



Original: **French**

No.: **ICC-01/04-01/07**
Date: **1 September 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

**Decision concerning the situation of Witness 270
(regulation 42 of the Regulations of the Court)**

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

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

Legal Representatives of Victims

Mr Jean-Louis Gilissen
 Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Ms Carine Bapita Buyangandu
 Mr Joseph Keta
 Mr Hervé Diakiese
 Mr Jean Chrysostome Mulamba
 Nsokoloni
 Mr Vincent Lurquin
 Ms Flora Mbuyu Anjelani
 Mr Richard Kazadi Kabimba
 Mr Magali Pirard
 Mr Dieudonné Kaluba Didwa
 Mr Lievin Ngondji Ongombe

Office of Public Counsel for Victims

Ms Paolina Massida

**Office of Public Counsel for the
 Defence**

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Other

Trial Chamber I

**Victims Participation and Reparations
 Section**

No. ICC-01/04-01/07

2/6

1 September 2009

Official Court Translation

TRIAL CHAMBER II of the International Criminal Court (“the Chamber” and “the Court”, respectively), acting pursuant to regulation 42 of the Regulations of the Court, decides as follows:

1. In its decision of 22 July 2009, following an application submitted by the Prosecutor on 23 March 2009, the Chamber ruled on the situation of Witness 270. As the transcripts of this witness contained information that was particularly useful, the Chamber considered that it must instruct the Office of the Prosecutor to conduct new investigations to locate this witness in order to determine whether the witness’s safety was still at risk and whether the witness remained opposed to the disclosure of his identity.¹ The Chamber also invited the Prosecutor to disclose to the Defence teams a redacted version of the witness’s transcripts, pending an update on the real risk he faced.²

2. On 18 August 2009, the Prosecutor made it known that he had been able to resume contact with the witness the day before and that the witness had indicated that he still did not consent to the disclosure of his identity. The Prosecutor also informed the Chamber that the transcript had been disclosed to the Defence on 14 August 2009.³

3. It was only then that the Chamber realised that, in a decision of 12 June 2009, in response to the Prosecutor’s Request, Trial Chamber I had (a) authorised protective measures for this same witness, consisting of the non-disclosure of his

¹ “Decision on the Protection of 21 Witnesses Under Article 67(2) of the Statute and/or Rule 77 of the Rules of Procedure and Evidence”, 22 July 2009, ICC-01/04-01/07-1332-tENG. See also the *ex parte*, confidential version, available only to the Office of the Prosecutor and the Registry, ICC-01/04-01/07-1329-Conf-Exp-tENG (“the Decision of 22 July 2009”).

² ICC-04-01/07-1332-tENG, para. 37.

³ Office of the Prosecutor, “Prosecution’s Observations regarding Witness 270”, 18 August 2009, ICC-01/04-01/07-1399-Conf-Exp.

identity and the non-disclosure of the transcripts of his statement, and (b) authorised the provision of a summary of the witness's statement together with the alternative evidence, as compensatory measures.⁴

4. The Chamber recognises that this decision of 12 June 2009 was mentioned in the annex to the Prosecution's brief of 7 July 2009, notified to the Chamber at 5.07 p.m., i.e. on the eve of the *ex parte* hearing held to look into this witness's situation.⁵ However, it was mentioned in passing and at no time during the hearing did the Office of the Prosecutor highlight the existence of a decision already rendered by Trial Chamber I, nor was the need to implement regulation 42 of the Regulations of the Court recalled.⁶

5. Accordingly, the Chamber now considers itself bound to implement regulation 42 of the Regulations of the Court *proprio motu*, as a matter of urgency. It would add that whenever in the future recourse to that regulation is required, this must be made clear in the body of the filings it receives and not in the annexes alone. In the Chamber's view the Chamber which first ruled on this matter ought to be notified of such filings for its information.

6. Finally, the Chamber considers it necessary to call Trial Chamber I's attention to the importance of this exculpatory evidence for the Defence in

⁴ Trial Chamber I, "Decision on the 'Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information' of 5 December 2008 and 'Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information' of 12 March 2009", 12 June 2009, ICC-01/04-01/06-1965-Conf-Exp. See also the public redacted version, dated 24 June 2009 (ICC-01/04-01/06-1980 Annex 2).

⁵ Office of the Prosecutor, "*Mémoire de l'Accusation aux fins de dépôt de propositions d'expurgations (Témoins P-270, P-292, P-337)*", 7 July 2009, ICC-01/04-01/07-1275-Conf-Exp-AnxB.

⁶ ICC-01/04-01/07-T-68-CONF-EXP-FRA ET, p. 69, lines 6-25, and p. 70, lines 1-25.

*Katanga/Ngudjolo*⁷ and to the fact that it would seem to the Chamber that it was possible to redact the transcripts of the Office of the Prosecutor's interviews with the witness without putting his safety at risk.⁸ For this reason, a redacted version of the transcripts has already been disclosed to the Defence in this same case, as this protective measure appeared to the Chamber to be best suited to the situation in hand.

⁷ ICC-01/04-01/07-1329-Conf-Exp, paras. 35 and 36.

⁸ *Ibid.* para. 37.

FOR THESE REASONS,

DECIDES, *proprio motu*, on the basis of regulation 42(3) of the Regulations of the Court, to seize Trial Chamber I with the situation of Witness 270; and

AUTHORISES Trial Chamber I's access to the confidential, *ex parte* documents mentioned in this decision and in the decision of 22 July 2009.

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

_____[signed]_____
Judge Bruno Cotte
Presiding Judge

_____[signed]_____
Judge Fatoumata Dembele Diarra

_____[signed]_____
Judge Hans-Peter Kaul

Done this 1 September 2009

At The Hague, The Netherlands