



Original: **French**

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

Date: **7 October 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***

Confidential

Ex parte, only available to the Registry, the Office of the Prosecutor and the
Defence

**Order concerning protection measures applied to transcripts of testimonies of
prosecution Witnesses 2, 12, 30 and 157 in the Thomas Lubanga Dyilo case**

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

The 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 the Victims

Legal Representatives of the Applicants

**The Office of Public Counsel for
 Victims**

**The Office of Public Counsel for the
 Defence**

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**

TRIAL CHAMBER II of the International Criminal Court (“the Chamber”), acting pursuant to articles 64(3)(c) and 68(1) of the Rome Statute (“the Statute”), rules 76(1) and 77 of the Rules of Procedure and Evidence (“the Rules”), and regulation 42 of the Regulations of the Court (“the Regulations”), issues the following order.

I. Procedural background

1. On 10 July 2009, the Prosecutor filed an application for the protection of the transcripts of in-court statements of Witnesses 2, 12, 30 and 157 in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (“the Thomas Lubanga Dyilo case”), which he intends to disclose to the Defence teams for Germain Katanga and Mathieu Ngudjolo (“the Defence”) in the present case (“the Application”).¹ The Defence has made no submissions.

2. The four witnesses appear on the list of prosecution witnesses disclosed by the Prosecutor on 27 May 2009.² Pursuant to rules 76(1) and 77 of the Rules and, where applicable, article 67(2) of the Statute, the Prosecutor wishes to disclose to the Defence the content of the witness testimonies. However, when these witnesses were giving oral testimony, Trial Chamber I (“Chamber I”) instituted the following measures to protect those witnesses: facial distortion, voice distortion, use of a pseudonym, and in addition, several parts of their testimonies were given in closed session.³

3. At the hearing on 15 May 2009 in the Thomas Lubanga Dyilo case, the Prosecutor requested that Chamber I vary those measures in order to allow the

¹ Office of the Prosecutor, “*Mémoire de l’Accusation aux fins d’obtention de mesures de protection concernant les témoignages de P-002, P-012, P-030 et P-157 donnés dans l’affaire Lubanga et devant être communiqués dans l’affaire Katanga et Ngudjolo*”, 10 July 2009, ICC-01/04-01/07-1285-Conf-Exp.

² ICC-01/04-01/07-1285-Conf-Exp, para. 1. Office of the Prosecutor, “*Mémoire aux fins de dépôt du tableau des éléments à charge, de la liste des témoins de l’Accusation et de la liste des pièces à charge, et Annexes confidentielles, ex parte, réservées à l’Accusation et à la Défense*”, 27 May 2007, ICC-01/04-01/07-1174. See also, Office of the Prosecutor, “Prosecution’s order of witnesses it intends to call at trial” and confidential, *ex parte* annex only available to the Office of the Prosecutor and the Defence, 14 August 2009, ICC-01/04-01/07-1378.

³ ICC-01/04-01/07-1285-Conf-Exp, paras. 1 to 6. See also, ICC-01/04-01/06-T-104-FRA ET, 16 January 2009, pp. 1-5.

Defence access to the statements of those witnesses, it being understood, however, that Witness 157 was yet to testify at that stage of the proceedings.⁴ During that hearing, Chamber I requested that similar confidentiality restrictions be applied in both cases. To that end, Chamber I indicated that it appeared necessary for “[TRANSLATION] Trial Chamber II [first] to make an appropriate order effectively instituting” protective measures, explaining that it would be able to grant the Prosecutor’s request “[TRANSLATION] provided that the protective measures were at least as rigorous as those [imposed in the Thomas Lubanga Dyilo case]”.⁵

4. In accordance with Chamber I’s wishes and pursuant to article 68 of the Statute, rule 87 of the Rules and regulation 42 of the Regulations of the Court, the Prosecutor therefore requested the Chamber to provide appropriate protection for the transcripts of the testimonies concerned.⁶ He stressed that his request was made under regulation 42(1) of the Regulations of the Court, and that it was not a request for the variation of the measures ordered by Chamber I within the meaning of regulation 42(3).⁷

5. The Prosecutor suggested various measures relating, *inter alia*, to (i) the use in court of parts of testimonies given in closed session,⁸ (ii) the use in court of the public parts of testimonies,⁹ (iii) the use of the testimonies during the Defence investigation,¹⁰ (iv) the use of evidence tendered during the testimonies for the purposes of the Defence investigation,¹¹ and (v) any references to the testimonies in filings.¹² In his view, these various measures cause no prejudice to the Defence.¹³

⁴ ICC-01/04-01/07-1285-Conf-Exp, para. 7.

⁵ ICC-01/04-01/07-1285-Conf-Exp, para. 8. See also, ICC-01/04-01/06-T-175-CONF-FRA ET, 15 May 2009, pp. 85-86.

⁶ ICC-01/04-01/07-1285-Conf-Exp, para. 9.

⁷ *Ibid.*, para. 11.

⁸ *Ibid.*, paras. 13-14.

⁹ *Ibid.*, paras. 15-20.

¹⁰ *Ibid.*, paras. 21-25.

¹¹ *Ibid.*, paras. 26-27.

¹² *Ibid.*, paras. 28-31.

¹³ *Ibid.*, paras. 14, 20, 24 and 31.

6. Lastly, the Chamber notes that in a 28 August 2009 application, the Prosecutor sought the same protective measures for 22 prosecution witnesses, including the four witnesses concerned by the Application.¹⁴ Both Defence teams have submitted observations in response to the Prosecutor's application,¹⁵ and the Chamber will rule on the application in due course.

II. Discussion

7. The Chamber wishes first to stress that the transcripts of the statements of the four witnesses cannot be used as incriminating evidence in the Germain Katanga-Mathieu Ngudjolo case, since the Prosecutor has not expressly invoked regulation 35 of the Regulations of the Court.

8. The Chamber further notes that regulation 42(1) of the Regulations of the Court provides that the protective measures ordered for a victim or witness in a case before the Court continue to apply, *mutatis mutandis*, in all other cases. Therefore, unless the procedure set out in regulation 42(3) is implemented, the protective measures originally ordered remain applicable.

9. Thus, the Chamber can but take formal note that, in accordance with regulation 42(1) of the Regulations of the Court, the protective measures ordered by Chamber I in the Thomas Lubanga Dyilo case apply directly, *mutatis mutandis*, to the present case. Accordingly, when they are called to testify, Witnesses 2, 12, 30 and 157 shall be afforded, where necessary, the same measures of facial distortion, voice distortion, use of a pseudonym and the ordering of closed sessions.

¹⁴ 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.

¹⁵ Defence team for Mathieu Ngudjolo, "*Réponse de la Défense de Mathieu Ngudjolo à la requête 1440 de l'Accusation visant à obtenir des mesures de protection sur base des règles 87 et 88 du RPP pour les témoins cités à comparaître par l'Accusation*", 16 September 2009, ICC-01/04-01/07-1475; 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.

10. The Chamber notes that a series of further measures is triggered by those already ordered by Chamber I. In this regard, it notes that the parts of the testimonies given in closed session by Witnesses 2, 12, 30 and 157 in the Thomas Lubanga Dyilo case may only be used after a closed session has been ordered in the present case.

11. Lastly, concerning the use of the transcripts of the testimonies during the Defence investigation, the Chamber wishes to remind the members of both Defence teams of the duty of confidentiality to which they are bound under the Statute, the Rules, the Regulations of the Court and any order of the Court in respect of all privileged information.¹⁶ The Chamber recalls, to that effect, that the Defence must comply with the orders set out in Chamber I's *Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses* of 3 June 2008, in particular the order concerning the non-disclosure of confidential information to the public.¹⁷

FOR THESE REASONS, the Chamber

TAKES FORMAL NOTE that, pursuant to regulation 42(1) of the Regulations of the Court, the measures granted by Chamber I in the Thomas Lubanga Dyilo case to Witnesses 2, 12, 30 and 157 are directly applicable, *mutatis mutandis*, to the present case; and

ORDERS the Defence teams for Germain Katanga and Mathieu Ngudjolo to comply with the instructions set out in the aforementioned Chamber I decision of 3 June 2008.

¹⁶ See, in particular, article 8 of the Code of Professional Conduct for counsel, as well as articles 64(6)(c) and (7), 68 and 72 of the Statute, rules 72, 73 and 81 of the Rules and regulation 97 of the Regulations of the Court.

¹⁷ Trial Chamber I, *Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses*, 3 June 2008, ICC-01/04-01/06-1372, paras. 8-10, 12-13.

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 7 October 2009

At The Hague, the Netherlands