



Original: **French**

No.: ICC-01/04-01/07
Date: **9 December 2009**

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

**Order on protective measures for certain witnesses called by the Prosecutor and the
Chamber (Rules 87 and 88 of the Rules of Procedure and Evidence)**

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

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

Office of Public Counsel for Victims

**Office of Public Counsel for the
 Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Other

**Victims Participation and Reparations
 Section**

TRIAL CHAMBER II of the International Criminal Court (“the Chamber”), acting pursuant to articles 64(2), 64(6)(e), 67(1), 68(1) and 68(2) of the Rome Statute (“the Statute”), rules 87, 88 and 134(1) of the Rules of Procedure and Evidence (“the Rules”) and regulation 43 of the Regulations of the Court, orders the following.

I. Background

1. On 28 August 2009, the Prosecutor submitted an application (“the 28 August 2009 Application”) requesting the Chamber to order protective measures for Witnesses 2, 12, 28, 30, 132, 157, 159, 160, 161, 166, 219, 233, 238, 249, 250, 267, 268, 279, 280, 287, 323 and 353, whom he intends to call to testify.¹ The Defence for Mathieu Ngudjolo filed its observations on 16 September 2009,² and the Defence for Germain Katanga filed its observations on 22 September 2009.³

2. The Prosecutor is requesting that the identity of the aforementioned 22 witnesses not be disclosed to the public during the proceedings, either because they are participating in the Court’s protection programme (“the Protection Programme”) or because they are vulnerable.⁴ Amongst other things, he requests that they be referred to during their testimony by a pseudonym and that their voice and image be distorted. He further requests that those parts of the testimony which might lead to their identification despite the protective measures be conducted in closed session. He also seeks additional measures for victims of sexual violence so that they may be allowed to give evidence from outside the courtroom via closed-circuit video link and have a trusted person with them.⁵ Lastly, to comply with rule 87(2)(c) of the

¹ Office of the Prosecutor, “*Requête de l’Accusation demandant l’adoption de mesures de protection aux termes des règles 87 et 88 pour certains témoins cités à comparaître par l’Accusation*”, 28 August 2009, ICC-01/04-01/07-1440.

² Defence Team for Mathieu Ngudjolo “*à la requête 1440 de l’Accusation visant à obtenir des mesures de protection sur la base des règles 87 et 88 du RPP pour les témoins cités à comparaître par l’Accusation*”, 16 September 2009, ICC-01/07-01/07-1475.

³ Defence Team for Germain Katanga, “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 cités à comparaître par l’Accusation*’ (ICC-01/04-01/07-1440)”, 22 September 2009, ICC-01/04-01/07-1486.

⁴ ICC-01/04-01/07-1440, paras. 2 and 4.

⁵ ICC-01/04-01/07-1440, paras. 5-6.

Rules, the Prosecutor proposes that the Chamber modify the notification of said protective measures to the witnesses concerned.⁶

3. The Defence for Mathieu Ngudjolo submits that the 28 August 2009 Application is inconsistent with the case law of the ad hoc tribunals and of Trial Chamber I in *Lubanga* and must therefore be rejected.⁷ It contends that the Prosecutor seeks all of the measures under rules 86 and 87 of the Rules for all of the witnesses, without providing grounds according to the circumstances and requirements of each witness.⁸ Lastly, it argues that the measures requested by the Prosecutor place excessive emphasis on witness protection, to the detriment of both the right of the Accused to a public trial and the right of the international community to be fully informed about the cases tried by the Court.

4. The Defence for Germain Katanga challenges the said Application on the ground that it takes insufficient account of the individual circumstances of the witnesses.⁹ It submits that, in their current form, the Prosecutor's requests are unwarranted, since they are being sought as a blanket measure, with no subjective analysis of each witness.¹⁰ It further submits that such measures unduly infringe upon Germain Katanga's right to a fair and public trial,¹¹ and it highlights the importance of public trials in international criminal proceedings.¹²

5. The Chamber consulted the Victims and Witnesses Unit ("VWU") in order to obtain its opinion on the protective measures sought in the Prosecutor's Application.¹³

⁶ *Ibid.*, para. 7.

⁷ ICC-01/07-01/07-1475, paras. 4 and 6-9.

⁸ *Ibid.*, paras. 15 to 22.

⁹ ICC-01/04-01/07-1486, paras. 5, 10-11 and 12.

¹⁰ *Ibid.*, paras. 3-5.

¹¹ *Ibid.*, paras. 6-8.

¹² *Ibid.*, paras. 13-16.

¹³ E-mail from the Legal Adviser to the Trial Division to the Victims and Witnesses Unit on 17 November 2009.

6. Furthermore, as the first witness called in the instant case is scheduled to appear, the Prosecutor also applied to the Chamber on 11 November 2009 for specific protective measures (“the 11 November 2009 Application”).¹⁴ The Prosecutor states that the identity of [REDACTED], Head of Investigations in *Katanga and Ngudjolo* must not be disclosed to the public, since her safety [REDACTED] would be jeopardised. He adds that Prosecution investigations might also be affected.¹⁵ Furthermore, he submits that [REDACTED]. He therefore requests the use of a pseudonym and image distortion for this witness.¹⁶

7. On 17 November, the Defence for Mathieu Ngudjolo filed observations¹⁷ recalling the rights of the Defence which the Chamber must take into account in its ruling.¹⁸ The Defence for Germain Katanga did not file any written submissions on this matter.

II. DISCUSSION

8. The Chamber recalls that trials before the Court are public, in accordance with article 67(1) of the Statute and regulation 20 of the Regulations of the Court. However, in order to protect “the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”,¹⁹ the Court’s core legal documents provide for exceptions to this principle. Accordingly, the Chamber may order that certain parts of the proceedings be conducted in closed session or allow witnesses to

¹⁴ Office of the Prosecutor, “*Observations de l’Accusation concernant le témoignage de ‘Responsable des enquêtes’ et demande de mesures de protection pour ce dernier*”, 11 November 2009, ICC-01/04-01/07-1624-Conf.

¹⁵ ICC-01/04-01/07-1624-Conf, para. 4.

¹⁶ ICC-01/04-01/07-1624-Conf, para. 4.

¹⁷ Defence for Mathieu Ngudjolo, “*Réponse de la Défense de Mathieu Ngudjolo aux ‘Observations de l’Accusation concernant le témoignage de “Responsable des enquêtes” et demande de mesures de protection pour ce dernier*”, 17 November 2009, ICC-01/04-01/07-1646-Conf.

¹⁸ ICC-01/04-01/07-1646-Conf, paras. 6 to 8.

¹⁹ Article 68(1) of the Statute. To this end, see also rules 87 and 88 of the Rules.

testify by “electronic or other special means”.²⁰ It may also order measures to protect the identity of witnesses, including the use of pseudonyms and distortion of the voice and image of a witness called to give evidence.²¹

9. Such measures must therefore be granted only on an exceptional basis, following a case-by-case assessment of whether they are necessary and proportionate to the rights of the Accused.

(1) The 28 August 2009 Application

(a) Protected or at-risk witness

10. [REDACTED]. [REDACTED]. These witnesses were assessed individually and, on the basis of a number of factors, VWU considered that they had to be granted protective measures for security reasons.

11. VWU considers that the protective measures sought by the Prosecutor would enable the relocated witnesses to continue living in their current location without fear of being recognised or needing to be relocated once again.²² In no circumstances does the Chamber wish witnesses or their families to be put at risk, nor does it wish to defeat the objectives of the Protection Programme. In this connection, it recalls that public hearings are broadcast on the internet with a 30-minute delay. Accordingly, it is crucial that the anonymity of these witnesses be preserved, and the requested protective measures are the only means of doing so.

12. Such measures must include voice and image distortion. Accordingly, the Registry must make arrangements so as to prevent any person outside the courtroom

²⁰ Article 68(2) of the Statute and rule 87(3)(c) of the Rules.

²¹ Rule 87 of the Rules and regulation 94 of the Regulations of the Registry.

²² E-mail from the Victims and Witnesses Unit to the Legal Adviser to the Trial Division on 19 November 2009.

from identifying the witnesses. Furthermore, it is appropriate that the witnesses be referred to by pseudonyms during the hearings.²³

13. The Chamber considers that these arrangements for testifying will not undermine the fairness of the trial. The Defence is now aware of the identity of all prosecution witnesses bar one, which will be disclosed 45 days prior to that witness's testimony. The Accused will be able to see witnesses give evidence at trial and hear their voices without distortion. Furthermore, unless a closed session is ordered, the public will be able to follow the trial and know what is discussed. While it is fully cognisant of the importance of the public nature of hearings, and while it intends to respect that principle, the Chamber considers that these measures will be required to an extent which may limit its scope. However, these are minimal restrictions which have no substantive impact on the rights of the Defence.

(b) Vulnerable witnesses

14. The Chamber recalls that the Statute provides that special measures may be taken, "in particular" for the testimony of victims of sexual violence,²⁴ and that under rule 88 of the Rules, a chamber may order special measures to facilitate the testimony of witnesses and victims of sexual violence. However, the Chamber does not consider it appropriate at this juncture, without prior consultation with the person concerned, to order measures enabling testimony to be given via closed-circuit televisions as the Prosecutor requests.²⁵ Furthermore, prior to making recommendations, VWU would like to be able to meet with witnesses when they arrive at the seat of the Court in order to assess their needs.²⁶

²³ VWU stated that it was in favour of the use of pseudonyms. However, there is a possibility that certain witness might prefer their chosen pseudonym rather than their protection number. See the e-mail from the Victims and Witnesses Unit to the Legal Adviser to the Trial Division on 19 November 2009.

²⁴ Article 68(1) and 68(2) of the Statute.

²⁵ ICC-01/04-01/07-1440, para. 5.

²⁶ E-mail from the Victims and Witnesses Unit to the Legal Adviser to the Trial Division on 19 November 2009.

15. Accordingly, the Chamber will base its assessment of whether special measures should be ordered and, if so, which measures are most appropriate, on the observations of VWU. In addition to the measures already envisaged for protected and at-risk witnesses, such measures may comprise special provisions to prevent a witness from having eye contact with the Accused.²⁷ The witness may also be accompanied by a trusted person while testifying if he or she so desires.

(c) Particular circumstances of Witnesses 161, 166, 233 and 323

16. [REDACTED]. However, VWU informed the Chamber that it did not have any information which would enable it to comment on whether or not it would be of use to grant the measures sought by the Prosecutor. In this respect, the Chamber notes that the Prosecutor did not provide any specific information about the risks that each of these [REDACTED] witnesses would face, were their identity to be disclosed to the public. The Prosecutor is therefore invited to provide the Chamber with any additional information, on a case-by-case basis and in light of the observations made by the witnesses themselves after the familiarisation session they are invited to attend upon their arrival in The Hague.

17. In the meantime, however, the Chamber considers that it is crucial that Witnesses [REDACTED] be referred to by their protection number until it receives confirmation from the Prosecutor that they have been informed that their identity will be disclosed to the public. It will make a final, oral ruling on a case-by-case basis once it has received the information required to make an informed decision.

c) Notification to the witnesses

18. The Chamber is of the view that it is for VWU to notify the Application to the witnesses in the days prior to their giving evidence, once they have arrived in The Hague.

²⁷ Article 65(2) of the Statute and rules 87 and 88 of the Rules.

(2) The 11 November 2009 Application

19. [REDACTED] was called to appear by the Chamber in her capacity as the Head of Investigations for this case. She will be the first witness to appear at trial.²⁸ The Chamber has noted that [REDACTED]. [REDACTED], the Chamber is of the view that this witness's image should be distorted and that she should be assigned a pseudonym. It recalls that such a measure does not prevent the public from being able to follow the hearings, and the witness's name is known to the Defence. Accordingly, the Chamber considers that, in the circumstances, the measures are minimal and proportionate to any potential harm to the Accused's right to a public trial.

(3) Redactions to the transcripts and video broadcast

20. Furthermore, the Chamber considers that, as a corollary to the protective measures granted to protected or at-risk witnesses, any information which might lead to their identification must be redacted from the public transcripts and video broadcasts. In the interest of consistency, the Chamber will use the measures adopted in *Lubanga*²⁹ as a basis to define the following rules. It would note at this point that, should it grant anonymity to additional witnesses, these same rules must be followed. The following will be redacted, *inter alia*:

- the witness's name, alias or nickname;
- the witness's gender, if this would help to identify the witness;
- any information which might enable the witness's current or past places of residence to be identified, and any references to dates or time periods which might identify the witness;
- any information about the witness's spouse or family which might lead to the identification of the witness;

²⁸ *Decision on the Application by the Defence for Mathieu Ngudjolo for Postponement of the Commencement Date for the Hearings on the Merits (Rule 132(1) of the Rules of Procedure and Evidence)*, 5 November 2009, ICC-01/04-01/07-1603-tENG.

²⁹ ICC-01/04-01/06-T-105-ENG ET WT 22-01-2009.

- any information concerning the witness's nationality, ethnic origin or religious affiliations, if it would distinguish him or her from another witness;
- references to the witness's past or present jobs or duties which would distinguish him or her from another witness;
- information about the witness's personal features and characteristics if sufficient to distinguish him or her from other witnesses;
- information linked to the Protection Programme which would identify the witness and his or her place of residence and which would have a negative impact on the programme; and
- information about the functioning and procedures of VWU which would jeopardise its activities within the Protection Programme, and the identity of staff members in contact with protected witnesses.

(4) Closed sessions

21. Lastly, with respect to those parts of testimony which might lead to the identification of a witness, victim or any other person at potential risk as a result of the testimony, or of such person's location, the Chamber will consider whether it is necessary to order a closed session on a case-by-case basis, at the appropriate time and in light of the principles set out in paragraphs 8 and 9 of this order.

FOR THESE REASONS, the Chamber

ALLOWS the Application of 11 November 2009;

PARTIALLY ALLOWS the Application of 28 August 2009, and to this end:

ORDERS the Prosecutor to inform the Chamber, as soon as possible after their arrival in The Hague, whether Witnesses [REDACTED] consent to the protective measures granted, or to provide grounds for varying the measures;

ORDERS the Prosecutor to provide the Chamber with any additional supporting information for the protective measures sought, on a case-by-case basis and in light of the observations made by Witnesses [REDACTED] at the end of the familiarisation process which they will be invited to attend upon their arrival in The Hague;

ORDERS the Registry to preserve the anonymity of Witnesses [REDACTED] in relation to the public, the press and other information agencies, and to implement the appropriate measures set out in this order; and

PROHIBITS the Defence and the legal representatives of the victims from disclosing to a third party the identity of the 22 witnesses listed in the 28 August 2009 Application, and the identity of the witness who is the subject of the 11 November 2009 Application, as well as any information which might lead to their identification.

Done in both English and in 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 9 December 2009
 At The Hague, The Netherlands