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**International
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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

**Public Redacted Version
With Public Annex A**

**Prosecution's request to adopt a Protocol on the handling of confidential
information and on contact with witnesses of the opposing party**

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. The Prosecution requests that the Single Judge adopt the Protocol attached as Annex A¹ on the handling of confidential information and contact with witnesses of the opposing party, pursuant to articles 57(3)(c) and 68 of the Statute and rule 87 of the Rules. In the context of regular and significant disclosure of confidential materials and witness statements, it is important to establish clear guidelines regulating these matters.
2. The Prosecution communicated the Protocol to the Defence on 24 June 2013, based on protocols that have been adopted by the Pre-Trial Chamber in *Gbagbo*² and by the Trial Chambers in *Katanga*,³ *Bemba*,⁴ *Ruto*,⁵ *Kenyatta*,⁶ *Banda & Jerbo*⁷ and *Lubanga*⁸ regulating the handling of confidential information and contact with the witnesses of another party.
3. Following a series of exchanges, the parties reached agreement on all but two of the proposed provisions in the Protocol. The disputed provisions relate to (i) the need to inform the Victims and Witness's Unit ("VWU") when, in the course of an investigation, it is necessary to disclose the identity of a witness who is in the protection program to third parties;⁹ and (ii) the need to exercise caution when investigating witnesses of the opposing party who allege that they suffered sexual violence, where it is apparent that the witness has not revealed the sexual violence to members of his or her family.¹⁰
4. The Prosecution requests that these two provisions be included in the Protocol.

¹ The Prosecution also submits that the VWU should be consulted in relation to the scope of this Protocol.

² ICC-02/11-01/11-49-Anx.

³ ICC-01/04-01/07-1134, ICC-01/04-01/07-2007-Anx1 and ICC-01/04-01/07-2047.

⁴ ICC-01/05-01/08-813-Red.

⁵ ICC-01/09-01/11-458-AnxA-Corr.

⁶ ICC-01/09-02/11-469-Anx.

⁷ ICC-02/05-03/09-451-Anx.

⁸ ICC-01/04-01/06-1372.

⁹ Paragraph 21 of the Protocol.

¹⁰ Paragraph 26 of the Protocol.

5. With respect to the first point, due to the heightened level of risk for persons accepted into the protection program, the VWU must be informed of all disclosures that could compromise the security of such persons and the integrity of its protection program including whether the identity of a witness in the Court's protection program ("ICCPP") is going to be disclosed. Such a provision has been included in the protocol adopted in the *Banda & Jerbo* case.
6. On the second point, the Statute and Rules uphold fundamental protections to the dignity, privacy and psychological well-being of victims and witnesses, with added emphasis on these protections for victims of sexual violence. It is common for victims of sexual violence to keep secret the fact that such crimes were committed against them, often due to a feeling of shame and the fear of rejection from family, friends and the community. All parties must exercise great care and sensitivity when investigating allegations of sexual violence, and should refrain from disclosing these details to the very people the witness fears informing.
7. These measures are not inconsistent with or prejudicial to the rights of the Suspect to a fair and impartial trial.

Procedural Background

8. On 17 June 2013, the Single Judge ordered the Prosecution to submit: (a) by 2 September 2013 justified proposals for redactions or other protective measures in relation to evidence collected up to 13 July 2012 and (b) by 1 November 2013 justified proposals for redactions or other protective measures in relation to evidence collected between 13 July 2012 and 1 November 2013.¹¹

¹¹ ICC-01/04-02/06-73, p. 19.

Confidential Classification

9. The Prosecution submits that the classification of the present filing and Annex A as Confidential is necessary. The filing refers to statements given by three alleged sexual violence victims detailing who they told of their alleged rape and/or who they fear telling. Given the sensitivity of this information, it should not be provided to the public at this stage even if the witnesses are identified only by code. The Prosecution will simultaneously file a public redacted version.

Prosecution's Submissions

Purpose of the Protocol

10. The purpose of the Protocol is to protect all victims and witnesses who cooperate with the Court while respecting the rights of the parties to investigate the other party's evidence, including the credibility of witnesses. As Chambers of this Court have held, such protocols reflect the principles of necessity and witness security and constitute "'a set of minimum rules' which are designed to safeguard, to the greatest degree possible, the security of witnesses during investigations, whilst taking into account the rights and the obligations of the parties".¹²
11. The VWU has noted that good investigative practices by the parties and participants are the first step in the protection system available to witnesses: "[t]he very foundation of the Court's protection system lies on the application of good practises (*sic*) by any representative of the Court who interacts with witnesses. These practices are aimed at hiding a witness's interaction with the Court from the community where the witness resides, from potential threats and

¹² ICC-02/11-01/11-49, para. 13, citing ICC-01/05-01/08-813-Red, para. 80 and ICC-01/04-01/06-1372, para. 8.

the public.”¹³ Consequently, the parties must ensure best practices not only when interacting with witnesses, but also when potentially exposing the witnesses’ interactions with the Court to third parties.

12. Respect for the confidentiality of *inter partes* disclosure, including the identity of witnesses, sources or even intermediaries, reduces the risks to their security and can avoid triggering the Court’s duty to take additional protective measures. Alternative protection mechanisms, such as the annexed Protocol, should be established.

i. The need for additional safeguards for witnesses accepted into the ICCPP

13. The Registrar is mandated by regulation 96 of the Regulations of the Registry to “take all necessary measures to maintain a protection programme for witnesses”. The VWU is the entity responsible for assessing risk and maintaining on-going protection strategies for witnesses whose level of risk is considered high enough to warrant admission into the protection program or other protections. Accordingly, the VWU needs to be informed of any development that could impact on its security assessment for such witnesses.

14. To this end, the Prosecution proposed several paragraphs in the Protocol regulating disclosure of information related to the identity and location of ICCPP witnesses, including the following:

21. Should the investigating party need to disclose the identity of a witness who is in the ICCPP or of a person otherwise protected by the Victims and Witnesses Unit (“VWU”), the VWU Head of Protection shall be informed of such intention as soon as possible.¹⁴ Additionally, the way disclosure will take place will be discussed with VWU.¹⁵

¹³ ICC-01/04-01/07-585, para. 10.

¹⁴ ICC-02/05-03/09-451-Anx, para. 15.

¹⁵ ICC-02/05-03/09-451-Anx, para. 15.

15. Paragraph 21 of the Protocol is designed to ensure that the VWU is properly informed of, and in a position to advise on, any disclosure that could impact the security and protection regime for a witness under its care. The disclosure of any information that could expose these persons to greater risk must be carefully managed by the parties, and the VWU must be involved.
16. The Trial Chamber in the *Banda & Jerbo* case adopted such a provision.¹⁶
17. Paragraphs 22-23 of the Protocol contain additional safeguards for witnesses in the ICCPP. These paragraphs mandate that the investigating party shall not make inquiries into the current location of an ICCPP witness and also require that if an investigating party knows or understands that an ICCPP witness (or witness under VWU care) is exposed as having cooperated with the Court, it shall take appropriate measures including advising the VWU Head of Protection.
18. While paragraph 22 aims at limiting risks to an ICCPP witness by not actively investigating his or her location, both paragraphs 22 and 23 are essentially reactionary in nature, indicating what steps should be taken to engage the VWU once it is apparent that information on the whereabouts or cooperation of an ICCPP witness with the Court becomes known.
19. Paragraph 21, on the other hand, is intended as an entirely *preventative* measure, ensuring that best practice is considered at the outset and in particular, that essential VWU input is provided to avoid, or significantly minimize, the risk of disclosure of information that could increase risk to ICCPP witnesses. As the VWU noted (see above in paragraph 10), good investigative practices by the parties are the first step in the protection system available to witnesses.

¹⁶ ICC-02/05-03/09-451-Anx, para. 15.

20. This paragraph in the Protocol does not unduly restrict the Suspect's right to investigate; it merely requires that the VWU be informed of the anticipated disclosure and be able to provide input on the manner in which he discloses the identity of a Prosecution witness who benefits from the protections of the ICCPP. The same requirement would apply to the Prosecution's investigations that could expose the security of a Defence witness who benefits from the ICCPP. It is not prejudicial to or inconsistent with the Suspect's rights.

21. The Prosecution acknowledges that a provision requiring VWU involvement when disclosure of the identity of an ICCPP witness will take place is not contained in the protocol established in the *Gbagbo* proceedings, the only other protocol adopted during the pre-trial stage. The context that led to the adoption of the protocol in the *Gbagbo* proceedings is different on this issue as the parties had not indicated their intention to refer any witnesses to the VWU for inclusion into the ICCPP when the protocol was adopted.¹⁷ By contrast, the issue of VWU involvement for ICCPP witnesses is highly relevant to the current case at this stage given that there are in fact witnesses in the ICCPP.

ii. *The need for additional safeguards for victims of sexual violence*

22. Where a witness has stated that he or she has suffered sexual violence and it is apparent that the witness has not discussed the alleged sexual violence with members of his or her family, the investigating party must exercise real caution in investigating the allegations in order to protect fully the witness's dignity, privacy and psychological wellbeing. Indeed, article 68(1) mandates that the Court *shall* take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, *specifically* where the crime involves sexual violence. By virtue of the same provision, the

¹⁷ ICC-02/11-01/11-49, para. 29.

Prosecutor is independently mandated to take such measures in the investigation and prosecution of these crimes.

23. Accordingly, the Prosecution proposed a provision in the Protocol whereby the investigating party must not reveal the alleged sexual violence to the family members where it is apparent that it is not already known to them. Any inquiries undertaken by the Defence must be done so as to ensure the confidentiality of this information. The contested provision in the Protocol on this matter reads as follows:

22. Where a witness has stated that she or he has suffered sexual and gender based crimes and it is apparent that the witness has not discussed the violence with members of his or her family, the investigating party must exercise real caution in investigating the allegations. It cannot reveal this information to the family members or to persons who will communicate the information to family members and any inquiries it undertakes must be done so as to ensure the confidentiality of the information.

24. Three witnesses in the present case have admitted to having suffered sexual violence and have stated to the Prosecution that they fear telling their family or community of their experience for fear of rejection and abandonment.¹⁸ The Prosecution obtained an expert report from a clinical psychologist who confirmed that the three witnesses' reluctance to complain of the alleged rapes during an earlier statement "may be compounded by the strong cultural stigma attached to rape victims in [the] community and the fear of being ostracised".¹⁹ [REDACTED].²⁰ [REDACTED].²¹ [REDACTED].²² [REDACTED].²³ The clinical psychological expert concluded in each assessment that "[t]he reality of this fear

¹⁸ DRC-OTP-P-0018, DRC-OTP-P-0019 and DRC-OTP-P-0113.

¹⁹ DRC-OTP-2059-0058 at 0062; DRC-OTP-2059-0080 at 0084; DRC-OTP-2059-0069 at 0073.

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

is supported by research on the experience of rape victims in the Democratic Republic of Congo (HHI, 2010).”²⁴

25. The Prosecution acknowledges that the Single Judge must balance the witness’s rights under article 68(1) with the right of the Suspect to challenge the evidence presented by the Prosecutor under article 61(6). Yet, there is unlikely to be significant, or any, benefit to the investigating party’s inquiries with family members if the witness has stated that he or she did not reveal the fact of the violence to the family members. The investigating party will not have advanced the inquiry at all by then asking the family members if they are aware of the account, as the investigating party already knows that the family members are not aware. The family members’ lack of information will not reveal that the account is untrue; it will merely reveal that they were not aware of it. On the other hand, the potential impact to the witness’s psychological well-being and dignity of this disclosure could be tremendous and devastating. The minimal “gain” obtained by the investigating party by following this line of inquiry is outweighed by the long-lasting impact the revelation could have on the witnesses and their families.

²⁴ DRC-OTP-2059-0058 at 0062; DRC-OTP-2059-0080 at 0084; DRC-OTP-2059-0069 at 0073.

Relief Requested

26. Based on the foregoing, the Prosecution requests that the Single Judge adopt the Protocol as set out in Annex A, including paragraphs 21 and 27, pursuant to articles 57(3)(c) and 68 and rule 87.



Fatou Bensouda,
Prosecutor

Dated this 9th day of December 2013
At The Hague, The Netherlands