



Original: **French**

No.: **ICC-01/04-01/07**
Date: **27 January 2010**

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 Redacted Version

**Decision Granting Protective Measures for Witness 323 during In-Court
Testimony**

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

The Office of the Prosecutor	Counsel for the Defence of Germain Katanga
	Counsel for the Defence of Mathieu Ngudjolo Chui
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	Defence Support Section
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Section	Other

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court”, respectively), pursuant to articles 64(2), 64(6), 68(1) 68(2) of the Rome Statute, and rules 87 and 88 of the Rules of Procedure and Evidence, decides as follows:

I. Background

1. On 23 November 2009, the Chamber issued an order on the protective measures for certain witnesses who have been called to testify (“the Order”),¹ thereby granting protective measures to 18 Prosecution witnesses and one witness of the Court. The Chamber further ordered the Prosecutor to provide additional information in support of the measures he was seeking for Witnesses 161, 166, 233 and 323, whilst temporarily allocating them a pseudonym. By oral decision of 25 November 2009, the Chamber, having received new information, granted the requested protection arrangements for Witness 233.²
2. The Chamber is now seised of a request from the Prosecutor concerning the protective measures that he is seeking for Witness 323 (“the Prosecutor’s Request”).³ He requests that: (i) the witness continue to be referred to by his pseudonym during his testimony; (ii) that image and voice distortion be applied; and that (iii) those parts of the testimony which could identify him be given in closed session.
3. The Prosecutor argues that such measures are necessary to ensure the safety of the witness and his family members.⁴ He notes that this witness fought for the

¹ *Ordonnance relative aux mesures de protection de certains témoins cités à comparaître par le Procureur et par la Chambre (règles 87 et 88 du Règlement de procédure et de preuve)*, 23 November 2010, ICC-01/04-01/07-1667-Conf.

² ICC-01/04-01/07-T-82-CONF-EXP-FRA RT 25-11-2009 T, pp. 2 to 5.

³ Office of the Prosecutor, “Prosecution’s Request for Protective Measures for Witness 323”, 15 January 2010, ICC-01/04-01/07-1766-Conf-Exp.

⁴ ICC-01/04-01/07-1766-Conf-Exp, para. 5.

UPC and currently lives [REDACTED]. He emphasises that, to date, his collaboration with the Court [REDACTED]. The Prosecutor states that [REDACTED]. [REDACTED].⁵

4. At the Chamber's request, on 20 January 2010, the Defence for Mathieu Ngudjolo⁶ and the VWU⁷ submitted their observations on the Prosecutor's Request. The VWU endorses the Prosecutor's suggestions and the Defence team for Mathieu Ngudjolo, for its part, has no objection to his requests. The Legal Representatives of the Victims, for their part, indicated that they did not intend to file submissions,⁸ and the Defence for Germain Katanga did not respond within the prescribed time.

II. The Chamber's analysis

5. The Chamber is mindful that in its Order, it requested the Prosecutor to convey to it any observations made by Witnesses 161, 166, 233 and 323 upon completing the familiarisation process in which they are invited to participate on their arrival in The Hague. Nevertheless, although Witness 323 has not yet undergone this process, the Chamber considers that it now has sufficient information to take an informed decision.
6. The Chamber recalls, once again, that protective measures may be granted only exceptionally, following a case-by-case assessment of their necessity and proportionality in respect of the rights of the accused.⁹

⁵ Ibid., paras. 5 to 10.

⁶ Defence for Mathieu Ngudjolo, "*Observations de la Défense de Mathieu Ngudjolo relatives à la « Prosecution's Request for Protective Measures for Witness 323 » (ICC-01/04-01/07-Conf-Exp-1766-Conf-Red du 15 janvier 2010)*", 20 January 2010, ICC-01/04-01/07-1777-Conf.

⁷ Registry, "Victims and Witnesses Unit's observations on the 'Prosecution Requests for Protective Measures for Witness 323'", 20 January 2010, ICC-01/04-01/07-1779-Conf-Exp.

⁸ E-mail sent on 20 January 2010 to the Chamber by the Legal Representatives of the Victims.

⁹ ICC-01/04-01/07-1667-Conf, para. 9; ICC-01/04-01/07-T-82-CONF-EXP-FRA RT 25-11-2009, p. 2.

7. [REDACTED], including on Mathieu Ngudjolo's alleged leadership role during the attack on Bogoro. The Chamber notes that, according to the information provided by the Prosecutor, this witness [REDACTED].
8. [REDACTED] and he has reportedly not received any threats to date.¹⁰ Although, as the Defence for Mathieu Ngudjolo¹¹ points out, he is not a public figure in his community, his safety would not be less in jeopardy were his identity to be made public.
9. Should he or his family members be threatened, Witness 323 [REDACTED]. However, [REDACTED], security remains volatile in the region where he currently lives and where armed militias are rampant. This situation, [REDACTED].¹²
10. Given this context, the Chamber accordingly finds that it is imperative that the anonymity of Witness 323 be preserved and that only the requested protective measures of voice and image distortion and use of a pseudonym allow his safety to be preserved.
11. As for the possible need to order closed sessions, this will be assessed on a case-by-case basis, which, moreover, accords with the Prosecutor's suggestion¹³ and the practice adopted by the Chamber.
12. The Chamber considers that the arrangements for testimony thus ordered will not undermine the fairness of the trial. Indeed, the Defence knows the identity of Witness 323 and the accused will be able to see him when he testifies in Court and to hear his undistorted voice. Moreover, unless a closed session is ordered, the public will be able to follow the proceedings and be apprised of their content.

¹⁰ ICC-01/04-01/07-1779-Conf-Exp, para. 3.

¹¹ ICC-01/04-01/07-1777-Conf, para. 9.

¹² ICC-01/04-01/07-1766-Conf-Exp, para. 10 and ICC-01/04-01/07-1779-Conf-Exp, para. 4.

¹³ ICC-01/04-01/07-1766-Conf-Exp, para. 13.

13. Although it is fully aware of the importance of the principle of public hearings and intends it to be respected, the Chamber finds that the protective measures for Witness 323 are necessary to the extent that the scope of this principle may be restricted. Such restriction would entail minimal restrictions which do not affect the rights of the Defence in any substantive way.

FOR THESE REASONS, THE CHAMBER

GRANTS the Prosecutor's Request; and

ORDERS the Prosecutor to inform the Chamber promptly of the consent of Witness 323 to all of the protective measures granted to him by this decision, as soon as the familiarisation process has been initiated.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Van den Wyngaert

Dated this 27 January 2010

At The Hague, the Netherlands