



Original: **French**

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

Date: **18 August 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 document, with confidential annex

**Decision on the *"Requête en clarification quant à la pratique
concernant le déplacement et logement de témoins
appelés à comparaître dans la présente affaire"***

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

Unrepresented Victims

**Unrepresented Applicants
(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

Counsel Support Section

Deputy Registrar

Division of Court Services

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER II of the International Criminal Court ("the Chamber" and "the Court" respectively), acting pursuant to article 64 of the Rome Statute ("the Statute") and regulation 23 *bis* of the Regulations of the Court decides the following:.

I. Background

1. On 27 September 2011, the legal representative of the main group of victims ("the Legal Representative") lodged a *"Requête en clarification quant à la pratique concernant le déplacement et logement des témoins appelés à comparaître dans la présente affaire"* ("the Application"), requesting the Chamber to clarify whether the practice in the present case is to allow witnesses to travel together and share accommodation, except where a party or participant objects, and to invite the Victims and Witnesses Unit ("the VWU") to inform the parties and participants whether the next witnesses due to give evidence travelled together and/or are sharing accommodation.¹ In his view, such facts are relevant for assessing the credibility of witnesses and the reliability of their testimonies.²

2. In a filing of 11 July 2011, the Defence for Germain Katanga ("the Defence") opposed the Application.³ It considers the Legal Representative's request for clarification to be moot as the VWU has already clearly stated the situation.⁴ With regard to the request for information, the Defence, while indicating that the Legal Representative is overstepping his mandate by making such a request,⁵ considers it to be late and that granting it would result in unequal treatment of the witnesses

¹ Legal Representative of the main group of victims, *"Requête en clarification quant à la pratique concernant le déplacement et logement des témoins appelés à comparaître dans la présente affaire"*, 27 June 2011, ICC-01/04-01/07-3035-Conf.

² ICC-01/04-01/07-3035-Conf, paras. 5, 17 and 19.

³ Defence for Germain Katanga, *"Defence Response to Requête en clarification quant à la pratique concernant le déplacement et logement de témoins appelés à comparaître dans la présente affaire"*, 11 July 2011, ICC-01/04-01/07-3067-Conf.

⁴ ICC-01/04-01/07-3067-Conf, paras. 3-4 and 13.

⁵ *Ibid.*, paras. 8-9 and 13.

called by the various parties and consequently breach the principle of equality of arms.⁶

3. The other parties and participants did not file observations in response to the Application within the deadline stipulated in regulation 34 of the Regulations of the Court.

II. Discussion

4. The Chamber would begin by expressing its surprise that the Legal Representative is requesting clarification on a topic that has been discussed repeatedly throughout the hearings, which, as the Defence rightly recalls, is addressed in the VWU Protocol on witness familiarisation applicable to the present case ("the Protocol"),⁷ and has already been clarified on several occasions.⁸ Consequently, it considers this request to be moot.

5. With regard to the request for information filed by the Legal Representative, the Chamber considers it appropriate to recall the position adopted by Trial Chamber I in the *Lubanga* case,⁹ which served as the guideline for drafting the Protocol:

31. The Trial Chamber is unpersuaded that all the witnesses to be called during the trial need to travel to court and to be accommodated separately. Instead, appropriate, fact-sensitive decisions should be made, bearing in mind particularly the personal circumstances of each witness and the areas of evidence they will be addressing. For instance, it would be without real purpose to separate – at this late stage – witnesses who are currently, or in the recent past have been, in regular contact with each other. Furthermore, with witnesses who have not been in contact with each other, often there would be little point in taking steps to keep them apart if their evidence does not materially overlap as regards the events they will address in court. Even with witnesses where there is a risk that they may speak with each other about events in ways that could

⁶ Ibid., paras. 5 to 7 and 19-22.

⁷ Registry, "Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial", 21 January 2009, ICC-01/04-01/07-842-Conf-Anx.

⁸ See, for example, an e-mail sent on 27 January at 11.52 by a Legal Officer of the Chamber to the Victims and Witnesses Unit and to all the parties and participants, set out in the annex. Also see the statement of the Presiding Judge at the hearing of 30 May 2011, following an exchange of e-mails between the Office of the Prosecutor and the VWU, set out in the annex to the Defence response (ICC-01/04-01/07-3067-Conf-Anx1): ICC-01/04/07-T-271-Red-FRA WT, pp. 1-2.

⁹ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, "Decision regarding the Protocol on the practices to be used to prepare witnesses for trial", 23 May 2008, ICC-01/04-01/06-1351, paras. 31-33.

influence their respective accounts, the broad picture needs to be considered before a decision is taken. Whilst it may be preferable to keep witnesses in this latter category apart, finance, logistics, available accommodation and protective measures, along with the well-being of the witnesses may collectively or individually tend towards a conclusion in favour of keeping them together as regards travel or accommodation, or both. Accordingly, although measures that would facilitate separation should be considered and implemented if feasible, this is a multifaceted issue which should be approached with care and sensitivity.

32. The critical requirement is that if witnesses are housed or travel together, regardless of the extent to which their accounts overlap, they should be warned with appropriate regularity that they must not discuss their impending evidence with each other (or anyone else).

33. If a party considers that witnesses with overlapping accounts should be kept apart, they have an obligation to inform the VWU as to which witnesses fall into this category. The presumption will be that the VWU is to implement this separation unless it can show the party or, in case of dispute, the Chamber good reason as to why it is either unnecessary or impractical.

If follows that the principles laid down in the Protocol were founded on the assumption that when witnesses travel together and share accommodation this does not necessarily imply an increased risk of "contamination". Furthermore, it should be recalled that under the Protocol, it is for the parties to request the adoption of such measures if they deem them necessary for some witnesses, rather than to exploit their absence afterwards.

6. Thus, in the view of the Chamber, the rationale of the current system, which does not prevent witnesses from travelling together or sharing accommodation, unless otherwise decided, opposes disclosure of the information that the Legal Representative would like to see provided to the parties and participants. In fact, as the Defence notes, it would be unfair to doubt the credibility of certain testimonies on the sole ground that separation measures were adopted for some witnesses and not for others.

7. Hence, the Chamber holds that any contacts between witnesses during the familiarisation process are not intended to be brought to the attention of the parties and participants. Such is, indeed, the message which the Chamber believes to have conveyed at the hearing of 30 May 2011.

FOR THESE REASONS, THE CHAMBER:

DECLARES the request for clarification to be moot;

REJECTS all other points of the Application;

ORDERS the reclassification of filing ICC-01/04-01/07-3035-Conf as a public document; and

DIRECTS the Defence to file a public version of its filing ICC-01/04-01/07-3067-Conf as soon as possible, while ensuring that the names of Court staff mentioned therein are redacted, since the annex is intended to remain confidential.

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 18 August 2011

At The Hague, The Netherlands