



Original: **French**

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

Date: 10 January 2011

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 redacted version

Decision on protective measures for 16 protected witnesses in the *Lubanga* case

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
Mr Éric MacDonald, Senior Trial Lawyer

Counsel for Germain Katanga

Mr David Hooper
Mr Andreas O'Shea

Counsel for Mathieu Ngudjolo Chui

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

Legal Representatives of the Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of the Applicants

**The Office of Public Counsel for
Victims**

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

States' Representatives

Other

Trial Chamber I

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

**Victims Participation and Reparations
Section**

TRIAL CHAMBER II of the International Criminal Court (“the Chamber” and “the Court” respectively), pursuant to regulation 42 of the Regulations of the Court, decides the following:

BACKGROUND

1. In an application filed on 14 July 2009,¹ the Prosecutor applied to Trial Chamber I for the variation of the protective measures ordered for several witnesses in the *Lubanga* case, in order to disclose the statements which those witnesses made in the *Katanga/Ngudjolo* case. Relying on regulation 42(3) of the Regulations of the Court, the Prosecutor requested the lifting of a limited number of redactions to the statements of Witnesses [REDACTED], and sought additional redactions to the statements of Witnesses [REDACTED].
2. In its decision of 22 July 2009,² the Chamber, on the basis of regulation 42(3) of the Regulations of the Court, referred *proprio motu* to Trial Chamber I the situations of Witnesses [REDACTED], who fall under rule 77 of the Rules of Procedure and Evidence (“the Rules”), and that of Witnesses [REDACTED], who fall under article 67(2) of the Statute. The Chamber considered that the Prosecutor had failed to provide convincing evidence of the risks incurred by those witnesses in the *Katanga/Ngudjolo* case, and sought the opinion of Trial Chamber I on the continued existence of a real and objective risk in the case before it.
3. Trial Chamber I had ordered protective measures for all of the aforementioned witnesses, except for Witnesses [REDACTED]. Before ordering the disclosure of

¹ Office of the Prosecutor, “Prosecution’s request pursuant to Regulation 42 in relation to protective measures sought before Trial Chamber II (Witness 33, 169, 175, 178/253, 179, 243, 271, 282, 288)”, 14 July 2009, ICC-01/04-01/06-2047.

² *Decision on the Protection of 21 Witnesses Under Article 67(2) of the Statute and/or Rule 77 of the Rules of Procedure and Evidence*, 22 July 2009, ICC-01/04-01/07-1329-Conf-Exp-tENG (public redacted version ICC-01/04-01/07-1332-tENG).

their statements to the Defence teams, however, the Chamber wished³ to take Trial Chamber I's opinion on the situation of those four witnesses, whose information was relevant principally to the *Lubanga* case.

4. On 17 August 2009, the Defence for Germain Katanga⁴ requested Trial Chamber I to carry out a case-by-case analysis of the Prosecutor's requests, recalling that the relevance of the information contained in a given statement may vary from one case to another. On that same day, the Defence for Mathieu Ngudjolo⁵ pointed out to Trial Chamber I that the Chamber was not bound by the protective measures ordered in the *Lubanga* case.
5. In three decisions – issued on 10 December 2009⁶ and 5 February 2010⁷ – notified to the Chamber, Trial Chamber I either maintained the protective measures that it had previously ordered, or accepted the variations of the redaction measures requested by the Prosecutor, or ordered the disclosure of documents that had never previously been brought to its attention, instituting, where necessary, the redaction measures requested by the Prosecutor. Witnesses [REDACTED] fall under the first category, Witnesses [REDACTED] under the second, and Witnesses [REDACTED] under the third.
6. Trial Chamber I however indicated that the protective measures that it had ordered were strictly limited to the *Lubanga* case. Accordingly, it invited the

³ Ibid., para. 64.

⁴ Defence for Germain Katanga, "Defence Observations on the Prosecution's request pursuant to regulation 42 in relation to protective measures sought before Trial Chamber II (Witness 33, 169, 175, 178/253, 179, 243, 271, 282, 288), 17 August 2009, ICC-01/04-01/06-2081 (see also the corrigendum ICC-01/04-01/06-2081-Corr).

⁵ Defence for Mathieu Ngudjolo, "Observations de la Défense de Mathieu Ngudjolo sur la requête ICC-01/04-01/06-2047 du Procureur", 17 August 2009, ICC-01/04-01/06-2078.

⁶ Trial Chamber I, *Decision on the Prosecution's applications to vary protective measures under Regulation 42 of 14 July and 17 August 2009*, 10 December 2009, ICC-01/04-01/06-2206-Conf-Exp; Trial Chamber I, *Decision on the variation of protective measures under Regulation 42 on referral from Trial Chamber II on 22 July 2009*, 10 December 2009, ICC-01/04-01/06-2209-Conf-Exp.

⁷ Trial Chamber I, *Decision on the Prosecution's request for Non-Disclosure of Information in the statements of Three Individuals providing Rule 77 Information*, 5 February 2010, ICC-01/04-01/06-2283-Conf-Exp.

Chamber to determine whether it was appropriate to maintain those redactions in the *Katanga/Ngudjolo* case and, [REDACTED].

ANALYSIS

7. Given the position taken by Trial Chamber I in the *Lubanga* case, the Chamber must now decide whether it wishes to adopt the same protective measures in the case before it.
8. As the Chamber has recalled on several occasions, any decision by which it authorises the non-disclosure of part of a document to the Defence must be supported by sufficient reasoning in light, *inter alia*, of the arguments relied on by the Prosecutor to support his application. In the case in point, the Chamber⁸ finds that the Prosecutor has failed to show that the witnesses in question would be exposed to risk in the *Katanga/Ngudjolo* case.
9. The Chamber notes that Trial Chamber I considered that the identities of Witnesses [REDACTED]⁹ and [REDACTED]¹⁰ could be disclosed in the *Lubanga* case. At the Prosecutor's request, it ordered the statements of these witnesses to be disclosed, redacting only information about their family members and about an internal memorandum from the Office of the Prosecutor.
10. The Chamber observes, however, that Trial Chamber I found that all of the other witnesses were still exposed to risk in the *Lubanga* case. Trial Chamber I thus accepted admissions in lieu of the statement of Witness [REDACTED] and allowed a summary and an admission to be substituted for the statement of Witness

⁸ ICC-07/04-01/07-1329-Conf-Exp-tENG, para. 16.

⁹ [REDACTED].

¹⁰ [REDACTED].

[REDACTED]. It further ordered that the redactions to the statements of Witnesses [REDACTED] be maintained or varied.

11. Inasmuch as Germain Katanga, Thomas Lubanga and Mathieu Ngudjolo are being held in the same detention facility, the Chamber considers that adopting less restrictive measures in the case before it risks compromising compliance with the protective measures implemented by Trial Chamber I. [REDACTED]¹¹ [REDACTED]¹² [REDACTED], any further disclosure ordered by the Chamber could lead to the identities of the witnesses concerned being revealed to Thomas Lubanga or his sympathisers.
12. The Chamber further notes that the redactions still in force, after Trial Chamber I's decision to lift some of the redactions at the Prosecutor's request, have proven to be of limited scope and do not impede the Defence's understanding of the documents concerned. It also notes that the admissions accepted by Trial Chamber I in lieu of the statements of Witness [REDACTED] and the admission accepted by that Chamber in addition to the summary of Witness [REDACTED]'s statement adequately replace the redacted information, which is only very indirectly relevant to the *Katanga/Ngudjolo* case. Lastly, the Chamber notes that no other less restrictive measure would satisfy the aforementioned protection requirements.
13. Accordingly, the Chamber considers that it must adopt the protective measures ordered by Trial Chamber I for the 16 witnesses concerned.

¹¹ [REDACTED].

¹² [REDACTED].

FOR THESE REASONS, THE CHAMBER

ORDERS the Prosecutor to disclose the identities of Witnesses [REDACTED] to the Defence teams and to disclose their statements with the redactions ordered by Trial Chamber I;

ORDERS the Prosecutor to disclose the statements of Witnesses [REDACTED] to the Defence teams with the redactions ordered by Trial Chamber I;

ORDERS the Prosecutor to disclose to the Defence teams the admissions accepted by Trial Chamber I in lieu of the statement of Witness [REDACTED]; and

ORDERS the Prosecutor to disclose to the Defence teams the summary and the admission accepted by Trial Chamber I in lieu of the statement of Witness [REDACTED].

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

[signed]
Judge Bruno Cotte
Presiding Judge

[signed]
Judge Fatoumata Dembele Diarra

[signed]
Judge Christine Van den Wyngaert

Dated this 10 January 2010

At The Hague, the Netherlands