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**International
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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***

Confidential

**Defence Response to the Prosecution's and Legal Representatives' Observations
on Joint VWU-Defence Protocol specifying concrete Modalities of Disclosure of
Protected Witnesses**

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 for Mr. Katanga (“Defence”) hereby submits its observations in response to the *Prosecution’s response to “Victims and Witnesses Unit and Defence Teams joint protocol specifying concrete modalities of disclosure of protected witnesses’ identities”*;¹ and the *Observations supplémentaires et conjointes des représentants légaux sur le Protocole sur les modalités de divulgation de l’identité de témoins protégés à des tiers (ICC-01/04-01/07-1797)*.²
2. In these observations made by the Prosecution and victim representatives, both oppose the protocol specifying concrete modalities of disclosure of protected witnesses’ identities, jointly agreed by the Victims and Witness Unit (“VWU”) and the two Defence teams (“joint protocol”).³ The Defence sets forth with its arguments as to why the Chamber should accept the joint protocol notwithstanding the observations from the Prosecution and victim representatives.

B. Procedural premise for the pleadings of the Prosecution and the Legal Representatives of the Victims

3. As a preliminary matter, the Defence takes note that there was no procedural foundation for the responses of the Prosecution and Legal Representatives of the Victims. The Joint Protocol filed was not a motion but a filing made pursuant to the Trial Chamber’s *Instructions sur la manière d’approcher des tiers* of 18 December 2009.⁴ That decision ordered this filing but did not request or accord the right to parties or participants to respond to that protocol. To the knowledge of the Defence, no leave was sought for this exercise.
4. Both the Prosecution and the Legal Representatives of the Victims had in fact already responded to the motion of the second accused and it was this which

¹ ICC-01/04-01/07-1879-Conf, dated 16 February 2010, but filed on 17 February 2010.

² ICC-01/04-01/07-1878-Conf, filed 16 February 2010.

³ ICC-01/04-01/07-1797, filed publicly with confidential annexes, 27 January 2010.

⁴ ICC-01/04-01/07-1734.

motivated the Chamber to request that the Defence and the Victim's and Witnesses Unit come together to reconcile the interests of defence investigations with the protection of witnesses.

C. Nature of the Trial Chamber's decision of 18 December 2009

5. The Trial Chamber's decision of 18 December 2009 followed a motion from the Defence for the second accused, Mr Ngudjolo, requesting clarification of the Trial Chamber's decision of 23 November 2009.⁵ This motion of the Defence for the second accused was responded to by the Prosecutor and the Legal Representatives of the Victims.⁶ Views were also submitted by the Victims and Witnesses Unit.⁷
6. The Defence for Katanga did not see a need to respond to the motion of the Defence for Ngudjolo, but did wish to respond to the specific suggestions raised by the Prosecutor and the Legal Representatives of the Victims.⁸ The Trial Chamber did not permit it to do so, on the basis that it should have responded to the Defence for Ngudjolo.⁹ Accordingly, the Decision of the 18 December 2009 was reached without regard to the views of the Defence for Mr Katanga on the propositions of the Prosecutor and the Legal Representatives of the Victims. This in fact renders no prejudice to the Defence because as outlined in the following paragraphs, the Trial Chamber did not in that decision attempt to lay down the law categorically and definitively, as suggested by the Prosecutor.
7. The Prosecutor now submits that the Trial Chamber laid down a binding framework in that decision. The Defence disagrees. It is submitted that it is plain that this was not the intention of the Trial Chamber and its observations were of a suggestive nature and only expressly meant to be binding to the extent that they were applicable in the interim period while these matters were

⁵ ICC-01/04-01/07-1702-Red, filed on 8 December 2009.

⁶ ICC-01/04-01/07-1720-Red; ICC-01/04-01/07-1719, both filed on 11 December 2009.

⁷ Views submitted to the Chamber by email of 15 December 2009, transmitted to the parties on 16 December 2009.

⁸ Defence Request for Leave to Reply regarding the Disclosure of Prosecution Witnesses' Identity to Third Party, ICC-01/04-01/07-1724, submitted on 16 December 2009.

⁹ ICC-01/04-01/07-1734, para. 9.

addressed by the Defence and the Victim's and Witnesses Unit in a preliminary stage. Had the Chamber meant to foreclose the parameters of the discussions, it would not have considered that it was proper in the preliminary phase to put the matter to the Defence and Victims and Witnesses Unit who were best placed to know the respective interests involved.

8. Moreover, the Trial Chamber appears to have been careful in the way it expressed itself to ensure that it was not laying down peremptory requirements for investigations. Thus, at paragraph 14 of its decision, the Chamber indicates that it cannot respond to the question in a general manner and that it is sensitive to the position that these matters should be addressed on a case by case basis. At paragraph 17, the Trial Chamber prefaces its comments with the expression 'A titre indicative il pourrait être envisagé'.
9. It is submitted that the language and overall tenure of the decision demonstrates that the Trial Chamber did not wish to lay down any permanent regime but rather that the matter be addressed through discussions between the Defence and the Victims and Witnesses Unit in the first instance.

D. The necessity for detailed and binding limitations for the conduct of investigations

10. It is submitted that once the Trial Chamber has ruled on motions for protective measures, such rulings must be applied by the parties. Counsel should be trusted to apply the decisions of the Chamber in good faith. It is not necessary to regulate the manner and execution of investigation in minute detail. As far as we are aware, this has not generally been done by courts and international tribunals and there is no good reason for it to occur in the International Criminal Court.¹⁰ The investigations of the Defence in the *Lubanga* trial are

¹⁰ See, for instance, *Prosecutor v. Brdjanin and Talic*, 'Decision on Motion by Prosecution for Protective Measures' 3 July 2000, <http://www.icty.org/x/cases/brdanin/tdec/en/00703PM213035.htm>; *Le Procureur c. Bagosora et consorts*, ICTR-98-41-AR73 et ICTR-98-41-AR73(B), « Decision on Interlocutory Appeals of Decision on Witness Protection Orders », 6 octobre 2005; *Le Procureur c. Bagosora et consorts*, ICTR-98-41-T, Décision relative à la requête du procureur en uniformisation et modification de mesures de protection de témoins, 5 juin 2005.

not regulated in this fashion.¹¹ Neither the Prosecutor nor the Legal Representatives for the Victims have provided precedents for what they contend. Experience suggests strongly that this is not an area where micro-management is a practicable answer to the diverse problems to be met in unpredictable situations.

E. Applicability of principles to the Prosecutor and the Legal Representatives

11. Both the Prosecutor and the Legal Representatives assert the non-applicability of the Protocol to them, while seeking greater and more binding restrictions on the Defence.

12. It should be recalled that article 67(1)(e) of the Statute provides that the accused has the right to examine and have examined witnesses under the same conditions as the Prosecution. Since investigations form the foundation of the examination of witnesses, it follows that restrictions on the Defence should be equally applicable to the Prosecutor. Whether this is done through a protocol applicable to all parties and participants or through the production of a later protocol applicable to the Prosecutor is a matter of form. What is important is that the accused is tried in conditions of equality of arms.

13. The Legal Representatives of Victims are not parties to the proceedings, but participants accorded certain privileges. As such it would be antithetical to the rights of the accused that such legal representatives should be in a position to participate in the trial of the accused under more favourable conditions than the accused himself. In paragraph 11 of its decision of 18th December 2009, the Trial Chamber reiterated the prohibition set out in the decision of the 23 November 2009 and noted its absolute necessity with regard to the Defence as with regard to the legal representatives of the victims.

14. The only justification for exclusion of the Prosecutor's office from the effect of the current protocol is to the extent that it is designed to address the protective

¹¹ See for that matter: ICC-01/04-01/06-1372, 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, 4 June 2008.

measures of prosecution witnesses. To the extent that it is aimed at all protected witnesses then it must be applicable to all parties. In the event that its application is limited to the protective measures of prosecution witnesses, there will have to be a subsequent protocol concluded for the protection of defence witnesses. Even to the extent that the current Protocol is only extended to the protection of prosecution witnesses, any restrictions on the manner of disclosure of identities, must it is submitted, necessarily be equally applicable to all parties and participants. This follows both from the principle of equality of arms and from the fact that it is no less prejudicial to a prosecution witness to have his or her identity disclosed by an agent of the Prosecutor than by the Defence.

15. It should be remembered that defence witnesses are often in a more vulnerable position than prosecution witnesses simply because they are perceived as supporting an unpopular cause. For example, the Rwandan cases illustrated a consistent and adverse pressure brought to bear on Defence witnesses by the government itself. In the present case issues that reflect poorly on the DRC government have been found by the Defence to cause potential defence witnesses to be concerned as to their position vis-à-vis that government. Moreover, in any regulation on the manner of giving effect to Trial Chamber decisions, the Defence must be accorded the same degree of trust in their professionalism as the Prosecution.

F. The circumstances in which disclosure may be made

16. The Defence would like to re-emphasise its position as stated in its observations of 29 December 2009 on the Trial Chamber's decision of 18 December 2009.¹² Reference to the names of witnesses is an inevitable and inescapable part of the process of any investigation. It cannot be avoided. But it is not the mentioning of a particular person's name that poses the problem. Rather, it is the going further and revealing that that person has the status of being a witness, or is otherwise involved with the trial process. The Defence have always emphasised that such specific revelation is, in its experience,

¹² Defence Provisional Observations on the Meaning and Execution of the Trial Chamber's Instructions re Approaching Third Parties during Defence Investigations, ICC-01/04-01/07-1745.

rarely necessary. It is only when that status is revealed, that any security issue arises.

17. Reference to the names of some witnesses is necessary when exploring the factual background. Was 'X' there, or what did 'X' do? Moreover, once the credibility of a witness is in issue it goes without saying that it is necessary to investigate the background of that witness. This is not realistically possible without reference to the name of the person. This may be done in a manner that does not disclose the status of that person as a witness. To suggest that it is abnormal to refer only to the name of a witness without referring to that person's status as a witness reveals a misunderstanding of the investigative process.
18. It would be highly impracticable to suggest that the names of witnesses would only be referred to in exceptional circumstances and only with prior discussion with the Victim's and Witnesses Unit. When on mission, the Defence must act expeditiously in speaking with people. Often, interviews are secured swiftly or with difficulty. It is often not possible to postpone the discussion with an informant or a witness or see them more than once. Given the limited resources of the Defence, counsel and legal assistants cannot, unlike the Prosecution, go to the Democratic Republic of Congo on a regular basis to interview witnesses and informants.
19. Imposing upon the Defence the obligation of discussing each time with the Victims and Witnesses Unit the use of a name in advance, even where the status of that person is undisclosed, would be an unfair burden. It would place the Defence at a significant disadvantage with respect to the Prosecution and result in significant delays in the investigative process and the expeditiousness of the trial.
20. With respect to the disclosure of the status of a person as a witness, the Trial Chamber did not exclude this possibility in its decision of the 18 December 2009. While this would be exceptional, there may be circumstances where it becomes unavoidable. For instance, where it becomes necessary to discuss a witnesses statement or testimony where the witness refers directly to the acts

and conduct of a third party. For example, ' X claims that you told him on the 5th of February that etc etc'. In such circumstances, while not expressly stating that the person is a witness before the court, the implication may be clear once such discussions form the basis of an investigation.

21. It follows that any protocol must be sufficiently flexible to allow investigations to be effective. The accused cannot be placed in a position where his team is carrying out investigations with their hands tied. This would violate article 67(1)(b) of the Statute.

On these grounds, the Defence prays the Chamber to accept the joint protocol agreed upon by the Defence and the VWU in its present form.

Respectfully submitted,



David HOOPER

Dated this 1st March 2010

At The Hague, Netherlands