



Original: **French**

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

Date: **10 March 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

**Public redacted version of the Decision on the Office of the Prosecutor's request to
communicate with Witness P-250 (ICC-01/04-01/07-2711-Conf, 18 February 2011)**

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

Office of the Prosecutor

Mr Luis Moreno-Ocampo
Mr Éric MacDonald

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 for
Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Counsel Support Section

Deputy Registrar

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 and 68 of the Rome Statute (“the Statute”) decides the following.

1. On 7 January 2011, the Victims and Witnesses Unit (“VWU”) submitted to the Chamber its second report on the situation of Witness P-250 (“Witness 250”).¹ This report states that, VWU having received information that [REDACTED] his security is not guaranteed, despite VWU having reminded him of this fact on several occasions, the Registrar decided to terminate the Witness’s participation in the Court’s Protection Programme (“the Programme”) and to prepare an exit strategy.² This procedure would now appear to be nearing completion, and VWU is due to report to the Chamber on 25 February 2011.

2. On 18 January 2011, the Office of the Prosecutor submitted a request seeking the Chamber’s leave to contact Witness 250 to discuss his security and protection, also requesting the Chamber to issue instructions with regard to post-testimony contact with witnesses (“the Prosecutor’s Request”).³

3. The Prosecutor considers that, under articles 54 and 68 of the Statute, the consequence of Witness 250’s exit from the Programme will be to transfer responsibility for the witness’s protection from VWU to the Office of the Prosecutor.⁴ The Prosecutor notes that the Chamber has never expressly prohibited post-testimony contact between a witness and the party which called the witness. He

¹ Registry, “*Second rapport de l’Unité d’aide aux victimes et aux témoins sur la situation du témoin DRC-OTP-P-250*”, 7 January 2011, ICC-01/04-01/07-2641-Conf-Exp. A confidential redacted version was filed on 12 January 2011 (ICC-01/04-01/07-2641-Conf-Red).

² *Ibid.*, paras. 3-5, 8 and 9.

³ Office of the Prosecutor, “Prosecution’s request to communicate with trial Witness P-250 to discuss security related matters and for the issuance of instructions in relation to post-testimony contacts with trial witnesses”, 18 January 2011, ICC-01/04-01/07-2654-Conf.

⁴ *Ibid.*, para. 2.

further recalls Trial Chamber I's instructions that "[d]iscussions with a witness about his or her testimony should be delayed until the close of the evidence in the case unless the Chamber has made an order on a[n] application for this to happen earlier",⁵ and urges the Chamber to adopt similar rules to avoid any risk of contamination of witnesses.

4. The Prosecutor states that post-testimony contact has so far been authorised by Trial Chamber I in the following circumstances: (1) to thank the witnesses;⁶ (2) to discuss matters pertaining to their security;⁷ and (3) to confront the witnesses with fresh information received from the Defence.⁸ He further recalls that the Chamber took formal note⁹ of the "Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial" ("the Registry Protocol")¹⁰ but emphasises that the Registry Protocol does not incorporate the practice of Trial Chamber I.¹¹

5. In an e-mail dated 19 January 2011, the Chamber requested the parties and participants to respond to the Prosecutor's Request no later than 31 January 2011.¹²

⁵ *Ibid.*, para. 4, and ICC-01/04-01/06-T-104-ENG ET WT 16-01-2009, p. 26, lines 7-9. The French version of the text reads as follows: "*Toute discussion avec un témoin concernant sa déposition devra attendre la fin de la déposition à l'audience, à moins que la Chambre n'ait rendu une ordonnance suite à une requête tendant à ce que cela se produise avant*". See ICC-01/04-01/06-T-104-FRA ET WT 16-01-2009, p. 25, lines 20-23. The Chamber notes that the term "*déposition*" included in the French version of the hearing transcript does not reflect the English version of the transcript, which uses the term "evidence" and which should serve as the reference.

⁶ ICC-01/04-01/06-T-114-Red-ENG CT WT, p. 89, lines 7-13.

⁷ ICC-01/04-01/06-T-119-Red2-ENG CT WT, p. 88, line 3, to p. 89, line 5.

⁸ ICC-01/04-01/07-2654-Conf, para. 5, referring to ICC-01/04-01/06-2192-Conf.

⁹ *Ibid.*, para. 3. See also *Decision on a number of procedural issues raised by the Registry*, 14 May 2009, ICC-01/04-01/07-1134, para. 18.

¹⁰ Registry, "Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial", 16 January 2009, ICC-01/04-01/07-842-Conf-Anx.

¹¹ ICC-01/04-01/07-2654-Conf, para. 4.

¹² E-mail from a legal officer of the Chamber to all the parties and participants at 9.25 a.m. on 19 January 2011.

6. On that date, the Defence for Mathieu Ngudjolo made it known that it was opposing the Prosecutor's Request.¹³ Firstly, it maintains that the Request has no legal basis whatsoever, as articles 54 and 68 of the Statute do not, in its view, entail any transfer of responsibility to the Office of the Prosecutor for the protection of a witness excluded from the Programme.¹⁴ Secondly, it considers that the meeting sought by the Prosecutor would be inappropriate, as, [REDACTED], Witness 250 has demonstrated his desire to leave the Programme and therefore no longer fears for his safety.¹⁵ The Defence for Germain Katanga did not file a response to the Prosecutor's Request.

7. Still on 31 January 2011, the Legal Representatives of Victims jointly submitted their observations on the Prosecutor's Request, arguing that it should be granted.¹⁶ In their view, the general principle accepted in *Lubanga*, prohibiting post-testimony contact unless authorised by the Chamber, should apply in the present case.¹⁷ Nonetheless, the Legal Representatives emphasised, without prejudice to their position, that articles 54 and 68 of the Statute applied to the investigation and proceedings stages and could not apply where a witness was called to appear and/or had already given testimony before the Chamber.¹⁸ Moreover, they consider that such a principle cannot apply to the situation of witnesses who also have the status of victims participating in the proceedings. They argue therefore that, as they may have to meet their clients once the clients have completed their testimony, they should not be obliged to seek the Chamber's leave each time they wish to enter into

¹³ Defence for Mathieu Ngudjolo, "*Réponse de la Défense de Mathieu Ngudjolo à « Prosecution's request to communicate with trial Witness P-250 to discuss security related matters and for the issuance of instructions in relation to post-testimony contacts with trial witnesses »*", 31 January 2011, ICC-01/04-01/07-2670-Conf.

¹⁴ *Ibid.*, paras. 7-11.

¹⁵ *Ibid.*, paras. 14-19.

¹⁶ Legal Representatives of Victims, "*Réponse conjointe des représentants légaux à la requête du Procureur intitulée « Prosecution's request to communicate with trial Witness P-250 to discuss security related matters and for the issuance of instructions in relation to post-testimony contacts with trial witnesses »*", 31 January 2011, ICC-01/04-01/07-2673-Conf.

¹⁷ *Ibid.*, paras. 12, 13 and 18.

¹⁸ *Ibid.*, paras. 19 and 20.

a discussion with said clients, it being understood that the content of their testimony would not be discussed.¹⁹

8. On 1 February 2011, the Prosecutor sought leave to reply to the responses of the Defence for Mathieu Ngudjolo and the Legal Representatives regarding the extent of his protection-related obligations under articles 54 and 68 of the Statute once a witness has given testimony, regardless of whether the witness was ever in the Programme or has left it.²⁰ The Chamber gave leave for a reply to be submitted.²¹

9. In his reply of 4 February 2011,²² the Prosecutor submits that under article 68(1) of the Statute, the Court and the Office of the Prosecutor are obliged to protect individuals before they cooperate with the Court, during the entire duration of their cooperation and after they have cooperated.²³ The Prosecutor further submits that the Court and the Prosecutor are obliged under articles 54(3)(f) and 68(1) of the Statute to protect individuals no longer in the Programme.²⁴

10. With regard to the conditions in which a party may contact its witness after the witness testifies, the Chamber takes formal note of the practice of Trial Chamber I, which it intends to adopt. It holds, therefore, that once a witness has finished giving testimony, contact between the party which called the witness and the witness should be prohibited until all evidence has been presented in the case. It

¹⁹ *Ibid.*, para. 16.

²⁰ Office of the Prosecutor, “*Demande d’autorisation de répliquer aux Réponses de la Défense de Mathieu Ngudjolo et des Représentants légaux à la « Prosecution’s request to communicate with trial Witness P-250 to discuss security related matters and for the issuance of instructions in relation to post-testimony contacts with trial witnesses »*”, 1 February 2011, ICC-01/04-01/07-2677-Conf.

²¹ *Décision relative à la demande du Procureur sollicitant l’autorisation de déposer une réplique à l’écriture* ICC-01/04-01/07-2677-Conf, 2 February 2011, ICC-01/04-01/07-2680-Conf and ICC-01/04-01/07-2680-Conf-Corr.

²² Office of the Prosecutor, “*Prosecution’s reply to Defence and the Legal Representatives’ response to the Prosecution’s request to communicate with Witness P-250*”, 4 February 2011, ICC-01/04-01/07-2685-Conf.

²³ *Ibid.*, paras. 1-5.

²⁴ *Ibid.*, paras. 5-10.

agrees, however, following the example of Trial Chamber I, that in certain circumstances, it may be necessary for a party which called a witness to contact that witness again. In the Chamber's view, such exceptional situations must first be brought to its attention, after which it will rule on the merits of such requests on a case-by-case basis, and on the conditions in which such meetings may take place.

11. With regard to contacting witnesses of other parties or participants, the Chamber recalls the terms of its *Decision on a number of procedural issues raised by the Registry*²⁵ and emphasises that the rules it set out therein shall apply until the end of the hearings.

12. As concerns the specific situation of Witness 250, the Chamber considers that this situation warrants granting the leave sought by the Prosecutor. Even though Witness 250 seems to be about to leave the Programme, the risks facing him still exist. Indeed, the witness has, on several occasions, expressed his desire [REDACTED],²⁶ [REDACTED], in VWU's view, he would not be safe.²⁷ Accordingly, the Chamber considers that interviewing this witness will allow the Office of the Prosecutor to explore all issues relating to his security so that, where appropriate and in consultation with VWU, all the necessary measures can be taken. The Chamber further emphasises that VWU does indeed consider it a necessary part of its strategy for Witness 250's exit from the Programme to consult the Office of the Prosecutor.²⁸ Accordingly, it authorises the Office of the Prosecutor to communicate with Witness 250 for the sole purpose of discussing matters pertaining to security and protection. A VWU member shall be present at the interview and discussions on the content of the testimony shall be strictly prohibited.

²⁵ ICC-01/04-01/07-1134.

²⁶ ICC-01/04-01/07-2641-Conf-Exp, para. 3.

²⁷ *Ibid.*, para. 9.

²⁸ ICC-01/04-01/07-2641-Conf-Exp, para. 5.

13. Finally, the Chamber considers that the Legal Representatives of Victims, who represent, *inter alia*, individuals having the dual status of witness and victim participating in the proceedings, must be allowed to have discussions with their clients after they have given testimony, without having to obtain the prior consent of the Chamber. The Legal Representatives may not, however, discuss the content of the testimony given by their clients, unless expressly authorised by the Chamber.

FOR THESE REASONS, the Chamber

GRANTS the Prosecutor's Request under the conditions set out at paragraph 12 of the present decision.

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 March 2011

At The Hague, The Netherlands