

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: French

No.: ICC-01/04-01/07
Date: 22 February 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 the application for the institution of protective measures for
Witnesses a/0381/09, a/0018/09, a/0191/08, pan/0363/09 and Victim a/0363/09, issued
on 27 January 2011**

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 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

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 articles 64, 67 and 68 of the Rome Statute (“the Statute”), rule 87 of the Rules of Procedure and Evidence, regulation 20 of the Regulations of the Court, and regulation 94 of the Regulations of the Registry, decides as follows.

I. BACKGROUND

1. On 9 November 2010, the Chamber authorised Mr Luvengika (“the Legal Representative”) to call as witnesses the following victims participating in the case: a/0381/09, a/0018/09, a/0191/08 and pan/0363/09 acting on behalf of Victim a/0363/09.¹ The last victim will also testify as a witness of the Court.²

2. As victims, each of these persons had already been granted anonymity *vis-à-vis* the public.³ On 15 November 2010, their Legal Representative filed an application for all appropriate measures to be taken to protect their anonymity during their testimony and throughout the proceedings (“the Application”).⁴

3. In the view of the Legal Representative, the security of a/0381/09, a/0018/09 and a/0191/08 would be jeopardized were their identity to be made public since these persons live in Ituri Province, the Democratic Republic of the Congo (“DRC”), where armed militias remain active.⁵ As regards Victim a/0363/09, his status as a minor and his unawareness of his true family situation, in the opinion of the Legal Representative, particularly warrants the institution of such measures.⁶ Mr Luvengika further points out that although a/0363/09 and pan/0363/09 live outside of

¹ *Décision aux fins d'autorisation de comparution des victimes a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 agissant au nom de a/0363/09*, 9 November 2010, ICC-01/04-01/07-2517.

² *Ibid.*, paras. 18-20 and p. 21.

³ See in particular the oral decision on the fourth submission on the disclosure of the victims' identity issued on 18 February 2010, ICC-01/04-01/07 ET, pp. 33-34.

⁴ Legal Representative of the main group of victims, “*Requête aux fins de mesures de protection des victimes a/0381/09, a/0018/09, a/0191/08, a/0363/09 et de pan/0363/09*”, 15 November 2010, ICC-01/04-01/07-2533-Conf.

⁵ *Ibid.*, paras. 4-7.

⁶ *Ibid.*, paras. 8-11 and 15.

Ituri, intimidation cannot be ruled out. Moreover, he emphasises that none of these persons is covered by the Court's Protection Programme and they all fear the consequences of testifying in public.⁷ Finally, he requests that the parties be reminded of their obligations when conducting their investigations, in which regard he stresses the specific situation of Victim a/0363/09, who is a minor.⁸

4. In its observations filed on 22 November 2010, the Defence for Mathieu Ngudjolo essentially defers to the wisdom of the Chamber.⁹ The Defence for Germain Katanga did not file any submission within the prescribed time limits.

5. For its part, the Office of the Prosecutor maintains that their personal situations render necessary the protective measures requested for these witnesses.¹⁰

6. Finally, the Victims and Witnesses Unit ("the VWU") repeated the suggestions for protective measures for testifying victims which it had made at a meeting with the Legal Representative.¹¹ Subsequently, at the Chamber's direction, it provided an updated report on 16 December 2010, assessing the potential risks to the four witnesses were their identity to be made public during their testimony.¹²

⁷ *Ibid.*, paras. 9-11.

⁸ *Ibid.*, paras. 13-15, which refer, *inter alia*, to the Decision on the "Protocol on investigations in relation to witnesses benefiting from protective measures", 26 April 2010, ICC/01/04-01/07- 2047-tENG.

⁹ Defence for Mathieu Ngudjolo, "Observations de la Défense de Mathieu Ngudjolo relatives à la « Requête aux fins de mesures de protection des victimes a/0381/09, a/0018/09, a/0191/08, a/0363/09 et de pan/0363/09 » ICC-01/04-01/07-2533-Conf du 15 novembre 2010", 22 November 2010, ICC-01/04-01/07-2549-Conf, paras. 12-23.

¹⁰ Office of the Prosecutor, "Observations du Bureau du Procureur sur la Requête aux fins de mesures de protection des victimes a/0381/09, a/0018/09, a/0191/08, a/0363/09 et de pan/0363/09 déposée par le Représentant légal commun du groupe principal de victimes (ICC-01/04-01/07-Conf)", 22 November 2010, ICC-01/04-01/07-2548-Conf. See in particular paras. 7-11.

¹¹ Registry, "Recommandations de l'Unité des victimes et des témoins s'agissant des mesures de protection sollicitées pour le bénéfice des victimes a/0381/09, a/0018/09, a/0191/08, a/0363/09 et pan/0363/09, enregistrées au dossier conformément aux instructions de la Chambre de première instance II en date du 16 novembre 2010", 23 November 2010, ICC-01/04-01/07-2572-Conf.

¹² Registry, "Rapport d'évaluation actualisé de l'Unité d'aide aux victimes et aux témoins relatifs aux risques qu'encourraient les victimes a/0381/09, a/0018/09, a/0191/08, a/0363/09 ainsi que pan/0363/09", 16 December 2010, ICC-01/04-01/07-2634-Conf.

7. In its report, the VWU re-emphasises the risks posed to Witnesses a/0381/09, a/0018/09 and a/0191/08 by their forthcoming cooperation with the Court in light of their places of residence, and expresses its fear of possible reprisals.¹³ The VWU further considers it appropriate to grant pan/0363/09 and a/0363/09 anonymity in order to preserve their security and privacy.¹⁴ Accordingly, the VWU recommends the use of a pseudonym, the application of voice and image distortion, and closed sessions where oral testimony will enable the witness to be identified.¹⁵ It takes the view that these measures should be effective in limiting the risks to these persons' security without causing upheaval in their daily lives.¹⁶

II. DISCUSSION

8. The Chamber reiterates the importance it attaches to the public nature of proceedings, as enshrined in articles 67(1) and 64(7) of the Statute. This principle cannot, however, be taken as absolute when the "safety, physical and psychological well-being, dignity and privacy of victims and witnesses" are at issue.¹⁷

9. The fact remains that protective measures must only be granted on an exceptional basis, following a case-by-case assessment of their necessity and proportionality in respect of the rights of the accused.¹⁸

10. All three witnesses, a/0381/09, a/0018/09 and a/0191/08, are women of the Hema ethnic group who were living in Bogoro at the time of the attack.¹⁹

¹³ *Ibid.*, paras. 1-4.

¹⁴ *Ibid.*, paras. 5-6.

¹⁵ *Ibid.*, p. 5.

¹⁶ *Ibid.*, paras. 7-8.

¹⁷ Article 68(1) of the Statute. In this regard, see also article 68(2) of the Statute and rules 87 and 88 of the Rules.

¹⁸ ICC-01/04-01/07-1667-Red, para. 9; ICC-01/04-01/07-T-82-CONF-Red-FRA ET, 25 November 2009, p. 2 and the oral rulings granting in-court protective measures for witnesses testifying before the Chamber, for example ICC-01/04-01/07-T-138-CONF-FRA ET, 10 May 2010, p. 16.

¹⁹ ICC-01/04-01/07-2393-Conf-AnxD-Red; ICC-01/04-01/07-2393-Conf-AnxB-Red; ICC-01/04-01/07-2393-Conf-AnxA-Red.

[REDACTED]²⁰ and [REDACTED].²¹ In this context, the VWU stressed that the relative stability enjoyed by the region remains fragile due to the existence of militias, such as the *Front Populaire pour la Justice au Congo* [Popular Front for Justice in Congo]. Moreover, the recent arrest of its leader risks dispersing the militia members and could constitute a real threat to security.²²

11. The Chamber further observes that these three witnesses may provide incriminating evidence and could therefore, in the view of the VWU and the Office of the Prosecutor, become the target of reprisals by persons seeking to show their support for the Accused persons, or who view their testimony as a threat to them.²³

12. Victim a/0363/09, who was a minor at the time of the events of which the Chamber is seized, is unaware that his biological parents were killed during the attack on Bogoro and that he was adopted by the family of pan/0363/0924.²⁴ The Chamber considers that the psychological repercussions and consequences for the privacy of these two persons that could result from the public disclosure of their identity at the hearing argue for the maintenance of their anonymity.

13. The Chamber further observes that the VWU mentions the harassment suffered by certain witnesses upon their return to the DRC on account, *inter alia*, of rumours that they were offered financial reward in exchange for their testimony.²⁵ It also notes that the witnesses concerned have themselves expressed the fear of being targeted by intimidation were members of their family or community to become aware of their testimony before the Court, and that this could inhibit them from expressing themselves as freely as is necessary.²⁶

²⁰ ICC-01/04-01/07-2393-Conf-AnxA, p. 1.

²¹ ICC-01/04-01/07-2393-Conf-AnxB-Red, p. 1; ICC-01/04-01/07-2393-Conf-AnxD-Red, p. 1.

²² ICC-01/04-01/07-2634-Conf, para. 2.

²³ *Ibid.*, para. 3; ICC-01/04-01/07-2548-Conf, para. 10.

²⁴ ICC-01/04-01/07-2634-Conf, paras. 6-7; ICC-01/04-01/07-2393-Conf-AnxC-Red.

²⁵ ICC-01/04-01/07-2634-Conf, para. 4.

²⁶ ICC-01/04-01/07-2533-Conf, para. 10.

14. Finally, the Chamber underscores that these witnesses [REDACTED].²⁷

15. Accordingly, the Chamber holds that the anonymity of Witnesses a/0381/09, a/0018/09, a/0191/08 and pan/0363/09 must be preserved, as must that of Victim a/0363/09. It follows that the witnesses' images and voices must be distorted before being publicly broadcast. In addition, the Chamber will order closed sessions when these persons enter and exit the courtroom and when potentially identifying questions are put to them. The Chamber will also be particularly vigilant in preserving the psychological well-being and privacy of Victim a/0363/09, who is a minor. More generally, the Chamber invites the Legal Representative and the parties to follow the "best practices" set out in its oral decision of 20 September 2010.²⁸

16. The Chamber is of the view that the arrangements for testimony thus ordered are not prejudicial to the fairness of the trial. Other than when a closed session is ordered, the public will be able to keep abreast of the proceedings and their content.

Lastly, as regards the Legal Representative's concerns about the investigations that the parties are conducting into these witnesses and the circumstances in which the witnesses may be contacted,²⁹ the Chamber wishes to point out that the "Protocol on investigations in relation to witnesses benefiting from protective measures" is already applicable to them as victims and so remains now that they are protected witnesses.³⁰ Finally, the Chamber further recalls that it has already ruled on arrangements for contact between the parties and these four victims who have been authorised to testify as witnesses.³¹

²⁷ *Ibid.*, para. 9.

²⁸ ICC-01/04-01/07-T-189-ENG ET, 20 September 2010, pp. 8-16.

²⁹ ICC-01/04-01/07-2533-Conf, paras. 13-15 and 22.

³⁰ ICC/01/04-01/07-2047, para. 15. For the protocol, see ICC-01/04-01/07-1956-Anx1.

³¹ ICC/01/04-01/07-2517, paras. 37-38.

FOR THESE REASONS, THE CHAMBER

GRANTS the Application;

ORDERS that the anonymity of a/0381/09, a/0018/09, a/0191/08, pan/0363/09 and a/0363/09 be maintained *vis-à-vis* the public and that they be referred to by their pseudonyms for the entire duration of the proceedings; and

DECIDES that the voices and images of Witnesses a/0381/09, a/0018/09, a/0191/08 and pan/0363/09 shall be distorted *vis-à-vis* the public during their testimony.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Van den Wyngaert

Dated this 22 February 2011

At The Hague, The Netherlands