

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 9 July 2010

**TRIAL CHAMBER II**

**Before:** Judge Bruno Cotte , Presiding Judge  
Judge Fatoumata Dembele Diarra  
Judge Christine Van den Wyngaert

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

**Public**

**Registry's observation on the Defence request With Regard to Private Session  
Hearings (ICC-01/04-01/07-2153)**

**Source:** The Registrar

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

**The Office of the Prosecutor**

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Mr. Fidel Nsita Luvengika

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**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**

Ms. Silvana Arbia

**Defence Support Section**

**Deputy Registrar**

Mr. Didier Preira

**Victims and Witnesses Unit**

Ms. Maria-Luisa Martinod-Jacome

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Ms. Charlotte Dahuron

## The Registrar of the International Criminal Court (the “Court”)

NOTING the “Defence Request with Regard to Private Session Hearings” submitted by the Defence for Germain Katanga on 1 June 2010<sup>1</sup>;

NOTING the oral decision rendered by Trial Chamber II inviting all parties and participants to submit their observations<sup>2</sup>;

NOTING the “Observations de la Défense de Mathieu Ngudjolo relatives à la Requête 2153 de l’Equipe de défense de Germain Katanga” submitted by the Defence for Mathieu Ngudjolo Chui on 17 June 2010<sup>3</sup>;

NOTING the “Observations sur la requête de la Défense de Germain Katanga concernant le recours au huis clos en la présente affaire” submitted by the Legal Representative for Victims on 21 June 2010<sup>4</sup>;

NOTING the “Observations du représentant légal du groupe des victimes « enfants soldats » sur la requête de la défense de Germain Katanga concernant le recours au huis clos” submitted by the Legal Representative for Victims on 22 June 2010<sup>5</sup>;

NOTING the “Observations du Bureau du Procureur sur le mémoire de la Défense de Germain Katanga relatif à l’usage des sessions à huis clos” submitted by the Office of the Prosecutor on 22 June 2010<sup>6</sup>

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<sup>1</sup> ICC-01/04-01/07-2153

<sup>2</sup> ICC-01/04-01/07-T-150-CONF-ENG ET1-62, page 2 line 16 – page 3 line 6

<sup>3</sup> ICC-01/04-01/07-2198

<sup>4</sup> ICC-01/04-01/07-2207

<sup>5</sup> ICC-01/04-01/07-2208

<sup>6</sup> ICC-01/04-01/07-2210

**CONSIDERING** that, during the hearing on 7 June 2010, the Registry was called upon to start reflection on the issue raised by the Counsel for the Defence of Germain Katanga<sup>7</sup>;

**NOTING** Article 68 of the Rome Statute, Rules 87 and 88 of the Rules of Procedure and Evidence, Regulation 20 and 24*bis* of the Regulations of the Court and Regulation 43 of the Regulations of the Registry;

**SUBMITS**, respectfully, the following observations:

1. The Registrar noted with interest the observations and subsequent suggestions put forward by the different parties and participants to the trial proceedings. However, the Registrar is of the view that, prior to suggesting any practical measures, certain considerations should be made.
2. Prior to questioning the recurrent recourse to private sessions, the specific situation in which the ICC, and more in particular the Registry, is currently working to execute its mandate need to be taken into consideration when analyzing the Defence request. Given the specific circumstances, a request to go into private sessions can be totally justified. Protection and security of witnesses and victims, one of the core functions of the Registry, and by a larger extend all parties and participants to the proceedings, depends heavily on local capacity in the DRC. However, this local capacity in relation to specialized police units, magistrates, prison officials is rather limited. As such, it may be necessary and justified to request, at numerous occasions, that relevant parts of the proceeding be conducted in private session in order to protect the safety and security of the victims and witnesses.

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<sup>7</sup> ICC-01/04-01/07-T-150-CONF-ENG ET1-62, page 2, line 23.

3. With regard to the submission by the Defence for Germain Katanga whereby the Defence team is “concerned at the extent to which [...] the trial has been conducted out of the public view”, the Registrar deems it appropriate and necessary to establish whether it is correct to state that a large part of the proceedings take place on private session or whether this rather amounts to a subjective feeling and or perception. In light of this, a study on the amount spent in private sessions relative to public sessions, with regard to the appearances of witnesses P-279 and P-280 before Trial Chamber II, was conducted by the Registry.

### **I. Hearings**

4. In total, witness P-279 appeared for 2.497 minutes before Trial Chamber II of which 411 minutes or roughly 16 % were spent in private sessions. With regard to witness P-280, 188 minutes or 11 % on a total of 1.653 minutes were spent in private sessions. The more extensive table is attached as an annex to the present document

5. As this time calculation exercise generated a heavy workload, the Registry was not able to extend it to all witnesses having appeared before Trial Chamber II so far. However, the Registry remains available to conduct the same exercise for all witness should the Trial Chamber so require.

6. It is clear from the data presented that, contrary to the perception of the Defence for Germain Katanga, only a limited and in the Registrar’s view an acceptable part of the hearings have taken place outside the public view. Nonetheless, the Registrar is mindful of the fact that this perception could have been generated, inter alia, by the frequent requests to go into private sessions or by the waiting time necessary to move from a public session into a private one.

7. In light of the figures presented above, the Registrar would like to draw the attention to the fact that, to her knowledge, no international standard on the reasonable correlation between public and private sessions exists.

## **II. Case file/ filings**

8. Furthermore, when doing the exercise of establishing the correlation between public and private (confidential) proceedings, the Registrar is of the view that this exercise should be extended to the case file as the case file equally forms an important and integral part of the proceedings before Trial Chamber II. Statistical data in the possession of the Registry show that, on the total number of 4.237 documents (all documents except translations) submitted by the parties and participants (without submissions by the Registry) in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui to date, 1.431 documents were public filings (including annexes) and 2.807 documents were submitted confidentially (Confidential or Under Seal).

9. These data unequivocally show that the majority (66 %) of the case file consists of documents outside of the public view. There is a huge discrepancy between the case file and the in court proceedings. As such, maybe an exercise in terms of an extensive reclassification of documents submitted, where possible, should be contemplated.

## **III. Witness protection**

10. Witnesses P-279 and P-298 are two out of 15 OTP witnesses or experts having appeared or appearing before the Trial Chamber so far. Out of these 15 witnesses or experts, 12 of them (or 80 %) did benefit, in one way or another, from in court protective measures (e.g. voice or face distortion, pseudonym,...).<sup>8</sup>

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<sup>8</sup> Based on figures on judicial protective measures at the ICTY between 1996-2006, 27,7 % of the witnesses appearing did benefit from such protective measures. <http://www.icty.org/sid/10175>

11. However, the Registrar observes that the regular switching between public and closed session is a factor of additional hardship for the witness. Indeed, every time the Court switches back to public sessions, the bench has to remind the witness about the necessity of not revealing confidential names or information, whereas he or she was authorized to do so in private sessions. This causes uncertainty for the witness as to what he or she can say or not and thus increases the stress endured by the witness. Limiting the number of switches from public to private sessions should thus be considered a good practice in order to reduce hardship for the witness.

12. Notwithstanding the request forwarded by the Defence for Germain Katanga, the Registrar is equally mindful of the necessity to have proceedings conducted in public in order to respect the rights of the Defence and to have an equitable process. However, next to the safeguarding of the rights of the Defence there are additional reasons as to why the proceedings should take place in the public view. It is important to show that the ICC is an effective judicial instrument and that justice is "seen" to be done. It also allows witnesses and victims to express themselves and making their experiences known to the outside world and not only to the people within the courtroom. Finally, having cases tried in the public domain/publicly also has a historical relevance for future generations to come.

#### **IV. Measures suggested**

13. As mentioned before, the fact that on one particular day (25 May 2010), on four different occasions in one hour, the Trial Chamber had to move from public into private session (for periods of, on average, 10 minutes) possibly contributed to the abovementioned perception. In light of the situation at hand, the Registrar would like to propose different types of measures, which in her view, could mitigate the

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perception that a large part of the proceedings is being conducted outside the public view and reduce hardship for the witness.

14. The Registrar first observes that this matter depends to a large extent on the way the proceedings are conducted, which falls into the exclusive province of the Trial Chamber. The Registrar has no competence on the management of hearings and will abstain from making any recommendation. However, since the Trial Chamber specifically invited the Registrar to start a reflection on this issue, she will share the following observations on identified ways to mitigate the perception that a large part of the proceedings is being conducted outside the public view:

- Addressing identified confidential issues in a single closed session at the beginning of the hearing: when there are issues that are clearly identified as confidential that have to be addressed in the course of a hearing (for instance, the identification of persons or places), these issues may be addressed all at once in a short closed session at the beginning of the hearing, so that the other non-confidential issues could then be addressed in public session without need for switching in private sessions.
- Grouping the requests for private sessions. The public could be correctly informed in advance in order to avoid any futile trip to the public gallery, contributing to the global image of the Court and, more importantly, reducing the hardship of the witness.
- Reaching an initial agreement on the issues that should be discussed during private and public sessions. This would be equally beneficial to the image of the Court as it would reduce the frequent recourse from public to private sessions and vice versa.
- Before moving from private to public session mutual agreed coded terms could be identified and subsequently used when referring to earlier mentioned locations, persons, ....



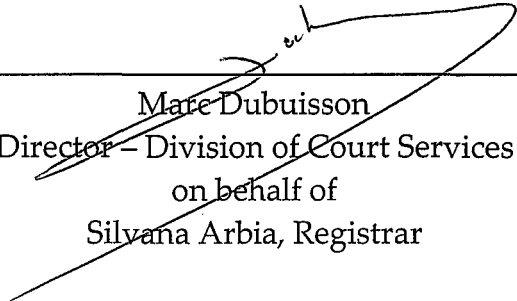
- Favoring the submission of confidential information by way of agreement between the parties under Rule 69 of the Rules of Procedure and Evidence. Some confidential information, such as the identity of protected persons or the localization of places, may not be controversial and may be agreed upon by the Parties without need to address them during the presentation of evidence. The entering of an agreement on these undisputed facts before the hearing would avoid having to switch to private sessions in order to address them.

15. The Registrar has also identified the following measures that could be implemented at Registry level in order to reduce the inconvenience caused by subsequent switching from public to private sessions:

- Adjusting the courtroom network and creating the possibility of a "silent procedure" whereby by questions, that can be answered by the witness by pressing a button "yes" or "no", could be put to the witness through the courtroom's IT systems and the witness answers "silently" using the switchboard. However, the language the witness is speaking and the witness' level of literacy should be taken into consideration.
- Making the courtroom network available for parties and participants to solve certain issues by way of email exchange without interfering with the courtroom proceedings as such. This email correspondence could then be joined to the case file as an annex to the transcript.

16. The Registrar did not explore measures such as the a posteriori review of transcripts and possible subsequent reclassification or the reading of a summary of what has been said during private sessions as these measures, in her view, would not reduce the number and frequency of closed sessions.

17. Without prejudicing the rights of the parties and participants to request in court protective measures, the Registrar would like to draw the attention to the fact that the majority of the witnesses (80 % of the total number so far) currently benefit from "small" protective measures, such as, for instance, voice and face distortion or the recourse to private session. However, with a view to substantially alter the reasoning on the publicity of the debate, it could be suggested to grant, in certain specific cases, the highest possible level of protection, i.e. international relocation or resettlement, to a witness, in combination with total publicity of all proceedings with regard to this witness. This would be highly beneficial to the publicity as every part of the proceedings would take place in the public view.



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Mare Dubuisson  
Director – Division of Court Services  
on behalf of  
Silvana Arbia, Registrar

Dated this 9 July 2010

At The Hague, the Netherlands