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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 THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public

**Prosecution's Application for Leave to Appeal the "Décision sur
le « Protocole régissant les enquêtes concernant les témoins
bénéficiant de mesures de protection »"**

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Introduction

1. The Trial Chamber has ordered that a number of witnesses in this case have their identities protected due to risks to their safety: while their identity is known to the defence teams, it must be kept confidential from the public. On 24 April 2010 the Trial Chamber endorsed a Protocol pertaining to investigations into witnesses who benefit from protective measures.¹ Despite the recognized risks to these witnesses, the Decision allows the defence² to disclose the name of a protected witness to third parties. The only requirements to do so are that the defence considers it “necessary”, believes that “no alternatives are available”, and uses the name “in a careful and focused manner”.³
2. Neither the Protocol nor the Decision endorsing it includes any requirement to assess the impact of the disclosure on the existing (and recognized) risk to the witness. The Court is prevented from making such an assessment since it will not even be informed prior to the defence revealing the identity of a witness. For the same reasons, the Court is also prevented from independently and objectively verifying that the criteria for revealing the identity of protected witnesses are met, or from balancing the risk to the witnesses against the defence’s legitimate interest in that particular investigative step. Rather, determining the appropriateness of revealing the identity of protected witnesses and the risks that this will cause are left to the sole discretion of the defence.
3. The Statute, in particular Article 68(1), imposes upon the Court an obligation to protect witnesses. This requires that the Court address, and aim to avoid, all foreseeable security risks. The Decision, by endorsing the Protocol, fails to respect these obligations. It leaves the Court unable to fulfill its duty to protect witnesses, and places the protection of witnesses who have been declared to be at risk in the hands of the defence. The Prosecution therefore seeks leave to appeal the Decision.

Procedural Background

4. The procedural background to this application is set out in detail in the Decision.⁴ As it recounts, on 23 November 2009, the Chamber ordered protective measures for a number

¹ ICC-01/04-01/07-2047 (“the Decision”); endorsing the Protocol set out in ICC-01/04-01/07-2007-Anx1, 26 March 2010 (“the Protocol”).

² The Protocol refers to “investigating party” and the Decision indicates that it applies to all parties and participants (ICC-01/04-01/07-2047, p.10). This necessarily includes the two defence teams. Indeed, the Protocol was developed in response to a request from one of the defence teams in this case.

³ Protocol, second chapeau paragraph and para. (a).

⁴ The Decision, paras. 1-7.

of witnesses. In response to a request from the defence of Mathieu Ngudjolo for guidance on how to investigate in light of these measures, which prohibited the defence teams from revealing the identity of protected witnesses to members of the public, on 18 December 2009 the Chamber ordered that the VWU and the defence teams (and subsequently the legal representatives of victims) consult on a protocol to guide such investigations. The Chamber also set out a series of conditions which the defence teams were obliged to comply with pending adoption of the protocol.⁵

5. The Prosecution was not party to the negotiation of this Protocol, despite the Chamber's recognition that it should reflect the broadest possible consensus.⁶ While the Prosecution made certain *ex post facto* observations to the Chamber by way of filing, its understanding of the risks faced by its witnesses and the conditions of investigation in the field were not incorporated during the preparation of the Protocol and are not reflected in it.
6. On 26 April 2010, the Chamber issued the Decision adopting the Protocol. In accordance with Article 82(1)(d) and Rule 155, the Prosecution hereby seeks leave to appeal the Decision.

The issue for which leave to appeal is sought

7. This application seeks leave to appeal the issue of:

“Whether the Decision endorsing the Protocol is consistent with the obligations of witness protection which the Statute places upon the Court” (“the Issue”).
8. Article 68(1) of the Statute imposes on the Court the essential obligation to take appropriate measures to protect, *inter alia*, the safety of witnesses. In the Decision, the Chamber endorsed a Protocol that allows a party, at its unreviewable discretion, to disclose the identity of a protected witness without notice to or approval from the Court or the Victim Witness Unit, so long as the disclosing party does so “in a careful and focused manner and only when necessary for the purposes of the investigation or inquiry”.⁷ This application seeks leave to appeal whether the Decision, in endorsing this Protocol, violates that essential obligation under Article 68(1).
9. The Issue affects witnesses who have been granted protection by an order of the Court. The Chamber accepted that these witnesses are at risk, and that it was imperative that their identity be protected.⁸ Yet under the terms of the Protocol and the Decision, the promise

⁵ ICC-01/04-01/07-1734.

⁶ Decision, paras. 6-7, 9

⁷ Protocol, para. (a).

⁸ ICC-01/04-01/07-1667-Red, paras. 10-11.

of protection given by the Chamber – that as a minimum their identity will not be disclosed to external parties – can be unilaterally abrogated by the defence.

10. Protecting the safety of witnesses is an *obligation* imposed by the Statute, not a matter of discretion. It is central to the Court’s operations⁹ and to the integrity and viability of the proceedings and of its mission: as the Appeals Chamber has stated, “ensur[ing], as a matter of the highest priority, that witnesses are appropriately protected [...] is, pursuant to article 68 of the Statute, a responsibility of the Court as a whole”.¹⁰ Ensuring the safety of those witnesses who decide to testify before the Court, and that they are able to testify free from fear and intimidation, is a fundamental element of the Court’s mandate. Yet the Decision endorsing the Protocol falls short of the standards and obligations of protection set out in the Statute.
11. Protection of witnesses under the Statute requires that the Court both avoid and minimise risks to their safety (preventive measures), and that it adequately manage those risks which are created (reactive measures). However, under the Decision there is no requirement on any organ of the Court to assess the risk that will be caused to a protected witness by the defence disclosing their identity to a third party.¹¹ Further, the defence has no obligation to even inform any organ of the Court that it has made such a disclosure, or keep records of the disclosures made, which conspires against the possibility of any assessment by the Court.
12. The Decision does not even require that the defence considers the possible detrimental consequences to the safety and well-being of witnesses that such disclosure may entail.¹² And even if it did, such an obligation should not be outsourced to a party which has no clear statutory obligation to protect witnesses, nor the resources or information to make a fully informed assessment of the risk to a witness, and their family, which a given disclosure of identity will entail. Only the Court is in a position to make that assessment.
13. The Decision also does not require the defence to consult and cooperate with VWU in assessing and minimising the risks caused by its investigations. The rationale for locating

⁹ A range of provisions of the Statute and Rules “are indicative of an overarching concern to ensure that persons are not unjustifiably exposed to risk through the activities of the Court.” - ICC-01/04-01/07-475 OA, para. 54 (setting out the other provisions in paras. 43-53).

¹⁰ ICC-01/04-01/07-776 OA7, para. 101. The Strategic Plan of the Court similarly considers “put[ting] in place a system to address all security risks, striving for maximum security of all participants consistent with the Rome Statute” to be a “priority objective” relating to the quality of justice - Strategic Plan of the Court, [ICC-ASP/5/6](#), 4 August 2006, paragraph 31 and Annex, page 14; see also Revised strategic goals and objectives of the International Criminal Court 2009-2012 in the Report on the activities of the Court, ICC-ASP/7/25, Annex, 29 October 2008, p. 18.

¹¹ The Protocol requires in general that an investigating party “avoids the risk of exposing the identity of protected witnesses to a third party to the extent possible.” (Protocol, second chapeau paragraph) But it does not require that the investigating party assess the risk that exposing the identity will cause, if the identity is revealed.

¹² *Ibid.*

the VWU in the Registry was that it be impartial, providing assistance and assessments regardless of the party or affiliation of the witness.¹³ The Prosecution, in addition to its independent statutory obligations to take steps to avoid risk to witnesses,¹⁴ must cooperate with the VWU during its investigations.¹⁵ However, there is no such requirement placed on the defence – which, as already said, has fewer resources, no such independent obligations, and a lesser interest in protecting Prosecution witnesses. Cooperation and sharing of information is left in the unfettered discretion of the defence.¹⁶ Instead of affirming the role of the Court to take steps to prevent or minimize any foreseeable risk, the Decision effectively precludes it from complying with this obligation in a consistent and efficient manner.

14. The Prosecution is mindful of the Chamber's duty under Article 64(2) of the Statute to balance the protection of victims and witnesses against the fairness of proceedings and the rights of the accused.¹⁷ The defence has an undisputed right to investigate and prepare its case. However, this right is not absolute,¹⁸ and it does not abrogate the obligation upon the Court to ensure that witnesses are adequately protected. Respecting the rights of the defence does not permit the Court to place the assessments of risk, and the appropriate actions to prevent and manage that risk, solely in the hands of the defence and beyond any judicial review. The Decision leaves the Court unable to intervene where an inquiry of marginal value would cause severe security risks for a protected witness, which may in turn have serious implications for the Court's protective scheme.

¹³ VWU has openly stated its neutral and independent role that serves to parties equally so the requirements of the principle of equality of arms are met. See ICC-01/04-01/07-585, para. 49. The Decision also ignores the mandate of the VWU and the obligations that the Statute assigns to it under articles 43(6) and 68(4); rule 17(2) - as developed by the jurisprudence of the Appeals Chamber. See in particular: ICC-01/04-01/07-776 OA7, para. 92: "the function of the VWU is to provide, *inter alia*, appropriate protective measures and security arrangements, respecting the interests of the witness and acting impartially," and "at the same time, the VWU must recognise the specific interests of, and cooperate with, the parties."

¹⁴ E.g. Article 54(1)(b), 68(1).

¹⁵ E.g. ICC-01/04-01/07-776 OA7, para.101: "[C]ooperation between the Prosecutor and the VWU will be essential to ensure, as a matter of the highest priority, that witnesses are appropriately protected. This is, pursuant to article 68 of the Statute, a responsibility of the Court as a whole. The VWU has specific expertise in protection matters; and the Prosecutor is close to the relevant witnesses on the ground and in a position to see where a need for protection may arise. The Appeals Chamber emphasises the vital importance of cooperation on all matters of witness protection, including relocation."

¹⁶ Neither the Protocol nor the Decision contains any requirement that the defence must consult or cooperate with VWU before disclosing the identity of a protected witness. It only provides that "VWU remains available to provide advice and guidance in relation to any questions or concerns the parties or participants may have in respect of any specific matter or a particular witness." (Protocol, para. (f)).

¹⁷ The requirement to balance the need for protection of witnesses against the rights of the accused applies also at the trial stage – see e.g. ICC-01/04-01/06-2209-Red, para. 9. Such a balance necessarily requires a careful case-by-case analysis based on all of the relevant facts (para. 10). See also ICC-01/04-01/06-1924-Anx2, paras. 16, 18, 20.

¹⁸ There have been circumstances in which items or information which may have been material to the preparation of the defence was not provided because of security concerns. In those cases the Chamber balanced the different interests at stake and looked for alternative measures – see e.g. ICC-01/04-01/06-1924-Anx2; ICC-01/04-01/06-2209-Red.

15. The existing jurisprudence emanating from the Appeals Chamber has insisted that in order to withhold information from the defence, the Prosecution's assessment of the necessity of a redaction and of the existence and sufficiency of alternatives must be subject to independent (judicial) scrutiny, and the interests involved must be balanced.¹⁹ The same principle applies here. Before the defence may abrogate an order by a Chamber pertaining to the protection of a witness and the confidentiality of any information about him or her, the defence's assessment of the necessity and availability of alternatives must be verified.²⁰ The need for independent scrutiny and control is even greater here, as the instant issue is not about disclosure to another party, but providing information to external persons over whom the Court has no control whatsoever.
16. The concerns outlined above illustrate the impact and implications of this Issue. The question in an application for leave to appeal is not whether the Decision is correct but whether the underlying matters constitute appellable issues.²¹ The Prosecution notes that issues of the proper relationship between the rights of the defence and the protection of witnesses have regularly been recognised as affecting the fair and expeditious conduct of the proceedings, and requiring prompt resolution by the Appeals Chamber.²²
17. In this case all requirements for granting leave to appeal are met:
- the Issue identified arises from the Decision on its plain terms;
 - given the role of witness evidence and the centrality of the protection obligation, the Issue affects the fair and expeditious conduct of the proceedings, and also the outcome of trial; and
 - this is a question which must be immediately resolved by the Appeals Chamber: the Court cannot allow protected information to be disclosed to third parties and witnesses to be put at risk, and then limit itself to intervening to manage that risk; nor can it wait until a witness has been harmed, or intimidated to the point where they withdraw their testimony, before addressing the issue raised by this Decision.

¹⁹ See in particular ICC-01/04-01/07-475 OA, paras. 62, 66 (non-disclosure requires careful balancing of the various interests at stake), and 67-69; ICC-01/04-01/06-568 OA3, para. 36 (the Statute does not establish a rigid system favouring one competing interest over the other).

²⁰ As noted above, the requirement to balance the security of witnesses and the interests of the defence applies also at trial (see note 177, above; the Trial Chamber also recognized this in a recent decision). A range of factors could be considered and balanced by the Court in such a situation. For example, in relation to alternatives, it may be relevant whether this is the only line of inquiry regarding the credibility of the particular protected witness. Furthermore, there may be other counter-balancing measures that the Court could take: e.g. the Chamber could if necessary take into consideration in its ultimate determination the inability of the Defence to fully investigate (and thus challenge) the credibility of the witness (see e.g. ICC-01/04-01/06-1924-Anx2, para. 17, citing jurisprudence of the ECHR).

²¹ ICC-02/04-01/05-20-US-Exp, para. 22.

²² See e.g. ICC-01/04-01/07-365, 4 April 2008; ICC-01/04-01/07-116, 19 December 2007; ICC-01/04-01/07-108, 14 December 2007; ICC-01/04-01/06-514, 4 October 2006; ICC-01/04-01/06-489, 28 September 2006; ICC-01/04-01/06-165-Conf-Exp, 23 June 2006, (referred to in ICC-01/04-01/06-489, 28 September 2006).

The Issue arises from the Decision

18. The Decision explicitly identifies whether the Protocol is consistent with the Court-wide obligations of protection in Article 68 as a key question to resolve in whether or not the Chamber could endorse the Protocol.²³ The Decision discusses various aspects of the Protocol, concluding that it conforms to the Statute and Rules, and approves it as applicable to all parties and participants.²⁴ The issue of whether the Protocol is consistent with these obligations is therefore “an identifiable subject or topic requiring a decision for its resolution” and a “subject the resolution of which is essential for the determination of the matters arising in the judicial cause under examination”.²⁵
19. The Prosecution, the Defence, and the Chamber may have differing views on the answer to this Issue. But that is a question of the merits, which must be reserved for the Appeals Chamber. Similarly, the Decision considers that using the name of a witness is not a risk-factor, and that a risk only arises when it is disclosed that a person is a witness.²⁶ In contrast, the Prosecution considers that when an investigator or lawyer from an ICC defence team asks questions about an individual, there is a risk that people will readily surmise that the person is a witness or is otherwise connected with that ICC case. But again, this is a question of the merits which is not relevant to the application for leave to appeal. Whether the Protocol endorsed by the Decision is consistent with the statutory obligations of witness protection is, for the purposes of Article 82(1)(d), an issue arising from the Decision on its plain terms.

The Issue affects the fair conduct of the proceedings

20. “Fairness” within the terms of Article 82(1)(d) incorporates fairness towards the accused, the victims and the Prosecution. It requires that the procedural and substantive rights and obligations of all participants be respected.²⁷ In particular, that “means that the Prosecutor must be able to exercise the powers and fulfill the duties listed in Article 54”.²⁸

²³ Decision, para. 9: “La Chambre [...] revient de s’assurer de la conformité de l’accord ainsi obtenu avec le Statut, notamment ses articles 67 et 68, et le Règlement” (emphasis added).

²⁴ Decision, paras. 10-13, and p. 10 (dispositif). See in particular “La Chambre estime donc que sa teneur est conforme aux dispositions du Statut et du Règlement” (para. 13).

²⁵ ICC-01/04-168 OA3, para. 9.

²⁶ Decision, para. 10.

²⁷ ICC-01/04-141, para. 48; ICC-02/04-01/05-212, paras. 10-11; ICC-01/04-135-tEN, para. 38. Fairness has also been held to include respect for the principles of equality and adversarial proceedings.

²⁸ ICC-01/04-135-tEN, paras. 38-39.

21. The Issue impacts on the fairness of the proceedings because it impacts on the Prosecution's ability to fulfill its statutory obligations, in particular the obligation under Article 54(1)(a) to establish the truth and under Article 54(1)(b) to ensure the effective prosecution of crimes within the jurisdiction of the Court. Potential and actual witnesses who are exposed to an objective risk or who are fearful will decline to be interviewed or to testify (or their testimony will be distorted) if they are placed at risk as a result of the defence's investigatory activities.²⁹ They can reasonably conclude that the Court is either breaching its protection agreement or is not capable to protect them. This will have a decisive impact on the Prosecution's ability to investigate, to present relevant and probative evidence and, consistent with this Court's interpretation of "fairness" in Article 82(1)(d), it will seriously impede the Prosecution's right to present the case,³⁰ its ability to establish the truth,³¹ and the overall integrity of the trial proceedings.³²
22. In addition, the Decision not only impacts on the fairness of the proceedings to come, but it is the result of a flawed process. Despite the obligations that the Statute places on the Prosecution to ensure the protection of victims and witnesses³³ and the lessons learned over the past years, the Prosecution was excluded from the negotiations and drafting of the Protocol: although the Chamber purported to seek the largest possible consensus,³⁴ it did not ask the Prosecution to participate in its draft. The Prosecution was only allowed to provide *a posteriori* comments, which cannot be equated to actual participation in the discussions and subsequent drafting of the protocol. Hence, not only the final product but also the process that led to it ignored and negated the rights of the Prosecution.³⁵
23. The Prosecution is therefore unfairly bound by a Protocol that overlooks the fact that witness' protection is a Court-wide duty, and disregards the mandatory distribution of responsibilities envisaged by the Statute among the different organs of the Court, including the Chambers,³⁶ and the Office of the Prosecutor,³⁷ and the support functions to

²⁹ The Prosecution does not imply that the Defence willingly seeks to coerce/ intimidate witnesses but this may be the inevitable result of their disclosure of a witness' identity to a third party absent a professional and proper assessment performed by a neutral organ of the Court.

³⁰ ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para. 24.

³¹ Article 54(1)(a).

³² Witnesses who are placed at risk may well refuse to testify or cooperate with the Court, or may even be pressured into changing their testimony.

³³ Articles 54(1) and (3)(f); 68(1).

³⁴ Decision, paras. 6-7, 9.

³⁵ ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para. 24: the Appeals Chamber has ruled that "[t]he principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of crime".

³⁶ Articles 64(2); 57(3)(c); 68(1); ICC-01/04-01/07-776 OA7, para. 95: "The Chamber has a general power to provide for the protection and privacy of victims and witnesses where necessary, pursuant to article 57(3)(c)"; para.101: "[E]nsur[ing], as a matter of the highest priority, that witnesses are appropriately protected [...] is, pursuant to article 68 of the Statute, a responsibility of the Court as a whole." See also ICC-01/04-01/07-475 OA, 13 May 2008, para. 54: A range of provisions of the Statute and Rules "are indicative of an overarching concern to ensure that persons are not unjustifiably exposed to risk through the activities of the Court."

be provided by the VWU to the Court as a whole.³⁸ In particular, the Protocol ignores the obligations that the Statute allocates to the Court to determine how foreseeable risks are identified, assessed and mitigated (the preventive aspect of witness protections) and shifts the burden onto the defence: the new standard enshrined in the Protocol effectively requires the defence to act as an impartial arbiter and to unilaterally assess whether the disclosure of a protected witness' identity is "necessary" and "there is no other alternative available".³⁹ This standard does not live up to the mandatory one enclosed in the Statute and embraced by the jurisprudence of the Appeals Chamber in alike scenarios; nor is the defence the organ entrusted to perform this task by the Statute.

24. First, the Appeals Chamber not only has required a prior Court intervention but it has established criteria to be applied when a Chamber is deciding on the non-disclosure of the identities of witnesses to the defence.⁴⁰ It would be illogical that the Prosecution's assessment of the necessity of a redaction and the existence of alternatives had to be subject to independent judicial scrutiny but not the defence's determination that the identifying details of a protected witness may be disclosed. Here, the importance of scrutiny and control is even greater since the issue is not disclosure to the defence, but disclosure of protected information to a third party that the Court has no control over. Second, the defence is not an organ with the resources, expertise and the necessary information to make a fully informed decision, even without taking into account its lack of partiality due to its interests in the case.⁴¹
25. In conclusion, leaving this essential determination to the limited and vague assessment by the defence, as foreseen in the Protocol and endorsed in the Decision, critically impacts on the integrity of the proceedings and the general powers of the Prosecution with regard to witness' protection.⁴² Issues as relevant as the instant one - related to the relationship

³⁷ Articles 54(1) and (3)(f); 68(1)

³⁸ Articles 43(6) and 68(4); Rule 17(2)

³⁹ See Protocol, chapeau second paragraph. This will necessarily lead to replace an objective and professional assessment performed by the Chambers or the VWU with the Defence's subjective perception.

⁴⁰ ICC-01/04-01/06-2209-Red, para. 9 referring to ICC-01/04-01/06-773 OA5, para. 33. In particular, the danger to the witness or his or her family members that disclosure may entail; the necessity for the protective measures; an assessment of whether the measures will be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial; an investigation into the sufficiency and feasibility of less restrictive protective measures. The Trial Chamber found that "[a]lthough these criteria were established in the course of pre-trial proceedings [...] they are equally applicable to the trial stage of the case".

⁴¹ The defence will be in possession of only partial information (to assess the need for disclosing the identity of protected witnesses), while the VWU and the Chamber are in a position (and have the obligation) to provide the rest of the required information. ICC-01/04-01/07-776 OA7, para. 92 – "the function of the VWU is to provide, inter alia, appropriate protective measures and security arrangements, respecting the interests of the witness and acting impartially." See also para. 98 on the Chamber being the ultimate arbiter on whether a witness protective measures (relocation) should be undertaken.

⁴² See ICC-01/04-01/07-776 OA7, para. 80: "the Prosecutor undoubtedly is responsible under the Statute to ensure that appropriate measures are taken to protect the safety of victims and witnesses." See also para. 98: "[...] the Prosecutor has a more general mandate in relation to protection matters under articles 54 (3) (f) and 68 (1) of the Statute. The Appeals Chamber interprets those provisions as ensuring that the Prosecutor takes general

between the rights of the defence and the need for protection of witnesses - have been regularly recognized as affecting the fair and expeditious conduct of the proceedings, and have required prompt resolution by the Appeals Chamber.⁴³

26. The Appeals Chamber has also ruled on the need for coordination between the VWU and the parties on issues related to witness protection,⁴⁴ being always the Chamber the ultimate arbiter.⁴⁵ It would be consistent that the defence engages in a more active cooperation with the VWU and the Chambers in issues related to witness protection as it does not have the statutory obligations entrusted to the Prosecution nor a full knowledge of the security situation of witnesses whose identities it considers “necessary” to disclose.⁴⁶
27. Finally, the Protocol will impact on the fairness vis-à-vis the witnesses by exposing them to unnecessary risk. Witnesses agree to testify before the Court under protective measures, but they do not agree on the disclosure of their identity to third parties who are not under the Court’s supervision and responsibility. The fact that they are awarded protective measures may be determinative for their decision to testify and entails an expectation of safety and protection afforded by the Court. By allowing that the identities of protected witnesses be disclosed without any prior scrutiny or approval by the Court, both Protocol and Decision fail to honor the promise of confidentiality that the Court has made to these witnesses.

The Issue affects the expeditious conduct of the proceedings

28. This Chamber has previously granted leave to appeal after finding that an issue “may significantly affect” or “clearly has a bearing on” the fairness of the proceedings, and that on that basis alone “the first requirement of Article 82(1)(d) of the Statute is met”.⁴⁷ The Prosecution agrees with this approach, which is consistent with the Statute and the

measures that ordinarily might be expected to arise on a day-to-day basis during the course of an investigation or prosecution with the aim of preventing harm from occurring to victims and witnesses.”

⁴³ See for instance ICC-01/04-01/06-489, p.7, para.2. Although it referred to pre-trial proceedings, the criteria established are equally applicable to the trial stage. See ICC-01/04-01/06-2209-Red, para. 9.

⁴⁴ ICC-01/04-01/07-776 OA7, para. 92: “At the same time, the VWU must recognise the specific interests of, and cooperate with, the parties.” See para. 98: the Appeals Chamber has stated that the Prosecution once in the field will need to take protective measures during the course of its investigations and “consultation, cooperation and advice [from the VWU] are all part of ensuring that individuals are not put at risk during the course of the investigations and prosecutions of the Prosecutor”. It also noted that “the obligation of the VWU to advise the Prosecutor on, and recommend the adoption of appropriate measures makes sense”.

⁴⁵ ICC-01/04-01/07-776 OA7, para. 97.

⁴⁶ While the defence may inform the Court on the need to disclose the identity of a particular witness to pursue a certain objective that it deems necessary to prepare its case, it is not privy to the security situation of that witness and may not be aware of the existence of less damaging alternatives. The Court is a neutral arbiter who can provide this information and make an informed decision after carefully considering all the interests at stake.

⁴⁷ ICC-01/04-01/07-2032, para. 28; ICC-01/04-01/07-1859, para. 18.

jurisprudence of the other international tribunals.⁴⁸ Nonetheless, in this case the Issue also does affect the expeditious conduct of the proceedings.⁴⁹

29. If the disclosure of the identity of a protected witness to a third party, in the absence of preventive measures intended to avoid or minimize the risk to the witnesses and the absence of proper coordination and supervision by the Court, results in witnesses being exposed to unnecessary risk, the Court will need to put in place additional measures to manage that risk. The Court will be forced to adopt reactive, *post facto*, measures once the risk has materialized instead of taking preventive steps to avoid or minimise that risk as the Statute foresees. This will in itself be a time intensive process, delaying the proceedings.⁵⁰
30. Furthermore, the failure of the Court to monitor and manage the risks caused by disclosure of protected witnesses' identities to third parties may result in witnesses being unwilling or unable to testify. If evidence cannot be presented by the Prosecution due to the manner in which the defence conducts its investigations, the Prosecution will have to devote further time to obtain additional evidence.
31. Regardless of the view which is taken, this Issue "may have an impact on how the Prosecution goes about selecting its witnesses [...] or it may delay certain investigative steps by the Defence" and therefore it would "also significantly affect the expeditious conduct of the proceedings".⁵¹ For these or similar reasons, a number of Chambers have recognized that issues relating to the protection of witnesses and the way in which this can

⁴⁸ Once a party has demonstrated that an issue affects the fair conduct of the proceedings, then any further showing that the issue also affects the expeditious conduct of the proceedings is superfluous for the purposes of obtaining leave to appeal under Article 82(1)(d). This reflects the consistent position of the Prosecution: see in particular ICC-01/04-141, paras. 49-52; ICC-01/04-103, footnote 5; ICC-01/04-01/06-125, footnote 30. The Prosecution considers that this requirement mirrors the obligation to ensure that proceedings are fair and expeditious (see e.g. Article 64(2)). In the same manner that once proceedings are no longer fair, or no longer expeditious, they are no longer "fair and expeditious"; so once an issue affects the fair conduct of the proceedings, or affects the expeditious conduct of the proceedings, it affects the "fair and expeditious conduct of the proceedings". The jurisprudence of the ICTY and ICTR, adjudicating on the same text as is found in Article 82(1)(d), supports this proposition (see e.g. authorities set out in ICC-01/04-141, paras. 49-52).

⁴⁹ The expeditious conduct means timely and efficient conduct of proceedings (on the connection of expeditiousness and the efficient administration of international justice. See *Prosecutor v Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003, paras. 6, 25). A decision which compromises the efficient conduct of the proceedings, or which delays the investigation and prompt determination of responsibility for the crimes under investigation, affects the expeditious conduct of the proceedings. The prompt determination of responsibility is not just an interest of the defence, but also of the prosecution, victims, and the international community as a whole. See e.g. *ibid*, para. 8; and Terrier, "Powers of the Trial Chamber" in Cassese, Gaeta and Jones (ed) *Commentary on the Rome Statute of the International Criminal Court* (2002) 1259 at 1264-65.

⁵⁰ "The issue raised by the Defence would also significantly affect the expeditious conduct of the proceedings in two ways in that (i) [...] (ii) if the names are disclosed, additional actions by the Prosecution and Victims and Witnesses Unit to ensure their safety may be required" - ICC-01/04-01/07-365, 4 April 2008, p. 7.

⁵¹ ICC-01/04-01/07-116, 19 December 2007, p. 6.

be implemented and balanced with the rights of the defence do affect, amongst other things, the expeditious conduct of the proceedings.⁵²

The Issue affects the outcome of the trial

32. An issue only needs to impact the fair and expeditious conduct of the proceedings or the outcome of the trial.⁵³ Nevertheless, the Prosecution stresses that the Issue does also affect the outcome of the trial. According to the Appeals Chamber, under this limb the Chamber “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence.”⁵⁴
33. The application of the Protocol will impact on the manner that parties carry out their investigations and collect evidence subsequently presented at trial. Witness evidence is the core of the trial proceedings and its assessment by the Trial Chamber will define its final judgment.⁵⁵ Therefore, the Issue has a direct impact on the outcome of the trial as it has a direct impact on determining the truth.
34. The Decision also affects the outcome of this case in other related ways. If witnesses are placed at risk, coerced or intimidated as a result of the application of the Protocol, this will severely impact the presentation and content of their evidence before the Chamber: it may affect the manner or demeanor in which their evidence is given or they may change their initial account and provide false testimony. All this will have a bearing on the Chamber’s assessment of the witnesses’ credibility and the weight attached to their evidence and the outcome of the trial will be affected with an unreliable verdict. On the other hand, if witnesses refuse to appear and the Prosecution is forced to proceed with insufficient evidence, the accused may be acquitted.
35. It is essential that witnesses know that the Court is effectively complying with its obligations to ensure the level of protection accorded. If witnesses know that their identity will be disclosed to third persons non-involved in the trial without a previous an impartial risk assessment conducted by the Court, they have no reason to trust the Court’s protective services. If the Court becomes known as an institution that easily discloses

⁵² See e.g. ICC-01/04-01/07-365, p. 7; ICC-01/04-01/07-108, p. 6; ICC-01/04-01/07-116, p. 6; ICC-01/04-01/06-165-Conf-Exp, (referred to in ICC-01/04-01/06-489); ICC-01/04-01/06-489, p. 12.

⁵³ ICC-01/05-01/08-75, para. 8; ICC-02/04-112, para. 17; ICC-01/04-01/06-1417, paras. 17-18; ICC-01/04-01/06-1473, paras. 21-22.

⁵⁴ ICC-01/04-168 OA3, para.13. See also ICC-01/04-01/06-2404, para. 30.

⁵⁵ Articles 69; 74(2).

personal data without going through a judicial filter, witnesses may be dissuaded from cooperating.

**Immediate resolution of the Issue by the Appeals Chamber may
materially advance the proceedings**

36. Immediate resolution of the Issue will materially advance the proceedings. As stated by the Appeals Chamber, this requirement means that “prompt reference of the issue to the court of appeal” and its “authoritative determination” will ensure that “the proceedings follow the right course.”⁵⁶
37. The Issue in this Application governs the conduct of future investigations by all parties:⁵⁷ this was not a decision on a concrete application that might, or might not, recur later in the trial;⁵⁸ rather, it expressly establishes a system to be applied in all future investigations. Further, the Issue impacts on the protection which the Court provides to the witnesses on which it relies. Both of these factors require that the Issue be resolved immediately; this is not a question that can effectively be resolved as part of a final appeal against judgment. Conversely, an appeal need not delay proceedings, as the Chamber had already implemented an interim set of guidelines.
38. We are currently at an early stage in the Prosecution’s case: the investigations which will be governed by the Protocol which the Decision adopted continue to take place, and will likely be ongoing throughout the Prosecution case and into the Defence cases. Given the importance of effectively maintaining the protection of vulnerable witnesses, the potential impact of investigation into protected witnesses and disclosure of their identities to external parties, and the need to balance this carefully with the rights of the defence to prepare their case, it is imperative that from the earliest stage any investigations are conducted on the correct basis to prevent any errors from having an ongoing impact on the proceedings.
39. The Trial Chamber accepted that these witnesses are at risk, or are vulnerable, and that the protection of their identity from external parties is a necessary measure to ensure their protection. That protection, and the recognized risks that disclosure of their identities would cause, has now been placed in the hands of the defence. The resolution of this question by the Appeals Chamber is essential to ensure that this critical question of

⁵⁶ ICC-01/04-168, paras. 14-15, 18.

⁵⁷ Decision, para. 14.

⁵⁸ Contrast ICC-01/04-01/07-1958; ICC-01/04-01/06-2404.

protection during investigations is resolved in time to have a meaningful impact on those investigations. It is required to “map[] a course of action along the right lines” and thus to “provide[] a safety net for the integrity of proceedings.”⁵⁹

40. In addition, given the risks to these witnesses which have been recognized by the Chamber – risks which have required some to relocate along with their entire families – disclosing their identities to third parties without any assessment by the Court of the impact of this on the risk could have irreparable consequences. Resolving questions of the proper procedures for ensuring the safety of witnesses cannot be left until a witness is put at risk or even harmed: this is a question which must be resolved now to ensure that the proper procedures are applied during the investigations.

41. In addition to the direct impact on the present proceedings, the prompt resolution of this Issue will also assist to advance all other proceedings before this Court.⁶⁰ Granting leave to appeal will enable the Appeals Chamber to establish an unambiguous standard in line with the applicable statutory provisions.

Relief Sought

42. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal pursuant to Article 82(1)(d).



Luis Moreno-Ocampo
Prosecutor

Dated this 3rd day of May, 2010

At The Hague, The Netherlands

⁵⁹ ICC-01/04-168, paras. 14-15, 18.

⁶⁰ While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under Article 82(1)(d), it is a factor to be weighed in deciding whether to grant leave. Pre-Trial Chamber II has previously recognised that in certain circumstances, the potential impact on other proceedings may be “invoked as an additional argument in support of the alleged significant impact on the current proceedings” See ICC-01/05-20-US-Exp, para. 54 (unsealed pursuant to ICC-02/04-01/05-52). See also *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.