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No.: ICC-01/04-01/07
Date: 28 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
Defence Provisional Observations on the Meaning and Execution of the Trial
Chamber's Instructions re Approaching Third Parties during Defence
Investigations**

Source: Defence for Mr Germain Katanga

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

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A. Introduction

1. The Defence hereby files preliminary and provisional observations on the Trial Chamber's 'Instructions sur la maniere d'approcher des tiers utiles aux enquetes de la Defence' (hereinafter "Instructions"), ICC-01/04-01/07-1734. These observations are made in order to ensure that there is no misunderstanding during this interim period up to the 25th January or such other time as the Trial Chamber makes any further decision in this matter, and while Defence investigations are currently under way. The Defence also wishes to place on record certain concerns that it has in relation to ensuring the effectiveness of its investigations.
2. On the 2 December 2009, the Defence for Mathieu Ngudjolo, seized the Trial Chamber with a request for instructions on the manner in which it should approach third parties in circumstances where it could not be excluded that it may have to reveal the identity of a protected witness.
3. On the 4th December and 9th December 2009, the Chamber requested observations from the Victims and Witnesses Unit and the participants respectively. The Prosecutor and Legal Representatives of the Victims filed observations on the 11th December 2009, and the Victims and Witnesses Unit on the 15th December 2009. These latter observations were communicated to the Defence and other parties and participants on the 16th December 2009. On the same day the Defence for Mr Katanga requested leave to respond to these various observations. The Defence for Mr Katanga made no observations in relation to the specific request of the Defence for Mr Ngudjolo.
4. The Trial issued its Instructions on the 18th December 2009. By virtue of this decision, the Trial Chamber denied the request of the Defence of Mr Katanga for leave to respond to the views of the Prosecution and the Legal Representatives of the Victims.
5. In this same decision, the Trial Chamber laid down certain statements of principal relating to the issue of the revelation of the identity of a witness and issued instructions to the effect that the Victims and Witnesses Unit and the Defence teams should coordinate to draft a protocol setting out the concrete modalities for divulging the identity of protected witnesses, and that the Victims and Witnesses Unit should submit this by the 25th January [2010] (the reference to 2009 being an obvious error).

It was further decided that in the interim the respective Defence teams should provisionally put into effect the instructions contained in paragraphs 15 to 20 of the decision.

B. The Chamber's decision in relation to Mr Katanga's request to be heard

6. In the light of the Trial Chamber's decision that Mr Katanga should not be granted the right to respond to the observations of the Prosecution and Legal Representatives of Victims, having not taken the opportunity to respond to the request of the Defence for Ngudjolo, the Defence confines its observations herein to the remarks of the Trial Chamber only.
7. The Defence wish to explain however, that in its understanding the Defence for Ngudjolo was seeking clarification as to the meaning and effect of the Trial Chamber's decisions on protective measures, including its directive of 23 November 2009. The Defence for Katanga did not deem it necessary to express any views thereon since this was a matter which was clear to it and it expected that it was the views of the Trial Chamber on the meaning of these protective measures which was being sought and that the Trial Chamber would clarify its interpretation of these measures.
8. When the Prosecutor, the Legal representatives of the Victims and the Victims and Witnesses Unit responded, a new and distinct issue was raised, which was the issue as to the role of the Victims and Witnesses Unit in potentially restricting the methods of investigations of the Defence. This is a matter upon which, while the Defence for Katanga could have raised the issue independently prior to the 11th December, only surfaced as a potential problem after the parties and participants, including the Unit, had brought the matter into issue.
9. The Defence for Katanga will explore this issue more fully with the Chamber if and when it is granted the opportunity prior to the Trial Chamber's next decision on this matter. Here certain preliminary observations are made.

C. The Chamber's decision that the Defence and Unit should coordinate and draft a protocol setting out the concrete modalities for divulging the identity of witnesses

10. The Defence for Mr Katanga appreciates the spirit in which this decision was made and is grateful for the caution exercised by the Trial Chamber in ensuring that the Defence is fully involved in the process and that its investigations are not compromised. The Defence also understands the wisdom in engaging in the discussions as directed by the Chamber.

11. The Defence would like to clarify that in its understanding, while the Trial Chamber has offered thoughts on the principles involved, it has made no decision on what such a protocol should look like. The only decision that has been made is that there should be a protocol. While the Defence has reservations about the adoption of any procedure requiring advance notification to the Unit in all circumstances where a witnesses name is used in discussions with third parties, the Defence agrees that in so far as a protocol implies guidance on the sensitivity required in matters of witness protection, it has a useful function. It would therefore be premature for the Defence to raise any challenge to the Trial Chamber's current stance. However, the Defence deems it important to inform the Chamber of its preliminary concerns given ongoing Defence investigations and in the light of the premises upon discussions have taken place thus far, as represented in the pleadings of the parties and participants, as well as the decision of the Trial Chamber.

12. The Defence for Katanga would wish to place on record its objection to a procedure requiring advance notification and the provision of details of investigation to the Unit with a view to finding solutions with the Unit prior to using a witnesses name in discussions with a third party in circumstances where the Defence has no intention of revealing that fact that the person named is a witness before the Court.

13. The Defence would further like to indicate that in its submission, whatever restrictions are placed on the manner of raising the name of a prosecution witness to third parties during the course of Defence investigations, must apply equally to defence witnesses during the course of prosecution investigations.

D. The order that the Defence provisionally comply with the instructions set out in paragraphs 15 to 20 of the Trial Chamber's decision

14. The Defence for Katanga is not entirely clear as the implications of the last sentence in the Chamber's disposition, given the nature of the discussion in the stated paragraphs. The Defence is concerned that there may be some misunderstanding as between the Chamber (and ultimately other parties and participants although the Defence must steer clear of commenting on that) on the one hand, and the Defence for Katanga on the other, as to the theoretical premises behind the exercise of producing a protocol.
15. In paragraph 17, as elsewhere in the decision, the Trial Chamber has described the divulcation of the identity of a witness to a third party as an exceptional measure, and suggested the possible implementation of a procedure involving advance notice to the Victims and Witnesses Unit of investigative activities of the Defence.
16. The question arises as to what is meant by 'divulcation de l'identite a un tiers' [taking the original French from the Decision]. Does this mean the disclosure of the name of a witness during the course of discussions with third parties in a manner which reveals the fact that the witness is due to give testimony before the court? Or is it being said that any reference to the name of a protected witness to a third party during the course of investigations must be viewed as exceptional, regardless of whether that person's status as a witness is being disclosed to that third party? It would appear from the context of the way in which the question was framed by the Defence for Mr Ngudjolo and from paragraph 18, that it is in fact the latter which is being referred to. It is stated in the second sentence of paragraph 18 that:

Pour la Chambre, il est important que chacun garde a l'esprit que, dans la mesure du possible, les questions eventuellement posees par la Defence a un tiers ne doivent pas reveler la collaboration du temoin concerne avec la Cour.

This seems to confirm that any form of reference to the name of a witness is considered a problem, while revealing the status of as a witness is out of the question.

17. The Defence understands the prohibition in the order of the 23rd November to be a prohibition on revealing the status of a person as a witness. As far as using the names

of witnesses in discussions with third parties is concerned, in the experience of counsel, far from being exceptional, depending on the nature of the case and how close the witness is to the facts of the case, it can in fact be very commonly required and essential to effective investigations. The names of protected witnesses frequently need to be referred to in any discussion on the facts where they were characters in the daily lives of the accused or the organisations to which they belonged. The names of protected witnesses also must be referred to in order to carry out effective investigations with regard to their credibility. Furthermore, the Defence will rarely be in a position to give advance notice of when the name of a witness may come into discussions during investigations, because of the practicalities of the planning and executions of missions. The issues for discussion and even the persons with which one may have a discussions often only becomes clear during the mission itself.

18. While the Chamber has indicated that modalities should not lead to delay in Defence investigations, this will be the inevitable result of requiring steps which are not practical in the execution of investigations, especially in the context of limited resources.

E. Provisional compliance with the spirit of the Decision of the Trial Chamber

19. The Defence outlines certain concerns it has, so as to keep the Chamber on notice of the difficulties in which it finds itself during current investigations and to place its position re the Instructions on record, but will endeavour to work as best it can within the spirit and letter of the Trial Chamber's Order and especially its indications at paragraphs 15 to 20.

Respectfully submitted,



David HOOPER

Dated this 28th December 2009, at Val Dieu, Belgium

