

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/11

Date: 6 March 2012

PRE-TRIAL CHAMBER III

Before: Judge Silvia Fernández de Gurmendi, Single Judge

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO***

Public

**Decision on the Protocols concerning the disclosure of the identity of witnesses
of the other party and the handling of confidential information in the course
of investigations**

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo

Ms Fatou Bensouda

Counsel for the Defence

Mr Emmanuel Altit

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Detention Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Others

**Victims Participation and
Reparations Section**

Judge Silvia Fernández de Gurmendi, Single Judge for Pre-Trial Chamber III of the International Criminal Court (“Chamber” and “Court” respectively), responsible for carrying out the functions of the Chamber in relation to the case of *The Prosecutor v. Laurent Gbagbo*,¹ hereby renders this decision on the protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations.

I) Procedural History

1. On 24 January 2012, the Single Judge issued the “Decision establishing a disclosure system and a calendar for disclosure” (“Disclosure Decision”) wherein she ordered the parties to file, by 3 February 2012 (subsequently extended to 8 February 2012),² “a joint proposal for a protocol on the handling of confidential information in the course of their investigations and on contact with witnesses of the other party”.³

2. On 8 February 2012, the parties filed their respective observations on the protocols, together with proposed drafts in French thereof.⁴ The first proposed protocol regulates the disclosure of the identity of witnesses of the other party during the investigations. The second proposed protocol governs the use of confidential material by the parties in the course of their investigations.

¹ Oral Decision of the Chamber, 5 December 2011, ICC-02/11-01/11-T-1-ENG, page 8.

² E-mail from the Legal Officer of the Chamber.

³ Pre-Trial Chamber III, “Decision establishing a disclosure system and a calendar for disclosure”, 24 January 2012, ICC-02/11-01/11-30, p. 33.

⁴ ICC-02/11-01/11-36 and its confidential annex; ICC-02/11-01/11-37 and its confidential annex.

II) Submissions of the parties

3. In its observations, the Defence requests the Single Judge: (i) to limit the scope of Protocol on confidentiality to witnesses benefiting from protective measures which are known by the investigating parties ("First Issue"); and (ii) to reject the Prosecutor's proposal to impose on the investigating party the obligation to keep a detailed record of the disclosure of protected information with the exception of photographs ("Second Issue").⁵

4. With regard to the First Issue, the Defence essentially argues that extending the scope of application of the first protocol to all witnesses, as the Prosecutor proposes, would be contrary to the principles of necessity and proportionality. Such extension, in the view of the Defence, would violate the rights of the suspect to examine the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, as stipulated by Article 67(1)(e) of the Rome Statute ("Statute").⁶ Accordingly, the Defence favours the protocol adopted in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ("Katanga Protocol" and "Katanga Case"), which was limited to protected witnesses.

5. The Second Issue relates to the second protocol, which regulates the use of confidential material by the parties during their investigations. This protocol is intended to apply when disclosure of such material to third parties ("Public") is necessary and inevitable for the preparation of the case by the parties. The Defence submits that when such disclosure takes place, the investigating party's obligation to keep a detailed record of the disclosure to the Public of confidential

⁵ ICC-02/11-01/11-36, pp. 9, 10.

⁶ ICC-02/11-01/11-36, pp. 6-7.

information should be limited to photographic material.⁷ The Defence contends that this approach is justified by the consideration that photographic material can have a specific security implication and psychological impact.⁸ Moreover, in the view of the Defence, this interpretation is in line with the existing jurisprudence of the Court.⁹ Finally, the Defence avers that imposing an obligation to keep a detailed record for all non-public information would paralyse the Defence and would prevent it from investigating efficiently.¹⁰

6. The Prosecutor, in his submissions, opposes both Issues advanced by the Defence.¹¹ In particular, with regard to the First Issue, the Prosecutor submits that the Defence's arguments to restrict the scope of the application of the first protocol to the category of protected witnesses are "artificial and inappropriate" and that Article 68 of the Statute is clear in providing protection to all victims and witnesses as well as to other persons at risk on account of the activities of the Court.¹² While acknowledging that the *Katanga* Protocol was limited to protected witnesses only, the Prosecutor contends that "the context that led to its adoption was very different [from the present case]".¹³ Therefore, the *Katanga* Protocol should not be imported mechanically to the present case as far as its scope of application is concerned.

7. In relation to the Second Issue, the Prosecutor submits that the obligation to keep a detailed record of the disclosure to the Public of non-public information

⁷ ICC-02/11-01/11-36, p. 9.

⁸ ICC-02/11-01/11-36, p. 10.

⁹ ICC-02/11-01/11-36, pp. 9-10.

¹⁰ ICC-02/11-01/11-36, p. 10.

¹¹ ICC-02/11-01/11-37, para. 14; ICC-02/11-01/11-37-Conf-AnxA, p. 3.

¹² ICC-02/11-01/11-37, para. 14.

¹³ ICC-02/11-01/11-37, para. 15.

should apply to all non-public information, irrespective of the nature of the material.¹⁴

8. Furthermore, the parties disagree on two additional issues. First, they diverge on whether the Code of Professional Conduct for counsel ("Code"), in particular Articles 8(4) and 29, should also apply to the Prosecutor. The Defence alleges that, absent a specific code of conduct for the Prosecutor, he is logically bound by the Code.¹⁵ The Prosecutor opposes the Defence's contention and (i) submits that the Code, by the very wording of its article 1, is not applicable to the Prosecutor and (ii) avers that his duties (and those of any staff on his behalf) to protect persons at risk on account of their interaction with the prosecution are primarily regulated by the Statute and the Regulations of the Office of the Prosecutor.¹⁶

9. The Second Issue focuses on whether or not the term "Public" in the second protocol should include victims' teams who have been allowed to participate in the proceedings and their legal representatives.¹⁷ Whereas the Defence proposes to include them in the category of Public, the Prosecutor takes the opposite stand.¹⁸

III) Analysis

10. The Single Judge notes Articles 54(1)(b) and (3)(f), 57(3)(c), 67(1) and 68(1) of the Statute, Regulations 92 to 96 of the Regulations of the Registry ("Regulations") and Articles 1, 8(4) and 29 of the Code.

¹⁴ ICC-02/11-01/11-37-Conf-AnxA, p. 3.

¹⁵ ICC-02-11-01-11-36, p.7.

¹⁶ ICC-02/11-01/11-37, paras 16-17.

¹⁷ ICC-02/11-01/11-37-Conf-AnxA, p. 3.

¹⁸ ICC-02/11-01/11-37-Conf-AnxA, p. 3

11. At the outset, the Single Judge observes that the parties have agreed on a substantial part of the protocols, based on the model adopted in the *Katanga Case*.¹⁹ Despite their agreement, however, they still have divergent views on two major issues concerning the scope of the protocols' application. The Single Judge takes note of the efforts of the parties to file a joint proposal on the matter in order to expedite the proceedings and also observes that, while they were invited to submit observations on the issue of contacts with the other party's witnesses, none of the parties did so. The Prosecutor justifies his silence on this issue on the fact that he does not intend to call any live witnesses.²⁰

12. The Single Judge underlines that an agreement on all aspects is not a prerequisite for the Single Judge's assessment. Accordingly, the Single Judge deems it appropriate to make some preliminary remarks and to lay down the main principles underpinning the protocols and their application during the parties' investigations before addressing the issues of disagreement between the parties.

13. In conformity with the Court's jurisprudence on the matter, the protocols should be inspired by the principles of necessity and witness security.²¹ The Single Judge agrees that the protocols shall constitute "a set of minimum rules"²² which are designed to safeguard, to the greatest degree possible, the security of

¹⁹ Trial Chamber II, "Decision on the 'Protocol on investigation in relation to witnesses benefitting from protective measures'", 26 April 2010, ICC-01/04-01/07-2047-tENG, para. 14.

²⁰ ICC-02/11-01/11-37, footnote 7.

²¹ See Trial Chamber III, "Decision on the Prosecution's Request to Lift, Maintain and Apply Redactions to Witness Statements and related Documents", 20 July 2010, ICC-01/05-01/08-813-Red, para. 80; Trial Chamber I, "Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses", 3 June 2008, ICC-01/04-01/06-1372, para. 8.

²² Trial Chamber II, "Decision on the 'Protocol on investigation in relation to witnesses benefitting from protective measures'", 26 April 2010, ICC-01/04-01/07-2047-tENG, para. 14.

witnesses during the investigations, whilst taking into account the rights and the obligations of the parties, in particular the suspect's right at the confirmation hearing, pursuant to Article 61(6) of the Statute, to challenge the evidence presented by the Prosecutor and to present evidence.

14. Finally, the parties should comply with the established best practices ("*bonnes pratiques établies*") in relation to the investigations.²³ In this regard, and with a view to providing the parties with the most updated best practices, the Single Judge considers it appropriate that the parties liaise with the Victims and Witnesses Unit ("VWU") to obtain the relevant established guidelines before applying the protocols.

A. First issue: the use of witnesses' names in the course of investigations

15. Although the proposal submitted by the parties in the present case is largely based on the *Katanga* Protocol, the Single Judge does not have to necessarily follow that model in all respects. Rather, she will make an assessment on the basis of the relevant provisions of the Court's statutory documents and will revert to the *Katanga* Protocol when deemed appropriate.

16. Turning now to the disagreement as to whether the first protocol on the use of their names shall be applicable to all witnesses or only to witnesses benefiting from protective measures, the Single Judge recalls that the aim of the protocol is to regulate the use of names of witnesses in the course of the parties' investigations and to mitigate any risk should their names be used while ensuring the right of the parties to investigate.

²³ ICC-02/11-01/11-36-Conf-Anx1, pp. 3, 4; ICC-02/11-01/11-37-Conf-AnxA, pp. 1, 3.

17. Therefore, the Single Judge is of the view that the first protocol should apply to all witnesses whose identity and interaction with the Court has not yet been made public by the party or the Chamber or who are subject to other protective measures known by the other party.

18. Accordingly, when the identity of a witness or his or her interaction with the Court is already public or when a witness is not benefiting from any other protective measure known by the other party, it is to be assumed that he or she is not to be considered endangered, and the protocol does not apply.

19. In addition, the Single Judge considers that the use of the names of witnesses whose identity and interaction with the Court is concealed to the public or who are subject to other protective measures known by the other party, could in certain circumstances be necessary for the purposes of a party's investigations. A balance should be reached between the need to ensure the protection of witnesses and the rights of the parties to investigate. In this respect and in regulating the use of witness names, the Single Judge considers that the practise adopted by Trial Chamber II and III of the Court appeared to provide a satisfactory and feasible method.²⁴ Accordingly, the Single Judge will rely on it for the purposes of establishing the first protocol.

B. Second issue: the use of confidential material in the course of investigations

20. The Single Judge reiterates that disclosure of non-public information to the Public must remain exceptional, to the extent that it proves to be necessary

²⁴ Trial Chamber III, "redacted Decision on the Prosecution's Request to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents", 20 July 2010, ICC-01/05-01/08-813-Red, para. 84.

and inevitable for the preparation of the case by the parties. Accordingly, it should be resorted to only if other means of investigation are unsuccessful.

21. In relation to the investigating party's obligation to keep a detailed record of the information it has shared with the public, the Single Judge is of the view that such obligation should not apply to photographic material only. The Single Judge does not share the assumption that photographs, as opposed to other types of material, have a particular impact and may reveal the interaction of a given person with the Court in such a way as to justify a duty of the investigating party to keep a detailed record of photographs alone. While acknowledging that photographs may be, by their very nature, sensitive material, the Single Judge considers that the disclosure of other types of documents may also jeopardise the safety of witnesses.

22. The Single Judge considers that the prejudice, if any, that would arise for the Defence if the obligation to keep a detailed record of disclosure of non-public information to the Public was to be applied to all non-public information, is not of such a nature so as to prevail over the obligation to protect the safety of witnesses. Accordingly, this obligation should apply irrespective of the type of material used during the investigations. In addition, it has to be noted that this interpretation is also in line with Trial Chamber III's recent jurisprudence.²⁵

23. At this juncture, however, the Single Judge wishes to stress that for the efficient application of the second protocol it is essential that the parties, in fulfilling their disclosure obligations, diligently indicate the level of confidentiality to be attached to the evidence disclosed. In the opinion of the

²⁵ Trial Chamber III, "Decision on the Prosecution's Request to Lift, Maintain and Apply Redactions to Witness Statements and related Documents", 20 July 2010, ICC-01/05-01/08-813-Red, para. 87.

Single Judge, reflecting the correct level of confidentiality of the evidence disclosed will ensure that the parties, in particular the Defence, will not face any disproportionate burden when applying the second protocol during their investigations.

24. In this regard, the Single Judge recalls that, in accordance with the Disclosure Decision, the Prosecutor shall file in the record of the case a disclosure note containing a list of the material disclosed and an inspection report of the items inspected by the Defence.²⁶ Accordingly, and with a view to ensuring the proper application of the second protocol, the disclosure note and the inspection report to be filed by the Prosecutor shall also include the level of confidentiality attached to each item of evidence disclosed to the Defence. The Defence shall also accurately specify the level of confidentiality of any evidence it may disclose.

25. As mentioned above, the purpose of both protocols is to constitute a set of minimum rules during the parties' investigations. As a result, if the parties consider that any departure to this decision and to the protocol attached thereto is deemed necessary, the parties are requested to approach the bench as soon as practicable with a specifically motivated request.

C. Additional issues of disagreement between the parties

26. Concerning the issue of the scope of application of the Code, the Single Judge notes that, by its very nature, it binds "defence counsel, counsel acting for States, *amici curiae* and counsel or legal representative of victims and witnesses [...]", as stated by Article 1 of the Code. Accordingly, the Code is inapplicable to the Prosecutor. However, this does not amount to say that the Prosecutor is not

²⁶ Pre-Trial Chamber II, Disclosure Decision, p. 26, 28.

bound, during his investigations, by a duty to respect the rights of persons interacting with him or with someone on his behalf, whether in their capacity as witnesses, victims or other persons at risk. Article 54(1)(b) of the Statute indeed sets an obligation for the Prosecutor, which is in no way less strict than the one imposed on other counsel, to “respect the interests and personal circumstances of victims and witnesses” during his investigations. Moreover, article 68(1) of the Statute puts an obligation on the Court to “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses” and expressly states that the “Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes”.

27. Accordingly, both parties and the legal representative(s) of victims, if any, are all equally under the obligation, albeit based on distinct provisions, to respect witnesses in the course of their investigations. Moreover, it is of importance to recall that the same obligation applies in respect of the parties’ own witnesses.

28. With regard to the issue as to whether the category of Public should encompass victims’ teams who have been allowed to participate in the proceedings and their legal representatives, the Single Judge recalls that, to date, no victims have been admitted as participants at the pre-trial stage and, consequently, no decision has yet been taken as to their rights. Accordingly, it is appropriate, at this stage, to encompass the victims within the category of Public. Moreover, and on the basis of the above consideration, the Single Judge is of the view that, for the purpose of the first protocol, the term “*tiers*” should also include victims, if any.

D. Contact with witnesses of the other party

29. The Single Judge observes that, to date, the parties have not manifested the intention to refer any witness to the VWU for the purpose of inclusion in the International Criminal Court Protection Programme ("ICCPP") pursuant to Regulation 96 of the Regulations.²⁷ However, the Single Judge considers it is appropriate, based on the jurisprudence of the Court, to establish the procedures governing the conditions under which the investigating party is allowed to contact the other party's witnesses who are included in the ICCPP, on the one hand, and those who are not included in the ICCPP, on the other.

30. With regard to first category, the Single Judge recalls that inclusion in the ICCPP represents the most intrusive protection measure that can be applied to witnesses. Considering that the Registrar is mandated by Regulation 96 of the Regulations to "take all necessary measures to maintain a protection programme for witnesses", the Single Judge is of the view that the VWU is the only appropriate channel through which the investigating party may initiate the procedure to contact the other party's witness benefiting from the ICCPP. Accordingly, should a party wish to interview an ICCPP witness of the other party, it shall contact the VWU which will make the necessary arrangements for the interview to take place.

31. As for contacts with witnesses of the other party who are not included in the ICCPP, the Single Judge points out that these interviews may only take place if the witness consents. The consent must be given voluntarily and must be sought through the representative of the other party and after having informed

²⁷ ICC-02/11-01/11-T-2-CONF-EXP-ENG ET, p. 12.

the VWU of the intention to contact the witness.²⁸ It is recalled that the party calling the witness or relying on his or her statement “is prohibited from trying to influence the witness’s decision as to whether or not to agree to be interviewed” by counsel of another party.²⁹

32. After obtaining the witness’ consent to be interviewed, the VWU shall be responsible for the necessary arrangements. Concerning the presence during the interview of a representative of the party calling the witness or relying on his or her statement, the Single Judge considers it appropriate to endorse the established practice of other Chambers. Accordingly, the party calling the witness or relying on his or her statement is entitled to have a representative attending the interview, unless the interviewing party objects to such presence and applies to the Chamber for a ruling on the matter.³⁰ However, if the witness wishes for the interview take place without a representative of the party calling him or her or relying on his or her statement, then there is no need for an application to the Chamber, as the witness’s consent in this sense is sufficient.³¹

FOR THESE REASONS THE SINGLE JUDGE HEREBY

DECIDES that the parties shall apply the protocols adopted by the present decision as contained in the Annex thereto;

²⁸ See Trial Chamber II, “Decision on a number of procedural issues raised by the Registry”, 14 May 2009, ICC-01/04-01/07, para. 28.

²⁹ See Trial Chamber II, “Decision on a number of procedural issues raised by the Registry”, 14 May 2009, ICC-01/04-01/07, para. 28.

³⁰ Trial Chamber I, “Decision on the prosecution’s application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses”, 3 June 2008, ICC-01/04-01/06-1372, para. 11.

³¹ Trial Chamber II, “Decision on a number of procedural issues raised by the Registry”, 14 May 2009, ICC-01/04-01/07, para. 28.

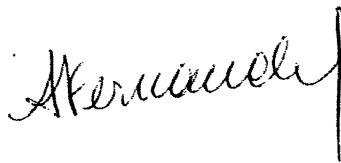
DECIDES that the parties shall comply with the procedures set out in paragraphs 29 to 32 in relation to contacts with witnesses of the calling party or the party relying on their statements;

ORDERS the Prosecutor to include, in the disclosure note and in the inspection report to be filed pursuant to the Disclosure Decision, the level of confidentiality attached to each item of evidence disclosed;

ORDERS the Defence when disclosing evidence to the Prosecutor to specify the level of confidentiality of each item of evidence;

INSTRUCTS the parties to liaise with the VWU as soon as possible and before they apply the protocols, in order to obtain the guidelines on the established best practices to put in place during their investigations.

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



Judge Silvia Fernández de Gurmendi

Single Judge

Dated this Tuesday, 6 March 2012

At The Hague, The Netherlands