

1 International Criminal Court
2 Trial Chamber II - Courtroom 1
3 Presiding Judge Bruno Cotte, Judge Fatoumata Dembele Diarra
4 and Judge Christine Van den Wyngaert
5 Situation: Democratic Republic of the Congo -
6 ICC-01/04-01/07
7 In the case of The Prosecutor v. Germain Katanga and
8 Mathieu Ngudjolo Chui
9 Trial Hearing
10 Monday, 20 September 2010
11 (The hearing starts at 1.59 p.m.)
12 (Open session)
13 THE COURT USHER: All rise. The International
14 Criminal Court is now in session.
15 PRESIDING JUDGE COTTE: (Interpretation) Our
16 hearing is now starting. Please be seated. The accused are
17 with us.
18 So where it concerns firstly the organisation of our
19 proceedings, ladies and gentlemen, parties and participants,
20 the accused, we are a bit unlucky at the moment. Witness 02
21 is available this afternoon. He would also be tomorrow
22 morning. We envisaged starting the testimony of Witness P12,
23 with the difficulty that the parallel conducting of two
24 testimonies might have.
25 One of the Defence teams did not wish for this

1 and the Chamber understands that very well -- understands it
2 very well to the extent that the Prosecutor has staff which
3 isn't infinite, but that makes it possible to give a
4 particular witness to a particular collaborator, and the
5 staff of the Defence is much more reduced. They work on a
6 day-to-day basis, without being able to split up certain
7 members of them to be able to prepare certain aspects, for
8 example a testimony which was not envisaged previously, even
9 if one might think that Witness P12 would testify more
10 speedily.

11 All this makes it possible for us to think -- and
12 certainly the wish of the Chamber was made very clear in this
13 regard. This makes it possible for us to think that Witness
14 P2 will be there on Wednesday morning.

15 Court officer, on Wednesday morning this witness
16 cannot be there, or can only be there at 10 o'clock. The
17 Chamber will meet despite everything at 9.30, with a view to
18 issuing an oral decision which it shall attempt to make
19 definitive by Wednesday morning using the time that it has
20 available to it and which it didn't think it would have. So,
21 unless any order of any other kind, we will be here at 9.30
22 on Wednesday morning for the reading of this oral decision
23 and then to receive the witness from 10 o'clock.

24 We will sit -- if the recordings can allow for this,
25 we will sit until 12. 9.30 until 12. Two-and-a-half hours.

1 It's impossible thereto with the constraints. One day we
2 will have to find tapes which can go on for two-and-a-half
3 hours so that we can go for two-and-a-half hours if we want
4 to. That is one of the things - we are in the 21st century -
5 that should be possible, but we do what we can with what
6 we've got.

7 So, we will meet then at 9.45. The decision will be
8 read at 9.45. This will make it possible for the witness to
9 come towards 10/10.10 and we will therefore leave at 12.15;
10 is that right? Is that two hours?

11 Please excuse me. We will therefore be 9.45 until
12 11.45. I already said to the Chamber that figures aren't my
13 strong point. 9.45 until 11.45. Two hours we shall sit for,
14 according to the criteria with regards to the recording
15 devices and the tapes. We will therefore suspend for
16 one-and-a-half hours and we can therefore continue from 13.15
17 to 15.15 on a second period, so between 11.45 there will be
18 an hour-and-a-half break for everybody to have lunch and have
19 a break and relax.

20 So unless there's an order issued otherwise, we will
21 sit from 9.45 until 11.45 and then from 13.15 to 15.15. The
22 Chamber is very much sorry for these issues which have
23 arisen, which it did not wish for.

24 Prosecutor.

25 MR MACDONALD: (Interpretation) Just with regards

1 to -- first of all, good afternoon. Just with regards to the
2 issue of the timetable, if I'm not wrong we were all sitting
3 in periods of 1.30 and we had a half-hour break and then we
4 had lunch and then we came back.

5 I'm just raising this point. In order to finish
6 Witness P2 next week - this week - taking into account that
7 we are the only case operating at the moment, before a
8 Chamber which is sitting, is it not possible to have 1.30
9 hearing blocks and then to suspend for Wednesday, Thursday,
10 Friday and in that way we could maybe catch up somewhat with
11 this time which we have lost on Monday and Tuesday?

12 PRESIDING JUDGE COTTE: (Interpretation)
13 Prosecutor, a few days you already made such a suggestion,
14 which was a very reasonable suggestion. The only problem is
15 that among us a lot of us organise our time in accordance
16 with the hearings as they have been decided up to now. We
17 are not able to apportion time in the afternoon, as would
18 have been wished for. If that had been possible, of course
19 that is something that we would have done. However, we often
20 find ourselves with our back to the wall right at the last
21 minute, and for those amongst us it is not possible to change
22 a timetable which has already been decided upon.

23 And in the same vein, once again I would also very
24 strongly like to encourage the Registry to stabilise our
25 hearings for October and November. We all need to be able to

1 plan ahead. You know that this stabilisation takes into
2 account the constraints of the first Chamber - I don't know
3 what time it is starting again - but also there's the third
4 Trial Chamber and we don't know what date they are starting,
5 but this Chamber has once again asked the Registry to state
6 clearly what our timetable will be and we would ask it also
7 to go to the other Chambers in order to get clarifications
8 which are indispensable to all of us.

9 I am now, if you would allow me, going to answer in
10 the name of the Chamber an urgent application of the Defence
11 of Mathieu Ndudjolo.

12 In a filing number 2395 of 16 September 2010, the
13 Defence of Mathieu Ndudjolo seized the Chamber with an urgent
14 application for an interpretation of its decision number 2388
15 of 14 September 2010 relating to the application of the
16 Prosecution concerning the disclosure of certain evidence by
17 the Defence under Rules 78 and 79(4) of the Rules of
18 Procedure and Evidence.

19 Counsel Kilenda wished that the Chamber make clear
20 to it the scope that should be accorded to paragraph 62 of
21 this decision, as well as to points (a) and (b) of the
22 measures within this decision.

23 More specifically it would wish to have -- it wished
24 to know if it has to fulfil its obligations - disclosure
25 obligations - at the same time as the Germain Katanga team,

1 or only two weeks before the presentation of its own case.

2 The Chamber thinks that there is perhaps, in the
3 present case, a lack of understanding, or a misunderstanding,
4 coming doubtlessly from the absence of a translation, as yet,
5 of the decision in question, which was initially drafted in
6 the English language. An official translation has indeed
7 been requested, indeed.

8 There has never been a question for the Chamber of
9 lumping together the two Defence teams, who each pursue their
10 own objectives, having defined strategies which are unique to
11 them and which intend to implement the means of Defence which
12 are their own, subject to the reservation of possible use of
13 witnesses who may be common to them.

14 The two teams follow one another in order to present
15 their respective cases, which paragraph 6 of the decision
16 1665 of 1 December 2009 states very clearly, and here I
17 quote: "The second phase of the trial will include the
18 presentation by the Defence of the two accused, of their
19 respective means of Defence, the means of the Defence. The
20 Defence of Germain Katanga will present its means followed by
21 the Defence of Matthew Ngudjolo."

22 But if it is not a question of lumping together the
23 two teams of the Defence, however, it cannot also not be an
24 issue of privileging one of the teams in relation to the
25 other by giving an additional deadline to the team coming

1 second, in this case, the team, Defence team of Matthieu
2 Ngudjolo. So it would be precisely the case if this team was
3 authorised not to proceed with its own disclosures but two
4 weeks before the presentation of its own case, and that is to
5 say several weeks after the Defence of Germain Katanga has
6 started to present its case and therefore carried out its own
7 disclosures.

8 Article 64(2) of the Statute also imposes on the
9 Chamber that it ensure the fair running of the trial, which
10 explains the position that it adopted with regards to
11 paragraph 62 of its decision and in its pronouncement.

12 That is the fastest possible response to the
13 application of Counsel Kilenda and Professor Fofé.

14 Before now going over to read an oral decision on
15 the use of closed session or private session, the Chamber
16 would like to go back to an intervention made by Counsel
17 Dutertre at the end of Wednesday's hearing, or the end of the
18 presentation of the Prosecutor's case on Wednesday. It was,
19 namely, an issue of whether there should be an MFI number
20 attributed to videos which were not used during the
21 presentation of its case.

22 A certain number of the video excerpts were
23 presented during the examination-in-chief of Witness P02 and
24 they received an EVD number. There is, of course, no
25 question of going back on that decision. Is it necessary to

1 attribute an MFI number to all the videos themselves?

2 Well, some excerpts were not presented, a position
3 which was suggested by the Registry, and which accords with
4 that taken in the Lubanga case was decided on, on 12 July,
5 and this was subject to -- the subject of an email of 12 July
6 2010 at 14.22 which was signed by Jasmine Toumaj.

7 Mr Dutertre referred to this email of 12 July last Wednesday,
8 and I indicated that I did not have this email in mind.
9 Apparently, most of us were not thinking of it, but perhaps
10 this was something that needed to be looked at.

11 Now, with the light of reflection, the solution
12 which was mentioned in this email seemed to be very
13 cumbersome, in addition to the fact that some videos had not
14 even been presented. Also, Prosecutor Dutertre had
15 renounced, as you remember, to produce video number 9, 10 and
16 11. Giving them an MFI number was therefore not necessary.

17 With regards to video 18, some excerpts of that had
18 been shown. It also does not seem to be necessary to give
19 them an MFI number. Indeed, all parties who wish to use them
20 following -- in the following proceedings can identify them
21 by their ERN number, which is sufficient, and it would not
22 make unnecessarily burdensome our record.

23 Mr Dutertre obviously wanted to present this on
24 Wednesday. The Chamber wasn't able to give a response at the
25 time but, with regards to the Office of the Prosecutor, we

1 would like to thank the Prosecutor for having brought that up
2 and we would like to use the hearing time that we have. We
3 would like to ask for your patience because we have to read
4 slowly for the interpreters, and we have to issue an oral
5 decision with regards to the application of the Defence of
6 Germain Katanga relating to use of private session,
7 Article 64(7), 67, 68, 69 and 72 of the Statute, to Rules 87
8 and 88 of the Rules of Procedure and Evidence and
9 Regulation 20 of the Regulations of the Court,
10 Regulation 94(d) of the regulations of the Registry.

11 In terms of the context, on 20 May 2010 the Defence
12 of Germain Katanga intervened orally during the proceedings
13 to express its concern with regard to the recourse to private
14 session that it considered to be too frequent and not always
15 necessary.

16 On 1 June 2010 it filed an application in this
17 regard, proposing the adoption of two specific measures:

18 1. A systematic a posteriori revision of
19 transcripts in private session carried out by the Registry in
20 consultation with the parties or the VWU and under the
21 supervision of the Chamber, and which would be aimed at
22 extracting those parts of the transcript which could be
23 reclassified as public and;

24 2. The possibility for the Chamber, or the party
25 who examined a witness during a hearing in private session,

1 to provide a summary of the examination once returning into
2 open session.

3 Well, considering that no abusive use has been made
4 of private session until now, everybody is making an effort
5 under the control of the Chamber to limit, as far as
6 possible, this measure, but the Chamber has considered it
7 necessary, with regards to this issue, to take the
8 observations and suggestions of all the parties and
9 participants in the case, as well as those of the Registry.

10 Having analysed them, it has defined best practices
11 which it intends to recommend. With a view to these
12 contributions, the Chamber considers that it has to remind
13 everyone that particularly in terms of criminal proceedings,
14 the public nature of proceedings is a fundamental principle
15 which, furthermore, is enshrined by Article 64(7) of the
16 Statute. This principle constitutes, for the Defence, a
17 safeguard, an essential safeguard. It contributes to
18 preserving the trust that all those subject to the law have
19 to have in justice, and it is one of the best means of
20 controlling the way in which such justice is rendered.

21 This principle, however, does not have an absolute
22 nature. As such, Article 64(7) and 68(1) of the Statute
23 provide for exceptions thereto and authorise the Chamber to
24 call for closed sessions for certain proceedings or parts of
25 proceedings when it considers necessary, in particular with a

1 view to ensuring, and here I quote, "The safety,
2 psychological and physical well-being, the dignity, and the
3 privacy of victims and witnesses... " or, furthermore, and
4 here I quote once again," ... with a view to protecting
5 confidential or sensitive information given in testimony."

6 And it is precisely with regards to these different
7 bases that, in the present case, measures such as private
8 session have been ordered at the request of parties or
9 participants. And here see order 1667 relating to protection
10 measures for certain witnesses called upon to appear by the
11 Prosecutor and by the Chamber. Where it now concerns the two
12 proposals made by the Defence of Germain Katanga, the first
13 proposal was therefore to have a systematic a posteriori
14 revision of transcripts of hearings held in closed session.
15 The Chamber, whilst fully understanding the interest thereof,
16 considers that this measure is cumbersome and difficult to
17 implement. It is, without question, time-consuming for
18 everybody, including for the Registry, and as such, hardly
19 compatible with a diligent conduct of proceedings, and it
20 would therefore not contribute significantly to reducing
21 either the number or the frequency of private sessions.

22 Therefore, it in its view could not be used
23 systematically or institutionalised. It remains the case
24 that the Chamber intends, as is currently the case, to
25 reserve the possibility of initiative, or, on the application

1 of parties and participants, to review, with a view to
2 possible reclassification thereof, passages of the
3 transcripts which correspond to a period of private session
4 which a posteriori have proved not to be essential.

5 The second suggestion from Mr Hooper would be to
6 give the Chamber or the party that examined a witness during
7 a private session an opportunity to summarise the examination
8 as soon as the Court returns to open session. The Chamber
9 can accept this suggestion only partly. The Chamber has an
10 obligation to ensure that the trial is held without undue
11 delay and also the Chamber must avoid any protected
12 information from being revealed, nor can summaries be found
13 on a public transcript that, coming from a party or a
14 participant, that may not always be perfectly faithful.
15 Thus, the Chamber is of the view that only the Chamber can --
16 when necessary to ensure proper understanding of the
17 proceedings, it is the Chamber's duty to provide a reminder
18 of the reasons why the Court went into private session, or
19 the Chamber can provide additional information to the public.

20 However, the Chamber does wish to stress the need,
21 each time a request is made to go into private session, to
22 provide grounds for the decision in a neutral and objective
23 fashion, and trying to specify the points that will be
24 touched upon.

25 Let us now move to the best practices that the

1 Chamber wishes to set out. Taking into account the various
2 interests at stake, in order to ensure that the proceedings
3 are as public as possible and also taking into account all
4 the observations made by the parties and the participants,
5 the Chamber intends to make a number of recommendations that
6 shall be considered as best practices.

7 The Chamber would like to request that all parties
8 and participants comply with these best practices. Thus, the
9 Chamber calls upon all parties and participants not to
10 request that the Court go into private session unless there
11 is a serious and established risk and, insofar as possible,
12 to endeavour to have testimony given in public.

13 Furthermore, we ask parties and participants to
14 alert the Chamber when it is possible to go back into open
15 session, as quickly as possible. The Chamber would also call
16 upon all parties and participants to ensure, when they are
17 preparing their lines of questioning, to bring together all
18 the identifying questions and to ask these identifying
19 questions at the beginning of the testimony, any question
20 having to do with a witness's family name, first name, place
21 of origin, or residence, or such information relating to
22 people close to him, or information such as birth date,
23 profession, name of a school attended, or the name of an
24 employer. These are all protected items of information that
25 require the Court to go into private session.

1 Indeed, the Chamber is of the view that if each one
2 of these items of information is taken in an isolated
3 fashion, and it is not possible to reveal the identity of a
4 witness who is protected, disclosure of several of these
5 items throughout open testimony could favour or even allow
6 identification of the witness.

7 No matter what the limit on the number of times that
8 we may need to go into private session, implementation of
9 this recommendation will allow the general public to follow
10 the proceedings in a consistent and ongoing fashion, as much
11 as possible.

12 Furthermore, the witness will not be troubled by all
13 the various difficulties caused by constantly hopping from
14 open session to private session, and back. Furthermore, the
15 Chamber calls upon each party calling a protected witness to
16 prepare and to provide to the Chamber, and to the parties and
17 participants, a list. This list shall be provided before the
18 first appearance of the person. The list shall be classified
19 confidential and it shall contain information and questions
20 that must be dealt with in private session.

21 Once again, the Chamber would call upon all parties
22 and participants to provide the Chamber with a *modus*
23 *operandi*, when this is necessary, or possible, before
24 examination-in-chief begins or before cross-examination
25 begins. We ask for a *modus operandi*, or sort of a -- or an

1 explanation of the work methods that will be used. For
2 example, will questions be asked regarding a certain place,
3 or people? And I think you all remember that this practice
4 has been followed before this Chamber. As much as possible,
5 please endeavour to do this on a routine basis.

6 The Chamber would also remind all parties and
7 participants to give grounds in an objective fashion and
8 briefly provide grounds explaining why the Court needs to go
9 into private session. Also, try to explain why it is
10 necessary to remain in private session if these grounds are
11 different from the grounds touched upon to explain why the
12 Chamber had to go into private session initially.

13 If necessary, please draw attention to any part of
14 the transcript of a private session that could be
15 reclassified after greater analysis. The Chamber wishes to
16 specify that we will be particularly vigilant on this point.
17 Similarly, the Chamber wishes to announce that it will be
18 reviewing all the decisions that have been issued
19 confidentially to determine whether it is possible, after a
20 number of redactions, to reclassify some of these decisions
21 as public, or whether it would be possible to issue redacted
22 versions.

23 Finally, the Chamber requests that the Registry
24 forward the conclusions of the study that is currently
25 underway as to the feasibility of two electronic methods that

1 have been suggested that could be used to provide additional
2 -- an additional contribution to this whole matter of private
3 sessions.

4 And I think it might be more -- might be easier for
5 you to take full knowledge of this ruling by reviewing the
6 transcript. This decision was not necessarily drafted to be
7 read out in public. In a way, we are suggesting a number of
8 good practices that we would like you to follow. Some of
9 them are not part of our day-to-day operations.

10 The purpose of this ruling - and in a way all of
11 this was initiated by the Katanga Defence team - in essence,
12 the aim is to encourage all parties to operate in a
13 systematic, organised way. The trial should be held in open
14 session as much as possible, and private session should be
15 the exception to the rule. So we would urge you to review
16 this decision very calmly and carefully and, above all,
17 please try to implement it.

18 Prosecutor.

19 MR MACDONALD: (Interpretation) We will review the
20 transcript in light of the comments that you've just made,
21 your Honour, but there is one thing that we would like to ask
22 for clarification regarding. I'm making reference to page
23 15, first line, when you said that the parties should provide
24 the questions. I believe -- well, I'm quite sure that my
25 Defence colleagues opposite also are wondering: Did the

1 Chamber perhaps mean the topics or the general areas of
2 interests? But are you asking that questions be provided to
3 the adverse parties? I am having a hard time understanding.
4 Perhaps I'm mistaken.

5 Now, we have no objection to providing in advance,
6 and I think the practice has shown that for protected
7 witnesses any identifying elements that could be dealt with
8 at the beginning, background questions can be done at the
9 beginning. I think this goes without saying. And we can
10 proceed in this manner for witnesses coming up. But to
11 provide the actual questions, that might be more difficult.

12 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
13 sir. This is the point that I will read again.

14 The Chamber wishes to remind all parties that is
15 calling a protected witness to provide to it and to parties
16 and participants, in advance, before the first appearance of
17 the witness, a list that is classified confidential, with
18 matters and issues that must be dealt with in private
19 session.

20 The French language is a language of great depth and
21 subtlety and there are many resources. The word "question" -
22 and I think you're quite right to point this out - "question"
23 must be taken in the meaning of information, or theme. We
24 are not asking you to disclose actual questions because
25 sometimes questions come up in a very spontaneous way during

1 examination. So please take that word "question" in a very
2 general fashion. I'm speaking of information or topics or
3 subjects. We all realise that sometimes matters come up, and
4 the Chamber may not be aware of one particular item, but the
5 parties taking part in the trial may think of one particular
6 matter or another.

7 We do not want to set up an overly restrictive
8 structure or way of doing things, but we do need to work in a
9 very systematic way so that we can ensure that the trial is
10 held, as much as possible, in open session because that is
11 the rule.

12 I think that will be all, so that you can work on
13 other matters than those that were initially scheduled for
14 today, other issues that were provided for today.

15 So allow me to reiterate. Wednesday morning, we
16 will resume at 9.45 until 11.45 and then 13.15 to 15.15.
17 Once again, the Chamber is very sorry that, despite all our
18 efforts, it was not possible to respect the schedule that had
19 been drawn up.

20 Some items were beyond our control and there were a
21 number of other problems that we had no control over.

22 Mr Gilissen.

23 MR GILISSEN: (Interpretation) Yes, thank you, your
24 Honour. I will not be in a position to take part in the
25 proceedings for a number of days, starting on Wednesday. I'm

1 very sorry about that. I did not see or I did not receive
2 authorisation from the Chamber, but I just wanted to make
3 sure that it would not be necessary for me to reorganise my
4 disorganised day book, so to speak.

5 PRESIDING JUDGE COTTE: (Interpretation) You are
6 represented and very ably represented, so we are always
7 delighted when you are with us and I think for you -- for you
8 it is important not to lose the thread of the proceedings,
9 but we realise that you have professional activities
10 elsewhere as well.

11 The accused, we will see you Wednesday morning with
12 the witness. I just have read an email that confirms that he
13 will be there Wednesday morning and so I can confirm this for
14 you.

15 We will now rise and the next hearing will be on
16 Wednesday morning.

17 (The hearing ends at 2.45 p.m.)