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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 Document

Defence Response to the *Dépôt d'un projet de Protocole relatif aux modalités de contact entre des victimes représentées et les parties* (ICC-01/04-01/07-2202)

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. On 17th June 2010, the legal representatives of victims filed their motion ‘Dépôt d'un projet de Protocole relatif aux modalités de contact entre des victimes représentées et les parties’, notified on 18 July 2010.¹ This motion follows upon a series of quadric-partite negotiations between the parties and participants. The Protocol filed by the legal representatives² does not however represent an agreed document but the final proposal of the legal representatives.
2. The Defence for Mr Katanga (hereinafter “the Defence”) opposes the legal representative proposal for a protocol in its present form.

B. Issues of contention

3. The main area of contention lies in the fact that the Defence wishes to be able to investigate its defence without revealing the results of those investigations to the legal representatives or the Prosecution.
4. There are therefore two propositions of the legal representatives which the Defence finds unacceptable. The first is the proposition that the legal representatives have an automatic right to be present during interviews with their clients conducted by the Defence. The second is the proposition that any document produced out of such meetings should automatically be transferred to the legal representatives of the victims. The Defence submits that these are unreasonable propositions in the context of defence preparations for a criminal trial, irrespective of the nature of the relationship between the legal representatives and their clients.
5. Following the interactions between the parties and participants on this protocol, the legal representatives are fully aware of the contentious nature of these issues for the Defence. It is therefore expected that any arguments in relation to these questions have been incorporated in the motion of the legal representatives.

C. Applicable legal principles

¹ ICC-01/04-01/07-2202.

² ICC-01/04-01/07-2202-Anx1.

General considerations

6. The legal representatives rely principally on Rule 16 of the Rules of Procedure and Evidence of the Court, as well as articles 15(1) and 28 of the Code of Professional Conduct. The Defence does not accept that these provisions impose the solution sought by the legal representatives.
7. In interpreting the principles applicable to the relationship between a lawyer and his client, it should be born in mind that such principles are subject to reasonable limitation in the public interest and for the respect of the rights of others.
8. It is further important to appreciate the unique nature of the situation at hand. Never before in an adversarial criminal process has there been such a high degree of participation of victims in the presentation and submission on evaluation of evidence against the accused. This statement applies even to those legal systems where the notion of *parties civiles* is recognized. Such systems are less adversarial in nature so that the burden of investigation for the accused does not rest so heavily on the Defence. Indeed, in some systems, such as France, defence lawyers are implicitly not permitted to conduct investigations and in others, such as Lebanon, it is expressly forbidden. Also, the *parties civiles* do not generally have such extensive rights of participation in the proceedings themselves.
9. Finally, it must be understood that there is no property in a witness,³ and so the consideration of this matter must be considered strictly within the context of the rights of the accused and that of the victim, and not on the basis of some misconceived notion of victims being the preserve of legal representatives of those victims.

The Registrar's obligation to assist in the provision of legal representation

10. Rule 16 addresses the responsibilities of the Victims and Witnesses Unit ("VWU") as an organ falling under the Registry. In terms of rule 16(1)(b) it is the responsibility of

³ Prosecutor v. Mrksic, Appeal Chamber "Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party", 30 July 2003.

the Registrar to assist the victims in obtaining legal advice and organizing their legal representation. Dealing as it does with the general responsibility of the Registrar to ensure the legal representation of the victims, this provision is of no assistance to the current issues as it only defines the role of the Registrar but does not define the consequences of such legal representation for the Defence.

Impact of the Code of Professional Conduct for counsel

11. The legal representatives rely heavily upon the Code of Professional Conduct for Counsel in supporting their proposed protocol. It should, however, be noted that the ICC Code of Conduct was heavily influenced by a draft prepared by the International Bar Association (IBA) with defence counsel in mind and relying principally on the ICTY and ICTR Codes of Professional Conduct for Defence Counsel. The articles in the draft Code were designed specifically for defence counsel, not for victim representatives. In its draft, the IBA defined client as defendant. Whilst eventually, it has been decided that the ICC Code of Conduct would apply both to defence counsel and victim representatives, many of the articles specifically designed for defence counsel were left untouched in the Code of Conduct that was finally adopted.⁴ Thus, it is submitted that these provisions should not automatically apply to victim representatives in an equal manner as to defence counsel.

12. In addition, it is instructive to examine the import of this document in general terms before addressing the specific provisions raised by the legal representatives. The Code of Professional Conduct is not a legal text governing the conduct of proceedings before the court. It is rather a set of principles governing the practice and ethics of counsel appearing before the Court (as recognized in Assembly of State Parties Resolution ICC-ASP/4/Res.1 adopting the Code). This document addresses the ethical obligations of counsel, not the legal obligations of the parties and the Chamber. It binds counsel, not the Chamber. Moreover, breaches of its provisions are remedied through disciplinary proceedings under articles 31 *et seq.*, not by recourse to the

⁴ Martha Walsh: The International Bar Association Proposal for a Code of Professional Conduct of Counsel Before the ICC, JICJ 1 (2003), 490-501, in particular, pages 497-498. At: <http://jicj.oxfordjournals.org/cgi/reprint/1/2/490.pdf> ; also see: IBA Presents Code of Professional Conduct for Counsel Before the International Criminal Court, at: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=8e2880d3-234c-4398-841b-76b8ddfb823e> IBA Commentary on the code of professional conduct for Counsel before the International Criminal Court submitted by the International Bar Association.

Chamber, although breaches of ethics might simultaneously constitute contempt of court, in which case the Chamber has jurisdiction to act in its own right.

13. Therefore, while the Code's provisions may be taken into account in the determination of any question before the Chamber to ensure that counsel is not unreasonably expected to violate ethical principles, it cannot constitute the principle foundation of any decision relating to the exercise of the rights of the accused. It is submitted that the Chamber must apply the Statute, Rules and Regulations of the Court and may have regard to the provisions of the Code of Professional Conduct in the interpretation of the former.

14. Since the Professional Code of Conduct addresses the ethical obligations of counsel appearing before the Court, it also follows that its provisions must be interpreted in the light of the Statute, Rules and Regulations of the Court.

Counsel's ethical duty not to address directly another client except through or with the permission of that client's counsel

15. The legal representatives place great emphasis upon Article 28 of the Code of Professional Conduct for counsel. Article 28 of the Code provides as follows:

Counsel shall not address directly the client of another counsel except through or with the permission of other counsel.

16. This provision has not yet been the subject of interpretation and in so far as it repeats or develops upon concepts in other codes of conduct, it is submitted that it must be interpreted in the particular and unique context of the International Criminal Court.

17. The obligation imposed upon counsel is broadly expressed. The plain meaning of the words 'except through or with the permission of' certainly envisages the involvement of victim's counsel in any initiative to approach a client of another counsel for an interview. It does not require that, or address whether the client's counsel should be present at any interview, nor does it impose any particular obligations of disclosure of results of an interview with the client of a counsel.

18. How this provision is applied will naturally vary according to the specific circumstances. There is a difference between, on the one hand, meeting a client who is facing criminal charges in the course of criminal proceedings, and on the other, meeting the client of another counsel for the purpose of investigations outside the court room or court premises. In the latter situation the client is not being questioned in the context of criminal proceedings against himself, but in relation to criminal proceedings against the client of counsel seeking the interview.

Counsel's ethical obligation to advise

19. The legal representatives further place great stock in Article 15(1) of the Code, which provides that:

Counsel shall provide the client with all explanations reasonably needed to make informed decisions regarding his or her representation.

20. This provision concerns the duty of counsel to provide advice relating to his client's case. This is a duty and not a right. It follows that counsel would not be in breach of this provision if rules or the Chamber endorsed a regime which restricted in any way the circumstances within which this duty is exercised.

21. In any event, this addresses the duty to give advice, but does not address the right to be present during interviews with the client nor the right to receive material emanating from such a meeting. Counsel only has the duty to advice within the parameters of the information made available to him.

The right to equality in conditions for investigations

22. The provisions of the Code are only relevant in the interpretation of the texts directly applicable by the Chamber. The primary text which is directly applicable in this instance is that Statute itself. Article 67 sets out the fundamental rights of an accused person in the conduct of his or her trial. These rights must be exercised in full equality.

This means that there must be equality of arms between the accused and those who seek to incriminate him. It also implies that an accused in one trial should not be treated unequally to an accused in another trial with regard to the exercise of his fundamental rights. Accordingly, the conditions under which his rights are exercised should not depend upon whether there are participating victims and what proportion of potential Defence witnesses fall within that category.

23. Article 67(1)(e) affords the accused the right to 'obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her'. It is clear that when the Prosecution interviews its witnesses there is no lawyer present and potentially obstructing the free exchange of information. Even in the instances where the witness has become a represented victim, there was no legal representative present during the prosecution investigations.
24. The presence of a legal representative may prejudice the interview in a number of ways. First, a victim will not necessarily feel free to speak in front of a legal representative and to offer exculpatory evidence.—Second, the victim may not have individually chosen the legal representative to be his lawyer and may not therefore fully trust him. Third, the witness may have a tendency to be cautious as to everything said and turn to the lawyer for confirmation as to whether he should talk about specific issues. The legal representative may have an interest in discouraging the witnesses from giving helpful information to the Defence. None of these restraints and potential elements of prejudice applied to the interviews of Prosecution witnesses, including those who were victims now represented.
25. The Prosecution also had the advantage of being able to make a preliminary assessment of the witness through its intermediaries without taking formal statements subject to disclosure. Anything said by the witness would be within the knowledge of the legal representative even if only recorded in the internal notes of the Defence.
26. These unequal conditions violate the principle in Article 67(1)(e). It follows that it is inappropriate to have a right of presence in a protocol of the nature under discussion.

Self-incrimination through defence investigations

27. The accused should not be placed in a position where he could effectively be providing incriminating evidence to those seeking to incriminate him. This includes the legal representatives of the victims since they have been accorded the right to present incriminating evidence.
28. The effect of having incriminating evidence uncovered during Defence investigations falling automatically into the hands of the legal representatives either through their presence at interviews or through an obligation of automatic and immediate disclosure, is to place an onus on the accused to rebut incriminating evidence provided by his own investigations.
29. Similarly, this impinges against his right not to incriminate himself.
30. The practical effect of this kind of self-incrimination simply through the conduct of defence investigations is that in most cases, it raises a too dangerous risk to interview a represented victim. This in turn violates the right to obtain witnesses under the same conditions as those against the Accused.

D. Proposed protocol

Appropriate scope of the protocol

31. The Defence has proceeded with negotiations on the assumption that the protocol envisaged had the purpose of regulating contact between the Defence and victims. The proposed protocol goes beyond this and moves into the question of the calling of witnesses who are victims by the Defence. It is submitted that this is not an appropriate topic for the protocol and that matters of disclosure relating to the Defence case should be dealt with separately, at the end of the Prosecution case and in conjunction with any principles which may ultimately be set with respect to Defence disclosures to the parties.
32. Accordingly, the Defence invites the Chamber to decline to endorse paragraph 17, not on its merits but simply on the basis that the protocol should be confined to the specific and sole purpose of regulating contact with victims.

Principle of contact through or with the permission of legal representative

33. The legal representatives submit that paragraphs 1 to 4, 6, 13 and 17 directly apply the principle in article 28 of the Code of Professional Conduct. As explained above, the rights set in Article 67 should be interpreted in the light of the duties of counsel under article 28 of the Code, but cannot be overridden by it. The question remains as to the extent to which the provisions of the proposed protocol actually reflect what is required by article 28 of the Code, because it is only to the extent that this is the case that its effect on the interpretations of the rights under article 67 are to be considered.
34. Paragraphs 1 and 2 certainly give effect to the principle in Article 28.
35. Paragraph 3 is unrelated to the duty to contact another lawyer's client through or with the permission of that lawyer. It relates rather to the exercise of caution in ensuring the effectiveness of protective measures. That notwithstanding, the Defence has no particular difficulty with that clause.
36. Paragraph 4 relating to the communication between the legal representative and the victim and reversion to defence counsel refers to a procedure which does not follow as a matter of course from Article 28 but constitutes one possible procedure to implement the principle of acting through the legal representative.
37. Paragraph 6 is highly contentious. It does not, contrary to the assertion of the legal representatives, result from the application of Article 28 of the Code. It goes well beyond the notion of passing through or contacting with the permission of counsel. Here the legal representatives attempt to impose a regime with respect to the method of interview by, in effect, requiring a full and detailed record of the interview. They additionally seek by this clause to obtain full knowledge of all incriminating and exculpatory information obtained from the victim.
38. With respect to the first requirement, it is not the participation of legal representatives in the proceedings which should determine the methods of investigation of the Defence in terms of the exact procedure to be adopted when interviewing a person

during investigations. The person may be interviewed for different purposes and those purposes may change according to the reactions of the person. So, a person may be being interviewed as a potential witness or simply in order to obtain leads. During the course of an interview it may become clear that a person who was not originally intended as a potential witness may become one, or *vice versa*. Therefore, there may not be an immediate interest in taking a detailed statement. The Defence may have no interest in taking a statement – and it may be not in the interests of the Defence to take a statement.

39. As to the second suggestion, it is inappropriate in the Defence submission to permit a participant in the proceedings who has been accorded the right to present incriminating evidence against the accused, the opportunity to be a fly on the wall during defence investigations. The measure sought is designed to give the legal representatives complete knowledge of the results of investigations of the Defence even before the Defence has determined which results, if any, it intends to use during the trial.

40. It is unclear whether the legal representatives would accept a corresponding right for the Defence with respect to all interviews they conduct. This procedure could potentially apply to very many interviews, given that the case involves an attack on one village, and where it is the victims who constitute, at least potentially, the richest source of testimony.

41. This requirement of handing over all information further creates a potential obstacle to the ability to interview the victim. Some victims may be in a position to provide exculpatory evidence, but may be afraid to do so if aware that information given is forwarded to the legal representatives. The victims have not chosen the legal representatives, may not have met them and or may not fully trust them. They may be concerned that other victims represented by the same lawyers could come to know of their assistance to the Defence.

42. Paragraph 13 outlines the requirement of informing the legal representative, and in certain cases the Unit, of the place and hour of the interview. Contrary to the assertion of the legal representatives, this is not an application of Article 28. It is not essential for the legal representatives to know the place and time of the interview. This

information can be given to the Unit with no prejudice to the Defence since it is an impartial organ. While there is no necessity for this the Defence does not oppose it.

43. Paragraph 17, contrary to the assertion of the legal representatives, has nothing to do with entering into contact with a client, but is more about defence disclosure of its case, a matter more appropriately dealt with outside the parameters of the protocol.

The question of legal counsel

44. As explained above, in the section dealing with the applicable legal principles, the duty to provide legal counsel as reflected in the Code does not exist in a vacuum but applies within, and is necessarily delimited by, the parameters of the legal procedures and rights under the Rome Statute and Rules. It follows that in no case can it override such procedures and rights, although it can inspire their interpretation. The question remains to what extent the proposed protocol enshrines principles which are in fact required by that principle or duty, keeping in mind that all legal advice is given within the context the procedures for a fair trial and the rights of the accused.

45. On the basis of the duty to provide counsel, the legal representatives have drafted paragraph 4 of the proposed protocol, which imposes a duty on the legal representative to enter into contact with the victim. Article 15 deals with advice with a view to making informed decisions with respect to their representation. The purpose of the representation is to seek reparations for injuries, so it does not follow as a matter of course that meeting the Defence falls within the purpose of that representation. In this context, if the victim seeks advice it should be given and nothing prevents the counsel from providing advice. However, if not, it is not essential for the respect of article 15 that the legal representative impose a duty on itself to automatically advise since the exercise involved does not necessarily fall within the parameters of the mandate for which representation has been sought by the victim. The Defence does not oppose the provision of advice but suggests that this should be expressed more as a right of the victim than a duty of counsel applicable in all circumstances.

46. As to the conditions for the giving of such advice, the Defence submits that this procedure might be followed where possible. However, it is not always practical.

When the Defence is on mission in the DRC and has the opportunity to interview a specific victim, such interview should not be held up because of a procedure which requires the direct intervention of the legal representative.

47. Moreover, it is the kind of procedure which need not be applied in all circumstances. It should be for the victim to determine if he or she requires specific advice before entering into contact with the Defence. Thus, the protocol may simply provide that, having informed the legal representative of the need to interview the victim, the Defence shall inform the victim of his right to consult with his lawyer prior to being interviewed and ask if he is happy to be interviewed without having obtained such advice. In the meantime, once the legal representative has been informed of the proposed interview, he or she can, of his or her own initiative, enter into contact with his or her client.
48. Where advice is given, this right to advice and corresponding duty to offer it where sought should under no circumstances prejudice the fairness of the trial and in consequence the equality of conditions of investigation. Accordingly, the Defence would wish to see a clause in the protocol prohibiting the legal representatives from acting to discourage contact with the Defence and thus obstruct the investigations of the Defence.
49. Paragraph 10 of the proposed protocol requires the presence of the legal representative unless the victim opposes. This is not required by article 15 of the Protocol and comes into direct conflict with the right to a fair trial. The Defence has a legitimate interest in opposing the presence of legal representatives during his investigations, which is reinforced by the right to conduct investigations under equal conditions. The fairness of the trial also supports the proposition, as explained above in the section on legal principles, that the legal representatives who have been afforded the right to offer incriminating evidence at trial not have an inside track into defence investigations.
50. Paragraph 15 of the proposed protocol even envisages possible interferences with the interview. The Defence strongly opposes any form of interference in defence interviews done as a part of its investigations, including the presence of legal representatives.

51. As a practical matter, the logistics of the procedure which the legal representatives seek to put in place promises to hinder and slow down defence investigations. Effectively, if a lead is found during a specific mission to the DRC, the interview agreed to by the victim may need to be postponed simply to accommodate the presence of a legal representative or an acceptable agent. It is an unacceptable proposition that the legal representative can appoint someone unknown to the Defence or formally engaged within the team, or part of the Unit, to be present at interviews.

52. Paragraph 16 suggests provision of the statement of the victim taken by the Defence or any other document obtained from the victim. This is an unacceptable infringement of the right of the accused to equal treatment in the conduct of his investigations and his right to a fair trial. This for the same reasons as outlined with regard to presence. The Defence strongly opposes advance knowledge of what may be incriminating and exculpatory material by parties and participants aiming to incriminate the accused, obtained by the Defence in his investigations even before a decision to use such evidence.

53. If the legal representatives renounce their right to tender incriminating evidence against the accused, then they might have a semi legitimate basis for the suggestions being made to give them absolute access to the defence investigations, subject to a promise to keep such information or incriminating evidence so obtained secret from the Prosecution.

E. Counter-proposal

54. The Defence submits a counterproposal with a view to the respect of the accused's rights under the Statute. This is attached as Annexure 1.

ACCORDINGLY,

- I. The Defence requests the rejection of the proposal of the legal representatives and the adoption of a protocol which gives full effect to the rights of the accused under the Statute;

- II. It encloses a model for this purpose and proposes that, independently of the Chamber's final view on the matter, this model could serve as an interim document until the Chamber has finalised its own version;
- III. It further requests that once the Chamber has settled on a solution that it revert to the parties and participants for comments on its proposal to the extent that it differs significantly from the proposals before it or introduces new elements.

Respectfully submitted,



David HOOPER Q.C.

Dated this 8 July 2010

At The Hague