecutor's Pre-Trial Brief* (10 December 2004), para. 10: "[...] In principle, it is preferable that hearings are conducted in public, and this includes making public as much of the written pleadings and Decisions as is possible. [...]"

²³ Jacques Kahorha, 'Congo-Kinshasa: Concern Over Anonymous Witnesses', 22 July 2009, available at <http://allafrica.com/stories/printable/200907230374.html> (last accessed on 14.09.2009).

15. These are views expressed by the very community that the Court is anxious to serve. It is striking that it is the people of Bogoro who are finding the anonymity of witnesses a concern. The Defence too, is concerned that the Prosecution requests, if met, will lead to the trial being held behind closed doors, with total anonymity for the Prosecution witnesses of fact.
16. The Defence submits that it is clearly in the interests of justice that witnesses testify in public and are subject to scrutiny. Public testimony is open to contradiction where private testimony is not. Those that do not testify in public, or whose identities are kept secret, may be less encouraged to tell the truth. Every effort should be made to publicise proceedings to the fullest extent. The Defence, in particular, is prejudiced by the identity of a witness being unknown to the public as public testimony can lead to others coming forward to contradict a witness. This is particularly relevant in a case where the Defence, as here, is necessarily limited in its capacity to investigate the Prosecution witnesses.
17. While the Defence accepts that the Chamber has a difficult task in balancing the competing interests in the case, it earnestly requests the Chamber to reject the blanket approach of the Prosecution, and to proceed strictly on a case-by-case basis, extending the exceptional protective measures sought only to those witnesses who truly require them.

Relief Sought

18. The Defence requests that the protective measures sought be rejected, save where the least restrictive protective measures are necessary according to individual circumstances.

Respectfully submitted,



David HOOPER

Dated this 22 September 2009
At The Hague