

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/07
Date: 24 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 CONGO
IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO
CHUI

Public

**Decision on protective measures for the exhibits associated with the
testimony of P-2, P-30 and P-157**

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo

Ms Fatou Bensouda

Mr Eric MacDonald

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 Applicants

Legal Representatives of the Victims

Mr Fidel Nsita Luvengika

Mr Jean-Louis Gilissen

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

REGISTRY

Other

Trial Chamber I

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Trial Chamber II ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, having regard to articles 64(3)(c), 67(2) and 68(1) of the Rome Statute of the International Criminal Court ("Statute"), rules 76(1) and 77 of the Rules of Procedure and Evidence ("Rules") and regulation 42 of the Regulations of the Court ("Regulations"), issues the following decision:

I. BACKGROUND

1. Four witnesses who appear on the Prosecution Witness List also gave testimony in the *Lubanga* case. They are witnesses P-2, P-12, P-30 and P-157. In order to comply with its disclosure obligations, the Prosecution sought permission to communicate the transcripts of the testimony given by these four witnesses before Trial Chamber I in the *Lubanga* case to the Defence for Mr Katanga and the Defence for Mr Ngudjolo.

2. Trial Chamber I, however, made it a precondition for the disclosure of the transcripts of the testimony, which was partially delivered in closed session, that this Chamber adopt at least the same level of protective measures as had been ordered for the *Lubanga* proceedings. To that end, the Prosecution applied to this Chamber for protective measures for these four witnesses on 10 July 2009.¹

3. On 7 October 2009, the Chamber issued an order imposing the requested protective measures.² In this order, the Chamber, considering regulation 42(1) of the Regulations, noted that Trial Chamber I had adopted certain protective

¹ "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 "Décision relative aux mesures de protection appliqués aux transcriptions des témoignages effectués par les témoins à charge 2, 12, 30 et 157 dans l'affaire *Thomas Lubanga Dyilo*", 7 October 2009, ICC-01/04-01/07-1516-Conf-Exp

measures, and that they should therefore be applied *mutatis mutandis* in the case against Mr Katanga and Mr Ngudjolo. It further ordered that the Defence must comply with Trial 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 2009.³

4. Following this Chamber's order, Trial Chamber I authorised the disclosure of the transcripts of the four witnesses. However, although this Chamber decided that the protective measures imposed by Trial Chamber I should be applied in the present case, the Prosecution considers that it is not sufficiently clear whether its order of 7 October 2009 also related to the exhibits that are associated with the testimony of the four witnesses.⁴ It therefore sought instructions from Trial Chamber I as to whether it could disclose the said exhibits to the Defence of Mr Katanga and Mr Ngudjolo.⁵ Trial Chamber I decided that the exhibits relevant to the witnesses could be released as long as they are not disclosed or used in any manner other than in private or closed session.⁶

³ ICC-01/04-01/06-1372

⁴ "Prosecution's Request for Protective Measures for the Exhibits Associated with the Testimonies of Witnesses P-002, P-030 and P-157 in the *Lubanga Case*", 17 December 2009, ICC-01/04-01/07-1729-Conf-Exp, par. 4

⁵ ICC-01/04-01/06-T-222-ENG ET WT, 9 December 2009, p. 9-11

⁶ *Idem*.

II. ANALYSIS

A. Authorisation to communicate the exhibits

5. Since the exhibits in question were requested by the Defence, who claim that without them the testimony is difficult to understand,⁷ the Chamber sees no impediment to their communication to the Defence as soon as Trial Chamber I authorises their release.

B. Request for protective measures

6. The Chamber considers that regulation 42(1) of the Regulations is applicable to the protective measures which were ordered by Trial Chamber I in relation to the exhibits and should be applied *mutatis mutandis*. This implies that the exhibits can only be used in closed or private session, depending on whether they were presented before Trial Chamber I in closed or private session.

⁷ E-mail message from Mr Katanga's Defence, received by the Chamber on 17 December 2009.

FOR THESE REASONS,

THE CHAMBER,

ORDERS that the following exhibits may only be used in closed session: DRC-OTP-0124-0002; DRC-OTP-0001-0031; DRC-OTP-0082-0016; DRC-OTP-0087-0261; DRC-OTP-0001-0033; whereas the following exhibits may be used in private session: DRC-D01-0003-1748; DRC-D-01-0003-1750; DRC-D01-0003-1754; DRC-ICC-0001-0297;

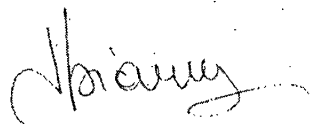
AUTHORISES the communication of the exhibits to the Defence as soon as Trial Chamber I releases them.

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

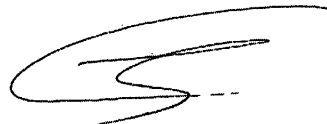


Judge Bruno Cotte

Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 24 December 2009

At The Hague, the Netherlands