

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: French

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

Date: 5 May 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public Document

**Order to convene an *ex parte* hearing on the protection of
Prosecution Witnesses 267, 353 and 219**

Order 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 the Defence of Germain

Katanga
 Mr David Hooper
 Mr Andreas O'Shea

**Counsel for the Defence of Mathieu
 Ngudjolo Chui**

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

Legal Representatives of Victims

Ms Carine Bapita Buyangandu
 Mr Joseph Keta
 Mr Jean-Louis Gilissen
 Mr Hervé Diakiese
 Mr Jean Chrysostome Mulamba
 Nsokoloni
 Mr Fidel Nsita Luvengika
 Mr Vincent Lurquin
 Ms Flora Ambuyu Andjelani

Legal Representatives of Applicants

Office of Public Counsel for Victims

Ms Paolina Massidda

**Office of Public Counsel for the
 Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Victims and Witnesses Unit

Mr Simo Väättäinen

Detention Section

**Victims Participation and Reparations
 Section**

Other

Trial Chamber II of the International Criminal Court ("the Chamber"), acting pursuant to regulation 30 of the Regulations of the Court, orders as follows:

1. On 23 January 2009, the Chamber ordered the Prosecutor, as he himself had proposed, to disclose to the Defence, no later than 30 January 2009,¹ the evidence on which he intended to rely at trial.² At an *ex parte* hearing restricted to the Office of the Prosecutor held on 28 January 2009, during which the issue of witness protection, amongst others, was discussed, the Prosecutor recalled that he intended to call new incriminating witnesses³ at the trial, in addition to those witnesses whose statements were used for the confirmation of charges hearing. He referred to the need for protective measures for these additional witnesses and repeatedly mentioned⁴ solutions he planned to adopt.

2. At the request of the Chamber,⁵ the Prosecutor committed his proposals to writing on 9 February 2009⁶ ("the Proposals"). The Defence teams⁷ and some of the Legal Representatives of Victims⁸ filed their observations on 20 February 2009. The

¹ Order Fixing the Schedule for Pre-Trial Disclosure of Incriminatory and Exculpatory Evidence and the Date of a Status Conference (rule 132 of the Rules of Procedure and Evidence), 23 January 2009, ICC-01/04-01/07-846-tENG, p. 8.

² Office of the Prosecutor, "Réponse de l'Accusation à l'« Ordonnance enjoignant aux participants et au Greffe de répondre aux questions de la Chambre de première instance II en vue de la conférence de mise en état (article 64-3-a du Statut) du 13 novembre 2008 »", 24 November 2008, ICC-01/04-01/07-764, p. 3; ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 46, lines 9 and 10, and p. 46, lines 24 and 25.

³ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 44, lines 2 to 20. See also, for example, ICC-01/04-01/07-T-54-CONF-EXP-ENG ET 28-01-2009, p. 75, lines 8 to 10.

⁴ ICC-01/04-01/07-T-54-CONF-EXP-FRA ET 28-01-2009, p. 102, lines 9 to 16; ICC-01/04-01/07-T-56-ENG ET WT 03-02-2009, p. 22, line 11 to p. 23, line 13.

⁵ ICC-01/04-01/07-T-56-ENG ET WT 03-02-2009, p. 26, lines 1 to 25.

⁶ Office of the Prosecutor, "Prosecution's Submissions on the Modalities of Disclosure Required for the Protection of Incriminating Witnesses", 9 February 2009, ICC-01/04-01/07-882.

⁷ Mathieu Ngudjolo's Defence Team, "Réponse de la défense aux « Mesures proposées par l'Accusation quant aux modalités de communication propres à assurer la protection des témoins à charge »", 20 February 2009, ICC-01/04-01/07-907; Germain Katanga's Defence Team, "Defence Response to the Prosecution's Submissions on the Modalities of Disclosure Required for the Protection of Incriminating Witnesses", 20 February 2009, ICC-01/04-01/07-909.

⁸ Legal Representatives of Victims a/0333/07 and a/0110/08, "Réponse des représentants légaux des victimes a/0333/07 et a/0110/08 aux « Prosecution's Submissions on the Modalities of Disclosure Required for the Protection of Incriminating Witnesses »", 20 February 2009, ICC-01/04-01/07-908; Legal Representatives of Victims, "Observations des représentants légaux de victimes sur les mesures proposées par l'Accusation quant aux modalités de communication propres à assurer la protection des témoins à charge", 20 February 2009, ICC-01/04-01/07-910.

Prosecutor subsequently clarified the situation of some of the additional witnesses at the status conferences held on 25 February⁹ and 16 March 2009.¹⁰ Furthermore, in an exchange of correspondence from 31 March to 3 April 2009 between the Chamber's Legal Adviser and the Prosecutor, the latter provided additional information about three incriminating witnesses.

a) Witnesses 267 and 353

3. On 8 April 2009, the Prosecutor filed a specific motion concerning the disclosure of the identity of Witnesses 267 and 353 ("the Motion")¹¹ and, on 23 April 2009, at the Chamber's request,¹² the Victims and Witnesses Unit ("the VWU") submitted a report commenting on the Proposals and addressing the specific modalities for the protection of the two above-mentioned witnesses ("the VWU's Report").¹³ On 27 April 2009, the Defence for Mathieu Ngudjolo¹⁴ and the Defence for Germain Katanga¹⁵ submitted their observations on the Motion. On 28 April 2009, the VWU submitted an addendum to its Report.¹⁶

⁹ ICC-01/04-01/07-T-60-CONF-EXP-ENG ET 25-02-2009.

¹⁰ ICC-01/04-01/07-T-62-CONF-EXP-ENG ET 16-03-2009.

¹¹ Office of the Prosecutor, *"Requête aux fins de divulgation différée de l'identité et des déclarations des témoins 0267 et 0353 et aux fins de communication à la Défense d'un résumé de leur déclaration dans l'intervalle"*, 8 April 2009, ICC-01/04-01/07-1044-Conf-Exp. See also the public redacted version of the Motion, ICC-01/04-01/07-1061.

¹² *Order to Consult the Victims and Witnesses Unit Regarding the Situation of Witnesses 219, 267 and 353*, 7 April 2009, ICC-01/04-01/07-1037-Conf-Exp-tENG.

¹³ Registry, *"Report pursuant to 'Ordonnance aux fins de Consultation de l'Unité d'aide aux victimes et aux témoins concernant la situation des témoins 219, 267 et 353'"*, 23 April 2009, ICC-01/04-01/07-1070-Conf-Exp.

¹⁴ Mathieu Ngudjolo's Defence Team, *"Observations de la Défense de Mathieu Ngudjolo relatives à la requête de l'Accusation aux fins de divulgation différée de l'identité et des déclarations des témoins 0267 et 0353 et aux fins de communication à la Défense d'un résumé de leur déclaration dans l'intervalle"*, 27 April 2009, ICC-01/04-01/07-1071.

¹⁵ Germain Katanga's Defence Team, *"Defence response to the public version of Prosecution's 'Requête aux fins de divulgation différée de l'identité et des déclarations des témoins 0267 et 0353 et aux fins de communication à la Défense d'un résumé de leur déclaration dans l'intervalle'"*, 27 April 2009, ICC-01/04-01/07-1075.

¹⁶ Registry, *"Addendum to the Victims and Witnesses Unit's Report pursuant to 'Ordonnance aux fins de Consultation de l'Unité d'aide aux victimes et aux témoins concernant la situation des témoins 219, 267 et 353'"*, 28 April 2009, ICC-01/04-01/07-1084-Conf-Exp.

4. In the Prosecutor's opinion, Witnesses 267 and 353 risk becoming the target of pressure and threats, especially because they refuse to participate in the Court's protection programme and be relocated.¹⁷ Accordingly, the Prosecutor considers that the delayed disclosure of the identity of the witnesses to the Defence, 30 to 45 days prior to their testimony at the trial, is the only measure likely to be taken to ensure that they are protected effectively, due, in particular, to their backgrounds, and personal, professional and family circumstances.¹⁸

5. The VWU's Report also concludes that rolling disclosure would usefully complement the initial response system measures which have been provided to the two witnesses.

6. However, before ruling, the Chamber considers that it is necessary to obtain additional information on the security situation of the two witnesses concerned by the Motion. The Chamber intends to examine the risk incurred by each of the two witnesses, taking into account their individual circumstances. The Chamber cannot focus only on the feelings of insecurity that the witnesses might be experiencing, nor must it attach itself solely to the conclusion that the situation in Ituri is still unstable. Rather, it has to assess the existence of an objective and not an indeterminate risk, and ensure that all solutions that reconcile, in the best way possible, the necessary protection for the witnesses and the effective exercise of the rights of the Accused have been considered. In the present circumstances and based on all the written submissions received, the Chamber does not consider that it is in possession of sufficient material to enable it to make an informed ruling on the Motion.

¹⁷ ICC-01/04-01/07-1044, para. 25.

¹⁸ ICC-01/04-01/07-1044-Conf-Exp, paras. 30, 31, 38 and 39.

b) Witness 219

7. The Chamber likewise asked the VWU to provide it with a report on the situation of Witness 219, as soon as his intentions concerning possibly joining the Court's protection programme and being relocated are known.¹⁹

8. The Registry replied that it had met this witness to discuss his security situation with him and that the Prosecutor had not yet submitted an application for participation in the Court's protection programme. It specified that the witness perceived that he was at high risk as a result of his interaction with the Court, especially if the assistance he is providing to the Court were known, and that he does not feel safe in his place of residence. The Registry added that it was currently exploring with the Prosecutor the most appropriate solution in order to address Witness 219's perceived level of risk.²⁰

9. The Chamber would now like clarification on the exact situation of this incriminating witness, which measures are being contemplated for the witness and the time frame within which the measures are likely to be implemented.

¹⁹ ICC-01/04-01/07-1037-Conf-Exp-tENG, p. 8.

²⁰ ICC-01/04-01/07-1070-Conf-Exp, paras. 27 to 29.

FOR THESE REASONS, the Chamber

CONVENES an *ex parte* hearing restricted to the Office of the Prosecutor and the VWU on 8 May 2009 at 9.30 a.m.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Hans-Peter Kaul

Dated this 5 May 2009,

At The Hague, The Netherlands