



Original: **French**

No.: **ICC-01/04-01/07**
Date: **18 December 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***

Public Document

**Instructions on Approaching Third Parties Material to the Defence's
Investigations**

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 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 Fidel Nsita Luvengika
Mr Jean Louis Gilissen

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

Maria Luisa Martinod-Jacome

Other

**Victims Participation and Reparations
Section**

Ms Fiona McKay

TRIAL CHAMBER II of the International Criminal Court (“the Chamber”), acting pursuant to articles 67 and 68 of the Rome Statute (“the Statute”) and to rules 87, 88 and 134(1) of the Rules of Procedure and Evidence (“the Rules”), issues the following instructions.

I. Background

1. On 28 August 2009, the Prosecutor submitted an application requesting the Chamber to order protective measures for witnesses 2, 12, 28, 30, 132, 157, 159, 160, 161, 166, 219, 233, 238, 249, 250, 267, 268, 279, 280, 287, 323 and 353, whom he intends to call to testify at trial.¹ In effect, the Prosecutor wished the identities of the 22 aforementioned witnesses not to be disclosed to the public during the proceedings, either on the ground of their participation in the Court’s Protection Programme (“the ICCPP”), or on the ground of their vulnerability.² He sought the Chamber’s permission for the witnesses to be referred to by a pseudonym during their testimonies in court and for broadcasts of their voices and images to be altered. He further requested that the parts of their testimonies which could lead to their being identified, despite the measures taken, be given in closed session. Furthermore, additional measures were sought for the victims of sexual violence, so that they might be granted leave to testify away from the courtroom by means of closed-circuit television, and to be accompanied by someone whom they trust.³ Finally, in order to comply with rule 87(2)(c) of the Rules, the Prosecutor proposed to the Chamber an adjustment to the way in which said protective measures are notified to the witnesses concerned.⁴
2. On 23 November 2009, the Chamber rendered an order in response to the aforementioned application, in which, inter alia, it prohibited the Defence and

¹ 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.

² Ibid., paras. 2 and 4.

³ Ibid., paras. 5 to 6.

⁴ Ibid., para. 7.

the Legal Representatives of the Victims from disclosing to a third party the identities of witnesses for whom it wished to provide protective measures.

3. On 2 December 2009, the Defence for Mathieu Ngudjolo submitted to the Chamber an application for instructions on the manner in which it might approach third parties material to its investigations, drawing the Chamber's attention to the fact that, in such instances, it could not rule out the possibility of the identities of protected witnesses being disclosed⁵ ("Mathieu Ngudjolo's Application"). Thus, the Defence submits the following:

[TRANSLATION] [...] Concerned [...] not to violate the Chamber's prohibition, the Defence would like to be guided by the Chamber in terms of the attitude it should now adopt in gathering information material to the defence of the interests of Mathieu Ngudjolo whenever such information relates to one of the witnesses covered by the aforementioned prohibition.

[...] To consider one scenario, it might arise that the Defence has indications which show that a particular witness did not tell the truth regarding the position which he held at the time of the offences in question, that position being a key point in his testimony. In order to check the testimony, the Defence would need to approach the entity concerned, which would certainly ask it for the name of the person about whom it is seeking to obtain information. The Defence asks that the Chamber provide it with specific instructions on the manner in which it should proceed in order to carry out such a check.⁶

4. By e-mail of 4 December 2009, the Chamber asked the Victims and Witnesses Unit ("the VWU") to submit to it a report on the Application, as quickly as possible owing to the urgency with which the Defence for Mathieu Ngudjolo was seeking the resolution of the issue raised. On 9 December 2009, mindful of the importance of that issue, the Chamber further sought by e-mail the observations of the parties and participants on the Application, of which it had requested the Defence for Mathieu Ngudjolo to file a public, redacted version. On 11 December 2009, it received the observations of the Legal Representative

⁵ Defence for Mathieu Ngudjolo, "*requête de la Défense en vue d'obtenir de la Chambre des instructions précises sur la manière d'approcher des tiers qui lui sont très utiles en vue du recueil des éléments à décharge et des éléments pouvant décrédibiliser certains témoins du Procureur*", 2 December 2009, ICC-01/04-01/07-1702-Conf-Exp; See also the public, redacted version of 8 December 2009, ICC-01/04-01/07-1702-Red.

⁶ ICC-01/04-01/07-1702-Red, paras. 6 and 7.

of the main group of victims⁷ and those of the Prosecutor.⁸ For its part, the Defence for Germain Katanga did not file any document within the time limit set by the Chamber.

5. In essence, the Legal Representative of the Victims submits that “[TRANSLATION] it is not so much the disclosure of the identity of a witness to a third party which poses a problem, but rather the disclosure to a third party of the identity of a protected person where the third party could realise that the person will be called to appear before the Court”.⁹ After referring to a decision of the Appeals Chamber of the International Criminal Tribunal for Rwanda, he emphasizes that “[TRANSLATION] if the Chamber were to allow the Defence, for the purposes of its investigations, to disclose the identities of protected witnesses and victims to third parties, it should be in such a way that could not under any circumstances lead to the third party being able to deduce that the person whose identity has been disclosed will be heard as a witness before the Court, or, more generally, that that person is cooperating with the Court”.¹⁰ Further, he notes that “[TRANSLATION] in view of the risks to protected witnesses and victims, as established here by the Chamber, the Defence should inform the Chamber, in advance and in detail, of any action which could lead the Defence to disclose to third parties the identities of those protected persons. Such a requirement would enable the Chamber to assess more precisely the risk to protected persons and any measures required in order to protect their safety, physical and psychological well-being and privacy, in accordance with

⁷ Legal Representative of the Victims, “*Observations du Représentant légal du groupe principal des victimes sur la requête de la Défense de Mathieu Ngudjolo Chui visant à obtenir de la Chambre des instructions sur la manière d’approcher des tiers quant à certains témoins à charge (article 64(2) et 68(1) et (3) du Statut)*”, 11 December 2009, ICC-01/04-01/07-1719.

⁸ Office of the Prosecutor, “*Observations regarding the disclosure of the identity of Prosecution witnesses to third parties*”, 11 December 2009, ICC-01/04-01/07-1720-Conf-Exp and ICC-01/04-01/07-1720-Red (public, redacted version).

⁹ ICC-01/04-01/07-1719, para. 9.

¹⁰ *Ibid.*, para. 12.

article 68 of the Statute”.¹¹ Finally, he recalls that the Chamber has the ability to consult the VWU at any time.¹²

6. After recalling that the prevailing state of insecurity in the Democratic Republic of the Congo is an argument against disclosure of the identities of witnesses to third parties, the Prosecutor puts forward various proposals, on the assumption that such disclosure is specifically necessary for the preparation of the Defence’s case. Thus, he suggests:

[...] First, disclosure of the witness's identity to a third party must be directly and specifically necessary for the preparation and the presentation of the Defence's case.

Second, because of the ever-present risk of compromising the witness's safety, the Defence must obtain, in advance of disclosing confidential information to third parties, the advice from the Victims and Witnesses Unit (“VWU”) on whether it is safe to do so and the manner in which this must be done. For these purposes, the VWU should obtain all relevant information from the Defence, including the identity of the third parties, in order to update its risk assessment of Prosecution witnesses. The VWU should be directed to give its advice on the basis of a Court-wide agreed standard for witness protection. If the VWU does not advise the requested disclosure, the Defence may make an application to the Chamber, *ex parte*, but may not disclose the witness's identity unless the Chamber expressly approves the request.

Third, the Prosecution requests a standing order from the Chamber directing the Defence to not reveal to third parties that the person about whom they are seeking information is a witness for the Prosecution or is involved in any way in a case before the ICC. The Defence should also be instructed to avoid any mention of the fact that the information is being solicited for a matter pertaining to the ICC.

Fourth, the Defence should be directed to inform the Prosecution of the fact that they have disclosed a Prosecution witness's identity to third parties. This is to enable the Prosecution to update its own risk assessment of Prosecution witnesses and to comply with its statutory duty to protect witnesses by taking extra measures to monitor the security of the witness involved.

Fifth, the Defence should maintain a logbook in which is recorded each instance in which a witness's identity has been disclosed. This logbook should also contain the name and the particulars of the person to whom it was disclosed, as well as the date on which this occurred. All other relevant information should also be included. The purpose of this logbook would be two-fold: (1) In case the security

¹¹ Ibid., para. 13.

¹² Ibid., paras. 14, 15 and 16.

of a witness would be compromised, the Chamber could have access to relevant information regarding the persons to whom the witness's identity was disclosed and (2) the Chamber would be able to identify the instances in which the witness's identity has been disclosed. This log should be available to the Chamber, upon request, on a confidential *ex parte* basis.

Sixth, the Defence should generally be directed to provide the Chamber, the Prosecution and the VWU with any information in its possession that is relevant to the assessment of a risk to victims and witnesses. The information provided to the Prosecution may in this case be limited to Prosecution witnesses of whom they have disclosed the identity to a third party. This is to enable all organs of the Court to witnesses comply with their respective duties to protect victims and witnesses.¹³

7. The VWU submitted its observations via e-mail on 15 December 2009. They were transmitted to the participants, on the Chamber's initiative, on 16 December 2009. The VWU put forward the following proposals:

On a preliminary note, the VWU stresses that the risk for any witness will increase with the number of individuals having access to information about the witness. It is for this reason that the VWU has consistently advised that exposure of witnesses should be restricted to the extent possible. In particular where witnesses are in need of and benefit from protective measures such as the ICCPP or procedural protective measures, it remains of paramount importance that as a general rule their identities are not disclosed to third parties. In this context, it is important to note that the VWU operates under constraints which mainly result from the fact that the Court does not have the support structures which domestic judicial bodies have to provide for these protection measures. Therefore, confidentiality remains one of the key ingredients of the Court's effective system of protection. For this reason, the Victims and Witnesses Unit reiterates the importance of maintaining confidentiality and applying good practices within any Court operation: Any party or participant interacting with witnesses should avoid exposing witnesses' identities to the extent possible and thus minimizing the risk for this individual from the outset.

As already noted by the defence, the investigative activities relating to Prosecution witnesses might expose those witnesses and make their identity known to third parties. This could include individuals with malicious intent. Without knowing who or how the Defence intends to approach for the proposed background investigations, the VWU is not in a position to specifically evaluate the risk to each individual. The VWU strongly advises against a "blanket" approach of authorizing the disclosure of the identities of numerous witnesses for the general purposes of conducting background investigations. Instead, the VWU advises that any disclosure should be targeted to achieve a particular line of inquiry of the Defence and consequently restricted to the extent possible. The VWU strongly advises that alternative modes of investigation are scrutinized which prevent the disclosure of the identities of witnesses to third parties, in particular where the concerned witnesses are participants in the ICCPP.

¹³ ICC-01/04-01/07-1720-Red, paras. 13 to 18 (footnotes omitted).

An additional area of concern relates to vulnerable witnesses. These witnesses may develop stress symptoms if they learn about the investigative activities of the other party as they may have difficulties to fully understand the process of investigations of the other party. In particular, where the defence may ask family members, this can be perceived as “going after the witness” and consequently increase their perceived level of risk. For this reason, it is recommended to consider reminding witnesses that the defence may legitimately contact specific person and that the Court has authorized the defence team to do so, subject to the ruling of the Chamber on this matter. The VWU also wishes to draw to the attention of the Trial Chamber another area of concern in this regard. Many vulnerable witnesses who participate in the ICCPP (for example former child soldiers) already have troubled relationship with their families and communities. If defence investigations are not mindful of those dynamics, they could impact negatively on their family relationships and make it more difficult for them to eventually return to their community if they wish to do so.

As requested by the Chamber, should the Chamber authorise the disclosure of witnesses’ identities, as a minimum requirement, the VWU recommends adhering to the following guidelines during the investigative activities in addition to the implementation of good practices:

To the extent possible, the questions by the defence do not disclose a witness’s involvement with the Court. Should this be unavoidable, no details are given regarding the specific role of the person with the Court, i.e. avoid referring to the person as a witness of a specific party. Should any such disclosure take place, the third party is clearly informed about the confidential nature of such information and instructed not to disclose this information any further. It is advised that the third person acknowledges this in writing.

No inquiries are made relating to the current location of the witnesses. Should the Defence happen to become aware of the location of an ICCPP witness, the VWU Protection Officer is informed as soon as possible.

The Defence keeps a record of all circumstances surrounding the disclosure, including the identities of the third persons, the explanations on confidentiality and the purposes of disclosure. Such records could be made accessible to the VWU if required.

If the Defence intends to speak with family members of any witness, the VWU is informed and consulted prior to initiating contact with those individuals. This is of particular relevance in case of vulnerable witnesses.

Having said that and in light of the neutral role of the VWU, it does not fall within the mandate of the VWU to restrict the investigative activities of any party or participant. Notwithstanding the right of the defence to conduct their investigations independently, the defence team is invited to discuss their specific approaches concerning individual cases with the VWU. This would allow the VWU to evaluate, in a joint effort with the defence, the risk for the individual witness regarding the investigative activities and to explore whether the suggested approach respects good practices and the above mentioned guidelines appropriately. The VWU proposes to inform the Chamber where it cannot reach

an agreement with the defence on the appropriate way to conduct the background investigations.

8. On 16 December 2009, the Defence for Germain Katanga sought the Chamber's leave to submit a reply to the submissions of the Prosecutor and the Legal Representative of the Victims, emphasizing that it had concerns regarding their content ("Germain Katanga's Application").¹⁴
9. The Chamber would emphasize that it cannot grant the Defence for Germain Katanga leave to file its observations in the form of a reply, since it did not avail itself of the opportunity which the Chamber had offered it at the appropriate time to respond to Mathieu Ngudjolo's Application. The Chamber further notes that the Defence did not request an extension of the time limit which had been prescribed for it to submit its observations on said Application. Thus, the Chamber is bound to deny its application.

II. The Chamber's Instructions

10. Although it appears that the Defence for Mathieu Ngudjolo only refers to 15 witnesses, the Chamber's instructions, presented hereafter, concern all of the witnesses for whom it wished to provide protective measures in its order of 23 November 2009.
11. The Chamber would first of all reiterate the prohibition which it set out in the aforementioned order and would recall that it constitutes an absolute necessity, as regards both the Defence and the Legal Representatives of the Victims. As emphasized by the VWU, confidentiality remains one of the key ingredients of the Court's effective system of protection. Where witnesses are subject to operational or procedural measures of protection, it is of the utmost importance that, to the extent possible, the parties and participants in the trial do not disclose their identities to third parties or, at the very least, do not expose them

¹⁴ Defence for Germain Katanga, "Defence Request for Leave to Reply regarding the Disclosure of Prosecution Witnesses' Identity to Third Party", 16 December 2009, ICC-01/04-01/07-1724.

to unnecessary risks as a result of their cooperation with the Court. Thus, it is also their responsibility to minimise the risks to protected witnesses. In this respect, it must be recalled that disclosure of the fact that a particular protected witness is cooperating with the Court is an important risk factor for that witness.

12. The Chamber further notes that the constructive proposals from the Office of the Prosecutor, the VWU and the Legal Representatives of the Victims are similar in many respects and that their respective submissions disclose no major disagreement.
13. The issue raised in the present case is the reconciliation of the general principle of non-disclosure of the identities of protected witnesses with the right of the accused to defend themselves by gathering exculpatory evidence, challenging the credibility of a particular prosecution witness, or raising any issue pertaining to the relevance or admissibility of the evidence presented at trial.
14. The Chamber cannot respond to that issue in general terms. Thus it is sympathetic to the position of the VWU, which advocates resolving the issue on a case-by-case basis according to the individuals or entities which the Defence is seeking to contact and the specific situation of the protected witness or witnesses concerned by that contact.
15. In that regard, the Chamber considers that it must fall to the VWU, a neutral organ of the Registry of the Court, to carry out an assessment of the real and concrete risks to the witnesses whose identities the Defence is seeking to disclose to third parties, before the Defence may take any action in connection with its investigations. The Chamber recalls that action of this kind is, and must remain, exceptional, as must the instances in which the identities of protected witnesses are disclosed. It is for this reason that the establishment of a procedure which gives a major role to the VWU cannot, as such, constitute an

obstacle to the proper conduct of the Defence investigations. As has already been recalled, the prohibition imposed by the Chamber remains in place and the Defence must systematically implement it during its investigations. It is only where the disclosure of the identity of the witness is genuinely and specifically necessary for the preparation of the Defence that it may proceed in this manner.¹⁵

16. However, this principle of VWU intervention does not mean that all of the procedures which it proposes must be systematically implemented. The Chamber considers that it is primarily the responsibility of the VWU and the two Defence teams to seek a *modus operandi* which reconciles the necessary protection of witnesses with the proper conduct of the Defence's investigations. It emphasizes that under no circumstances must the VWU's intervention generate delays for the Defence's investigations and that every possible solution must be sought in order to decide, by common agreement, on an effective procedure.
17. By way of example, it could be envisaged that, in the exceptional event of disclosure of an identity to a third party, the Defence contacts a representative of the VWU before taking any action in relation to that third party. Thus, the Defence would be obliged to provide the VWU with the maximum of detail on the witnesses concerned, the objectives it sought to achieve and the individuals or entities it was intending to contact, so that, in the first place, efforts were made to find alternative solutions enabling the same result to be achieved. If it proved that no alternative solution could be found, the VWU could explore with the Defence any measures which might be taken in order to limit, as far as possible, the risks to the witness or witnesses concerned, whilst safeguarding the proper conduct of the Defence's investigations. In this respect, and in view

¹⁵ 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. 9 and 12.

of the need for haste as already recalled, it should be emphasized once again that the VWU must, as far as possible, respond to the Defence's application as quickly as possible, on the basis of the protection criteria already established by the Court.

18. The Chamber has no doubt that the Defence teams and the VWU will be able to reach agreement in order to define and implement a procedure which is effective and consistent with their respective missions. In the Chamber's view, it is important that each keep in mind, as far as possible, that any questions which the Defence puts to a third party must not disclose the fact that the witness concerned is cooperating with the Court, and that the Defence must not conduct inquiries with a view to discovering the location of a protected witness. If, however, the Defence or a Legal Representative of Victims were to become aware of such a location, he or she would be obliged to inform a VWU representative of that fact as soon as possible.
19. As regards the proposal that the Defence teams be asked to record in a logbook the instances in which the identities of particular witnesses may have been disclosed to third parties, as well as the latter's names, the Chamber cannot accept this. Thus it seems to the Chamber that the role which it confers on the VWU, to intercede prior to any potential disclosure of the identity of a witness to a third party, constitutes an acceptable safeguard, and it is therefore not necessary to keep a record of such information, it being recalled once again that such contact must remain exceptional.
20. Finally, the Chamber recalls that the parties and participants should provide the VWU with any relevant and useful information they might have in their possession which would enable it to assess the risk to a particular protected witness. Moreover, in the event that the VWU were to consider re-evaluating or modifying the protective measures in place following contact between the Defence and third parties, a report to that effect must be placed on file.

FOR THESE REASONS, the Chamber

GRANTS Mathieu Ngudjolo's Application;

DENIES Germain Katanga's Application;

INSTRUCTS the VWU and the Defence teams to consult one another and to draft a protocol setting out concrete procedures for disclosure of the identities of protected witnesses;

INSTRUCTS the VWU to place said protocol on file by 4.00 p.m. on 25 January 2009; and

In the interim, **ORDERS** the Defence for Mathieu Ngudjolo and for Germain Katanga provisionally to implement the instructions set out above in paragraphs 15 to 20 of the present order.

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 18 December 2009

At The Hague, The Netherlands