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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***

Public

Defence Response to Prosecution's Application for Leave to Appeal the "Decision sur le 'Protocole regissant les enquetes concernant les temoins beneficant de mesures de protection'"

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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Introduction

1. On 3 May 2010, the Prosecutor filed his Prosecution's Application for Leave to Appeal the "Decision sur le 'Protocole regissant les enquetes concernant les temoins beneficant de mesures de protection'".¹ In this application the Prosecutor identifies the following issue:

Whether the Decision endorsing the Protocol is consistent with the obligations of witness protection which the Statute places upon the Court ("the Issue")

2. Having identified this as the issue for appeal, the Prosecutor enters into a discussion of the merits of that issue. This is followed by an analysis of the fulfillment of the criteria for leave to appeal in terms of Article 82(1)(d). This analysis is divided into the following questions:
 1. The issue arises from the Decision;
 2. The issue affects the fair conduct of the proceedings;
 3. The issue affects the expeditious conduct of the proceedings;
 4. The issue affects the outcome of the trial;
 5. The immediate resolution of the issue by the Appeals Chambers may materially advance the proceedings.
3. The Prosecutor's enumeration of criteria for leave to appeal is slightly inadequate in respect of the first four points above. Article 82(1)(d) sets out the criteria for leave to appeal as:

A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

¹ ICC-01/04-01/07-2062.

The Chamber has consistently held that an issue must first be determined to be an appealable issue.²

4. It is therefore evident that the Prosecutor's first enunciation of the criteria is too narrow, since it is not just a question as to whether the issue as defined by him arises from the decision. It is more accurately necessary to determine whether the issue in question is an appealable issue. The Prosecutor further omits to note that the issue must not merely affect the fair and expeditious conduct of the proceedings, but must significantly do so.

An appealable issue

5. The Defence accepts that the issue as defined by the Prosecutor arises from the Trial Chamber's decision since the Trial Chamber itself referred to Article 68 in its determination of whether to endorse the Protocol. However, in order for an issue to be an appealable issue, it is submitted that not only must it arise out of the decision, but it should further be an issue worthy of appeal in the sense that it is a serious issue and not one which is so tenuous as not to merit the Appeals Chamber's consideration. While this type of obstacle to granting leave has not been raised before in the ICC, it is submitted that it follows from an interpretation of the word 'issue' in Article 82 having regard to its object. It could not have been the intention of the drafters that completely unmeritorious issues be the subject of interlocutory appeals.
6. Article 68(1) of the Statute directs the Court to take appropriate measures for the safety and protection of witnesses. This imposes a duty on the Trial Chamber to exercise a discretion in determining what are appropriate measures. In this case the Trial Chamber has exercised this discretion and ordered protective measures on the request of the Prosecutor. These protective measures are contained in the Trial Chamber's *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*

² Public Document Decision on the "Defence Application for Leave to Appeal the Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence", ICC-01/04-01/07-2035 20-04-2010, paras. 23-27; "Judgement on the Prosecutor's Application for Evidentiary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, par. 9-20.

procédure et de preuve).³ The Prosecutor has not challenged these measures as inadequate in terms of the provisions relating to the use of names.

7. The Protocol in question was not an imposition of new protective measures as such, but rather a set of general practice guidelines on how the parties should approach their investigations in implementing protective measures contained in Trial Chamber decisions. These guidelines endorse the prohibition on disclosing that a person is an incriminating witness or otherwise has an association with the court, such being inherent in the prohibition on the disclosure of the identity of witnesses in terms of the decision of 23rd November 2009. Indeed, the guidelines go further than this in inviting parties to be cautious and focused in the use of names and to act in a manner which does not disclose a person's association with the Court. In summary, this Protocol does not alter protective measures put in place, but is guidance of a general nature. Further, it encourages the exercise of caution even beyond the strict parameters of the protective measures put in place in respect of the issue of disclosure of identity and the use of names.
8. It is submitted that in these circumstances, the issue of the consistency of the Protocol with obligations under the Statute is not an issue open to serious question.

An issue significantly affecting the fairness and expeditiousness of the trial

9. The Defence submits that the issue as defined by the Prosecutor does not *significantly* affect the fairness and expeditiousness of the trial for the same reasons as outlined above.
10. The Prosecutor submits that 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

³ ICC-01/04-01/07-1667-Red, Ex Parte version issued on 23 November 2009; Redacted Version filed on 9 December 2009.

their testimony *will* be distorted) if they are placed at risk as a result of the defence's investigatory activities.' [our emphasis]

These speculative assertions, applied exclusively to the Defence, again assume a lack of professional caution on the part of the Defence. In the absence of a demonstration of such problems resulting from these general guidelines so as to effect the implementation of protective measures, it is difficult to accept that the fairness and expeditiousness of the trial will be *significantly* affected by the issue.

11. The Prosecutor's second argument in this respect contends that the Protocol is the result of a flawed process because the Prosecutor did not participate in the negotiations between the WVU and the Defence.
12. This question arose due to a request for clarification made on behalf of Mr Ngudjolo as to how the defence should undertake its investigations. It was a Defence, not a Prosecution initiative. The question was initially framed as relating to defence investigations and it was defence investigations which were the immediate concern. It is the Defence for the two accused who are best placed to outline the difficulties attached to their investigations. Such difficulties could not be frankly revealed if other parties and participants were privy to these initial discussions. A three way or four way (including victims representatives) negotiation was likely to have been more cumbersome and less likely to result in a degree of consensus than a two way negotiation. Importantly, the WVU was best placed to consider the issue of risk assessment with respect to witnesses, in some respects better placed than any party or participants, because of their special role and impartial status. Some of these factors may have impacted on how the Chamber approached the matter, and this certainly seems to be reflected in its first decision on the matter.
13. The legal representatives of the victims, as well as the Prosecutor's Office, were brought into the process and asked for their observations. The fact and extent to which those observations were not accepted is irrelevant to the process itself. The principle of *audi alteram partem* had been fully respected. Therefore, neither the details of the process, and in particular the negotiations between the WVU and the Defence, constitute a matter which leads the issue, being consistency of the Protocol with

protective measures obligations under the Statute, to be something which significantly affects the fairness and expeditiousness of the proceedings.

An issue which significantly affects the outcome of the trial

14. For the above stated reasons, it is submitted that it has not been established that the outcome of the trial will be significantly affected. The Protocol is a subsidiary document dealing with the collateral issue of how to approach investigations in a professional manner with the issuance of general guidelines to be applied appropriately in individual cases. Its impact if any on the outcome of the trial is purely speculative.

Immediate resolution of the Issue will materially advance the proceedings

15. The Prosecutor claims that the immediate resolution of the Issue will materially advance the proceedings. This claim is premised upon the argument that the Protocol causes prejudice which is not isolated to one occasion but amounts to a system for witness protection. Therefore, according to the Prosecutor, it is essential to have the issue resolved now in order that the proceedings follow the right course.

16. It is submitted that in so far as the immediate resolution of the issue of the consistency of the Protocol with obligations under the Statute might give further clarity on how investigations should be conducted, it will not *materially* advance the proceedings. While the Protocol does develop upon the system of witness protection, it does not constitute the basic regime of witness protection. This was established by the Trial Chamber in its decisions on protective measures.

17. This system would not have been further developed with a Protocol had it not been for a request by an accused for clarification of how the protective measures of the Chamber should be implemented. The Prosecutor himself at no stage attempted to have such specificity with respect to the conduct of investigations in the protective measures which he requested. The issuance of such a Protocol is a novel initiative, to the knowledge of the Defence, and has not existed before in most international criminal proceedings, with no notable impact on the fairness of proceedings in those cases. The Protocol constitutes an aid on the system of witness protection providing

additional guidance and assistance to parties in their implementation of protective measures, rather than an indispensable document without which the fairness of the proceedings could not be preserved. Moreover, it is an aid which expresses more precise and onerous obligations of vigilance for the parties than the general principles of witness protection established in the regime of protective measures contained in decisions arising from the prosecution application. In such circumstances it is difficult to claim that questioning whether its provisions should not be stricter before the Appeals Chamber is so indispensable to the future conduct of proceedings.

18. The Protocol itself does not contain protective measures as such but merely general guidelines for parties in their implementation of protective measures already put in place. These guidelines are subject to review by the Trial Chamber and subordinate and subject to the protective measures regime established at the Prosecution request in the Trial Chambers decisions. The Protocol does not therefore, contrary to the Prosecution contention, place a discretion in the conduct of its investigations in the hands of the Defence which it does not already possess, but merely seeks to guide the Defence in exercising that discretion cautiously.
19. The Prosecution's contention that the Protocol establishes an ongoing problem in future investigations is misguided because it assumes that the Defence will not act properly and ethically in the course of its investigations. It is not realistically possible to micro-manage Defence investigations or Prosecution investigations at the level of the Trial Chamber. As has been outlined earlier, it cannot be seriously suggested that the name of a witness can never be used in investigation into the credibility of a witness without first coming to the Trial Chamber. The Protocol directs the investigating party to use names in a careful and focused manner but not in a manner which discloses the association of the person with the court. Unless it is being suggested that the name of a person can never be used without prior permission, there is nothing in the directions of the Protocol which automatically leads to ongoing security problems for witnesses. So while this is not the time to discuss the merits, a clearly tenuous foundation cannot form the basis of an assertion that there is an ongoing problem. A degree of trust in the professionalism of the teams in applying the protective measures imposed by the court is essential to the workability of the trial process. It follows that if the Defence acts properly throughout the trial their application of protective measures may result in no difficulties or security problems

for witnesses. For this reason also, the urgency of reopening the question of appropriate guidelines before the Appeals Chamber is not apparent. The Prosecution can, in any event, seek further protective measures in circumstances where it can show it is necessary.

Relief Sought

The Defence requests that the Trial Chamber dismiss the Prosecution's Application for Leave to Appeal the "Decision sur le 'Protocole regissant les enquetes concernant les temoins beneficant de mesures de protection'".

Respectfully submitted,



David Hooper QC
Lead Counsel for Mr. Germain Katanga

Dated this 7th May 2010

At The Hague, Netherlands