

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: French

No.: ICC-01/04-01/07

Date: 7 September 2010

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 document

***Decision on the Prosecutor's application for leave to appeal the Decision on the
"Protocol on investigations in relation to witnesses benefiting from protective
measures"***

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

Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Mr Éric MacDonald, Senior Trial Lawyer

Counsel for Germain Katanga

Mr David Hooper
Mr Andreas O'Shea

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Ms Maria-Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

TRIAL CHAMBER II of the International Criminal Court (“the Chamber” and “the Court”), acting pursuant to article 82(1)(d) of the Rome Statute (“the Statute”), rule 155 of the Rules of Procedure and Evidence and regulation 65 of the Regulations of the Court, decides the following.

I. Background

1. By decision of 26 April 2010 (“the Decision”),¹ the Chamber approved the “Protocol on investigations in relation to witnesses benefiting from protective measures” (“the Protocol”),² which was prepared jointly by the Victims and Witnesses Unit (“VWU”), the Defence teams and the legal representatives of the victims, after several consultations with the Prosecutor.³ The Protocol authorises the use of names of protected witnesses, whose identity is not permitted to be disclosed to third parties, for the purposes of investigation, should it become necessary and subject to the proviso, *inter alia*, that it is not disclosed that the person is a witness or connected to the Court.

2. On 3 May 2010, the Prosecutor sought leave to appeal the Decision (“the Application”),⁴ arguing that the Protocol necessarily puts protected witnesses at risk because it does not require a case-by-case assessment of the risks incurred by using the witnesses’ names, and thus allows the Defence to act without any supervision by the Court.⁵ The defence teams for Mathieu Ngudjolo and Germain Katanga filed their observations in response on 6 and 7 May 2010 respectively⁶

¹ Decision on the “Protocol on investigations in relation to witnesses benefiting from protective measures”, 26 April 2010, ICC-01/04-01/07-2047.

² Registry, 26 March 2010, ICC-01/04-01/07-2007-Anx1.

³ For the procedural background to the drafting of the Protocol, see ICC-01/04-01/07-2047-tENG, paras. 1-7.

⁴ Office of the Prosecutor, “Prosecution’s Application for Leave to Appeal the ‘*Décision sur le “Protocole régissant les enquêtes concernant les témoins bénéficiant de mesures de protection”*’”, 3 May 2010, ICC-01/04-01/07-2062.

⁵ See, *inter alia*, ICC-01/04-01/07-2062, para. 11.

⁶ Defence for Mathieu Ngudjolo, “*Observations de la Défense de Mathieu Ngudjolo sur ‘Prosecution’s Application for Leave to Appeal the “Decision sur le protocole régissant les enquêtes concernant les témoins bénéficiant des mesures de protection”*” (ICC-01/04-01/07-2062)”, 6 May 2010, ICC-01/04-01/07-2084; Defence for Germain Katanga, “Defence Response to Prosecution’s Application for Leave to Appeal

opposing the granting of leave. The legal representatives of the victims did not file any observations.

II. Discussion

3. In its analysis of the Application, the Chamber will apply the tests set out in article 82(1)(d) of the Statute, as specified by the Appeals Chamber in its judgment of 13 July 2006.⁷ Accordingly, it will determine:

- 1) whether the matter raised constitutes an appealable “issue”;⁸
- 2) if so, whether that issue is apt to “significantly affect”, i.e. in a material way,⁹ either the fair and expeditious conduct of the proceedings¹⁰ or the outcome of the trial;¹¹ and
- 3) whether an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings.¹²

4. The Chamber recalls that several Chambers of the Court have held that the mere fact that an issue is of general interest or could be raised in future pre-trial or trial proceedings is not sufficient to warrant the granting of leave to appeal.¹³ Leave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances.¹⁴ Furthermore, the Chamber emphasises that these criteria

the “*Décision sur le ‘Protocole regissant les enquêtes concernant les témoins bénéficiant de mesures de protection’*”, 7 May 2010, ICC-01/04-01/07-2087.

⁷ Appeals Chamber, *Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal*, 13 July 2006, ICC-01/04-168, paras. 9 to 20.

⁸ ICC-01/04-168, para. 9.

⁹ *Ibid.*, para. 10.

¹⁰ *Ibid.*, paras. 11 and 12.

¹¹ *Ibid.*, para. 13.

¹² *Ibid.*, paras. 14-19.

¹³ See, for example, Trial Chamber I, *Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008*, 26 February 2008, ICC-01/04-01/06-1191, para. 11.

¹⁴ *Decision on the Prosecutor’s Application for Leave to Appeal the Decision on Redactions Rendered on 10 February 2009*, 6 March 2009, ICC-01/04-01/07-946-tENG, para. 11. See also, for example, Pre-Trial Chamber II, *Decision on Prosecutor’s application for leave to appeal in part Pre-Trial Chamber II’s decision on the Prosecutor’s applications for warrants of arrest under article 58*, 19 August 2005, ICC-02/04-01/05-20-US-Exp, para. 19 (this decision was made public pursuant to a decision issued on 13 October 2005, ICC-02/04-01/05-52).

8. In actual fact, the issue arising from the Decision pertains only to the implementation of these protective measures. The question was therefore whether the arrangements for using the names of protected witnesses during investigations as set out in the Protocol compromised the protective measures ordered by the Chamber in carrying out its duty to protect witnesses.

9. In this respect, involving VWU – a neutral and particularly qualified organ of the Court – in the preparation of the Protocol was intended precisely to ensure that due account was taken of the risk assessment conducted by the VWU in order to assist the Chamber in the adoption of the necessary protective measures. The Chamber considers that, in such circumstances, its choice to rely on the VWU's assessment rather than the Prosecutor's, on the one hand, and to assume that the Defence teams will comply with the directions approved by a decision of the Chamber, on the other, are wholly at its discretion, and that the Prosecutor failed to show how it had abused its discretion, only advancing a mere difference of opinion as to the method applied by the Chamber.

10. The Chamber therefore considers that the issue arising from the Decision is not appealable. Accordingly, the Chamber need not assess the other criteria set out at article 82(1)(d) of the Statute.

FOR THESE REASONS, THE CHAMBER

REJECTS the Prosecutor's application.

Done in both English and French, the French version being authoritative.

[signed]
Judge Bruno Cotte
Presiding Judge

[signed]
Judge Fatoumata Dembele Diarra

[signed]
Judge Christine Van den Wyngaert

Dated this 7 September 2010
At The Hague, The Netherlands