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TRIAL CHAMBER II

Before: **Judge Bruno Cotte, Presiding Judge**
Judge Fatoumata Dembele Diarra, Judge
Judge Christine Van den Wyngaert, Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Confidential
with Annex A – Confidential

Prosecution's response to "Victims and Witnesses Unit and Defence Teams joint protocol specifying concrete modalities of disclosure of protected witnesses' identities"

Source: **Office of the Prosecutor**

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

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Introduction

1. On 18 December 2009, the Trial Chamber ordered the Victims and Witness Unit ("VWU") and the defence teams of Germain Katanga and Mathieu Ngudjolo Chui ("Defence Teams") to agree on a joint protocol regulating the disclosure of the identity of protected witnesses ("18 December 2009 Decision").[1] The 18 December 2009 Decision defined the parameters to which the Defence teams and the VWU shall adhere:

   (i) The disclosure of the identity of a protected witness to third parties is prohibited unless it is absolutely necessary. Disclosure can only take place in exceptional circumstances and when there is a genuine and specific need for the preparation of the Defence case.[2]

   (ii) Prior to disclosing the identity of a protected witness to a third party, the Defence Teams must provide the VWU with maximum information on the witness involved, the objectives it aims to achieve and the persons or entities it intends to contact.[3] The VWU shall then evaluate the real and concrete risks that the witness would encounter if the identity is disclosed.[4]

   (iii) If there is no feasible alternative to disclosure, the VWU and the Defence Teams should explore measures to minimize the risks to be endured by the witness.[5]

   (iv) The questions posed by the Defence Teams to third parties shall, to the extent possible, not reveal the collaboration of a witness with the Court, and the Defence shall not conduct any investigation to locate a protected witness.[6]

   (v) The intervention of the VWU shall be expeditious, so as to reconcile the necessary protection of witnesses with a proper and timely conduct of the Defence's investigations.[7]

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[1] ICC-01/04-01/07-1734.
[2] 18 December 2009 Decision, paras. 11 and 15: "La Chambre souhaite tout d'abord réitérer l'interdiction qu'elle a énoncée dans l'ordonnance précitée et entend rappeler son absolue nécessité tant à l'égard de la Défense que des représentants légaux des victimes. […] Elle rappelle que ce type de démarche est et doit rester exceptionnel et que les occasions de révéler l'identité des témoins protégés doivent l'être tout autant. […] Ce n'est que lorsque la divulgation de l'identité du témoin est véritablement et spécifiquement nécessaire pour la préparation de la Défense qu'elle pourra procéder de la sorte."
[3] 18 December 2009 Decision, para. 17.
[4] 18 December 2009 Decision, paras. 15, 17.
[5] 18 December 2009 Decision, para. 17.
[6] 18 December 2009 Decision, para. 18.
[7] 18 December 2009 Decision, paras. 16-17.

2. On 27 January 2010, the VWU and the Defence Teams filed a joint protocol specifying concrete modalities of disclosure of protected witnesses' identities,[8] in which they proposed "general guidelines to be followed as a minimum requirement when a witness's identity might be revealed to a third party"[9] ("Joint Protocol"). The VWU further recommends that the protocol be applied also to investigations in relation to participating victims and non-protected witnesses,[10] and be considered as an addition to a prior decision of the Trial Chamber,[11] which is binding on all parties and participants.[12]

3. Contrary to the suggestion of the VWU,[13] the modalities proposed in the Joint Protocol fall short of the parameters set forth in the 18 December 2009 Decision and are inadequate to constitute the basis for regulating the procedure to be followed by the Defence. The Joint Protocol may be applied with respect to all witnesses who face a foreseeable risk, regardless of whether they currently enjoy operational or procedural protective measures, and should not be extended to the Prosecution.

Confidentiality

4. This submission is filed as Confidential since it refers to the joint protocol which was filed confidentially.[14]

Prosecution's Submissions

5. In the 18 December 2009 Decision, the Trial Chamber set out the mandatory regulatory framework which must be followed by the Defence during its investigative activities and, in particular, when revealing the identity of a protected witness to a third person. The Trial Chamber thus set minimum requirements that are binding on the Defence. It further directed that a Joint Protocol specify the concrete modalities to be followed, in compliance with the 18 December 2009 Decision, in those instances when the Defence must reveal the identity of protected witnesses to third persons.

6. As shown below, the Joint Protocol's standard and procedures for disclosure of the identity of protected witnesses to third parties fall short of the requirements defined in the

[8] ICC-01/04-01/07-1797 and ICC-01/04-01/07-1797-Conf-Anx1.
[9] ICC-01/04-01/07-1797, para. 2.
[10] ICC-01/04-01/07-1797, para. 4.
[11] ICC-01/04-01/07-1797, para. 5. The VWU is referring to ICC-01/04-01/07-1134 ("14 May 2009 Decision").
[12] See also ICC-01/04-01/07-1797-Conf-Anx1, first paragraph, suggesting that the protocol itself already "applies equally to all parties and participants".
[13] ICC-01/04-01/07-1797, para. 2.
[14] ICC-01/04-01/07-1797-Conf-Anx1.

18 December 2009 Decision. Hence, disclosure consistent with the terms of the Joint Protocol could constitute a violation of the 18 December 2009 Decision. In addition, since the Trial Chamber has authorized disclosure of the identity of protected witnesses to third parties only under circumstances and following the procedures identified in the 18 December 2009 Decision, disclosure outside those circumstances and procedures would also violate the Code of Professional Conduct of Counsel[15] and the Code of Conduct of Investigators.[16] These texts prohibit counsel and investigators to disclose the identity of protected witnesses unless the Chamber authorises them to do so.

The Joint Protocol does not limit disclosure to exceptional circumstances

7. As noted above, the 18 December 2009 Decision limits disclosure of protected witnesses' identities to third parties to exceptional circumstances and when there is a genuine and specific need for the preparation of the Defence case.[17] In comparison, the Joint Protocol's limitations on such disclosure evince a much broader approach.[18] Under the Joint Protocol, the Defence Teams would be able to disclose the identity of a protected witness to a third party whenever they consider that this may be useful to their investigations, in whatever way. Moreover, the Defence Teams may reveal the identity of a protected person for the purposes of any unspecified inquiry: contrary to the 18 December 2009 Decision, the Joint Protocol does not require the existence of a "genuine and specific need for the preparation of the Defence case", neither does it require the existence of exceptional circumstances to justify disclosure. Moreover, it does also not

[15] Article 8(4) of the Code of Professional Conduct for counsel states that: "[…] Counsel *shall not reveal* the identity of protected victims and witnesses, or any confidential information that may reveal their identity and whereabouts, unless he or she has been authorized to do so by an order of the Court." (emphasis added).

[16] See Sections 5.2 and 6.1 of the Code of Conduct for Investigators, dealing with Security and Confidentiality matters, respectively: "An investigator *shall not disclose* any privileged material or information, or any material or information deemed confidential by the Court, *unless authorized to do so*", and "[a]n investigator shall not engage in any deliberate conduct, or make any disclosure, which places or is likely to place the security of any person at risk".(emphasis added).

[17] 18 December 2009 Decision, paras. 11 and 15: "La Chambre souhaite tout d'abord réitérer l'interdiction qu'elle a énoncée dans l'ordonnance précitée et entend rappeler son absolue nécessité tant à l'égard de la Défense que des représentants légaux des victimes. […] Elle rappelle que ce type de démarche est et doit rester exceptionnel et que les occasions de révéler l'identité des témoins protégés doivent l'être tout autant. […] Ce n'est que lorsque la divulgation de l'identité du témoin est véritablement et spécifiquement nécessaire pour la préparation de la Défense qu'elle pourra procéder de la sorte."

[18] The Joint Protocol vaguely states that "[i]t is crucial that any party or participant should strictly avoid the risk of exposing the identity of witnesses *to the extent possible*. In case where it is necessary to refer to the names of persons who are protected witnesses to a third party, the following […] will apply. […] The names of protected witnesses *should be used in a careful and focused manner and only when necessary for the purposes of the investigation or inquiry*. This is even more important when witnesses are participants in the ICCPP", Joint Protocol, second introductory paragraph and item (a) (emphasis added).

require that disclosure be limited to instances where it is absolutely necessary and where no alternative to such disclosure is available.

The Joint Protocol does not require the Defence Teams to liaise with the VWU prior to proceedings with disclosure

8. According to the 18 December 2009 Decision, prior to disclosing the identity of a protected witness to a third party, the Defence Teams must provide the VWU with maximum information on the witness involved, the objectives it aims to achieve and the persons or entities that it intends to contact.[19] The VWU shall then conduct an evaluation of the real and concrete risks that the witnesses would encounter if their identity is disclosed.[20]

9. The Joint Protocol omits these procedural requirements. Under the Joint Protocol, the Defence Teams disclose first and inform the VWU afterwards. The Joint Protocol requires the Defence Teams to inform the VWU Head of Protection "where an exceptional naming of the specific role [of a protected witness] *has been* made",[21] where the location of a protected witness becomes apparent,[22] or if there is a reasonable suspicion that "a witness may *have been* placed at risk for any reasons".[23] These procedures deprive the VWU of the ability to make an advance risk assessment and to take steps before the risky disclosure is made to prevent foreseeable risks and to maintain an appropriate level of protection.[24] The correct sequence – notification and risk management must occur before disclosure and actual risk – is key, and the Joint Protocol is fundamentally contrary to the 18 December 2009 Decision in this regard.

The Joint Protocol wrongly purports to bind the Prosecution

10. The 18 December 2009 sets out the general conditions and procedures for the Defence Teams to disclose the identity of protected witnesses to third parties.[25] It further instructs the VWU and the Defence Teams to regulate the concrete modalities for the Defence to

[19] 18 December 2009 Decision, para. 17.
[20] 18 December 2009 Decision, paras. 15, 17.
[21] Joint Protocol, item, d (emphasis added).
[22] Joint Protocol, item e, second paragraph. The first paragraph of item e refers to non-protected witnesses and goes therefore beyond the scope of the Joint Protocol.
[23] Joint Protocol, item f (emphasis added).
[24] Pursuant to the 18 December 2009 Decision, prior intervention of the VWU and a risk assessment is necessary to evaluate the existence of a genuine investigatory need by the Defence and to balance this against the risk to be endured by the witness as a result of the disclosure and to explore alternative avenues (paras. 13, 15, 17).
[25] See for instance, 18 December 2009 Decision, paras. 11, 14, 15, 16, 17, 18, 19 and 20.

proceed with such disclosure. The Prosecution fully endorses the principles expressed in the 18 December 2009 Decision. However, it stresses that this decision does not govern the manner in which the Prosecution has to conduct its investigations.

11. It is not clear on what basis the Joint Protocol claims to be applicable equally "to all parties and participants".[26] The VWU and the Defence Teams do not have the authority to adopt procedures that bind anyone other than themselves.[27] Nor was the Prosecution invited to participate in the discussions leading up the preparation of the Joint Protocol; indeed, had it been invited, the final product would have been different.[28] The Prosecution is bound under Article 68(1) and 54(3)(f) to take appropriate measures to protect the safety of persons at risk on account of their interaction with the Prosecution, particularly during the investigation and prosecution.

The scope of the Joint Protocol should cover witnesses who face a foreseeable risk as a result of disclosure of their identities to third parties, and should not be extended beyond.

12. Although the Joint Protocol initially states it applies only to instances of disclosure to third parties of the identities of protected witnesses,[29] item e) of the Joint Protocol extends its application to inquiries about the current location of non-protected witnesses. In addition, the VWU generally recommends "applying the protocol also to investigations in relation to participating victims and non-protected witnesses".[30]

13. The Prosecution submits that the Joint Protocol, once amended to accord with the requirements set forth in the 18 December 2009 Decision, may be applied with respect to all witnesses who face a foreseeable risk, regardless of whether they currently enjoy operational or procedural protective measures. However, if there is no foreseeable risk linked to parties' disclosure of witnesses' identities to third parties, the VWU has no role

[26] Joint Protocol, first paragraph.
[27] The principle that parties cannot create rules that bind uninvolved third parties without the third parties' consent is common in international law. See, e.g. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, art. 34 ("A treaty does not create either obligations or rights for a third State without its consent"), and art. 35 ("An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing").
[28] Had the Prosecution participated, it would not have accepted a Joint Protocol that does not comply with the minimum requirements set forth in the 18 December 2009 Decision. Second, without infringing on the rights of the accused, it would have required that the Prosecution is also informed of any foreseeable or actual risk to its witnesses. This step is in fact essential for the Prosecution to comply with its duty of protection under the Statute and its obligation to independently monitor and assess any security risks to persons interacting with the Prosecution. Indeed, The Appeals Chamber recognized that the Prosecution has a legitimate interest and role in protection when it conferred on the Chamber the duty of resolving differences between the Prosecution and the VWU concerning protection of witnesses.
[29] Joint Protocol, second paragraph.
[30] ICC-01/04-01/07-1797, para. 4.

to play. In such cases it is not necessary to follow the procedure established in the 18 December 2009 Decision. For instance, the application of the Joint Protocol to P-373 (who is not a resident or national of the DRC), P-418 (a staff members of the Court) and P-419 (a staff member of the ICTY) is not appropriate.

Conclusion

14. For the above reasons, the Prosecution requests the Trial Chamber to:

a) require the VWU and the Defence Teams to amend the Joint Protocol in a manner that it reflects the minimum requirements set forth in the 18 December 2009 Decision or to endorse the amendments to that effect proposed by the Prosecution in the annex to this filing; and

b) rule that the Joint Protocol may be applied by the Defence teams with respect to all witnesses who face a foreseeable risk, regardless of whether they currently enjoy operational or procedural protective measures.

Luis Moreno Ocampo, Prosecutor

Dated this 16th day of February 2010

At The Hague, The Netherlands