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

Date: **8 February 2012**

PRE-TRIAL CHAMBER III

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Elizabeth Odio Benito
Judge Adrian Fulford

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO

**PUBLIC
Confidential Annex A**

**Prosecution's Observations for a Protocol on the Handling of Confidential
Information**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence

Mr Emmanuel Altit

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. On 24 January 2012, Pre-Trial Chamber III ordered the parties to file by 3 February 2012 a joint proposal on a Protocol for the handling of confidential information ("Protocol").¹ On 3 February, at the request of the parties, the Chamber extended the deadline to 8 February 2012.²
2. The Parties have agreed on a number of clauses of the Protocol but there remain two contentious issues: 1) should the Protocol apply only to protected witnesses, and 2) should the Protocol contain a clause, proposed by the Defence and opposed by the Prosecution, that the Code of Professional Conduct for Counsel be extended beyond its specific terms to apply to the Prosecution.
3. *"The 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 the public."*³ Consequently, the Prosecution submits that the Protocol should not be limited to the handling of information provided by protected witnesses but should extend to witnesses, and in fact any person cooperating with the Court.⁴
4. Although the Prosecution is expressly not bound by the Code of Professional Conduct, it is obligated in the same way as any other party or participant to respect orders and decisions of the Court. It is also under specific obligations pursuant to the Statute to take appropriate measures to protect victims and witnesses, the very purpose of the Protocol. Therefore, it is in the interest of the Prosecution and its duty to follow good practices that

¹ ICC-02/11-01/11-30, *in fine*.

² Email from the Legal Office of the Chamber to the parties sent at 10.56am.

³ See Appeals Chamber decision ICC-01/04-01/07-585, para. 10. The Prosecution also submits that the VWU should also be consulted in relation to the scope of this Protocol.

⁴ See for instance, ICC-01/04-01/07-475 OA, para.1.

protect any victims and witnesses, including Legal Representatives and Defence witnesses.

Request for Confidentiality

5. Annex A appended to this submission contains the Prosecution's proposed Protocol. The Prosecution requests that this annex be received as "Confidential" since it provides the content of *inter partes* discussions.⁵

Submission

Purpose of the Protocol

6. The Protocol's purpose is to protect all victims and witnesses (or other persons) who cooperate with the court, while respecting the rights of the parties to investigate the other parties' evidence, including the credibility of witnesses.
7. The Prosecution conducts its investigations in conflict or former conflict zones that are often unstable and unpredictable. Pursuant to its obligations under Articles 54 and 68(1) of the Statute, the Prosecution will only interview witnesses or collect evidence after it has assessed that it can respect its protection obligations, including the confidentiality of its investigations. Even after securing the cooperation of prospective witnesses, if it later proves impossible, and sometimes just difficult, to adequately protect witnesses, the Prosecution will choose to renounce their evidence in lieu of putting them in a situation of undue risk. Consequently, when a witness cooperates with the Court, it is in the interest of all witnesses and justice to preserve this cooperation by providing and putting in place the necessary protective measures.

⁵ The Prosecution has no objection to its reclassification as public if deemed necessary by the Chamber.

8. The Prosecution's protection obligations are not limited to the period of the investigation, they also extend through the prosecution phase and, where necessary, afterwards. The initial appearance of a suspect triggers the disclosure obligations of the Prosecution, including the disclosure of the identity and statement of witnesses to the Defence.
9. It is uncontested that as part of fair and impartial proceedings, the Accused has the right to prepare, including to investigate the Prosecution's evidence (and thus to timely disclosure of that evidence) and to call evidence and witnesses on its own behalf. Talismanic invocation of this right, however, cannot trounce the Prosecution's and the Court's concurrent obligation to protect victims and witnesses.
10. In the legitimate conduct of its activities, a party may have to investigate the identity and credibility of victims and witnesses. It is therefore foreseeable that the identity and cooperation of witnesses may become known to third parties and consequently impact on their safety and security.
11. The Prosecution submits that the Protocol should delineate the parties' obligations in the conduct of their investigations while minimizing all foreseeable risks to the security of victims and witnesses (and other persons interacting with the Prosecution).
12. As the Appeals Chamber noted (see above in paragraph 3), good investigative practices by the parties and participants are the first step in the protection system available to witnesses.⁶ For instance, 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.

⁶ ICC-01/04-01/07-585, para. 10.

Because of the intrusive nature of relocation on the lives of witnesses and their family members, all efforts should be made to maintain a lower risk so as to not have to relocate a witness within the Court's Witness Protection Program ("ICCPP"). The ICCPP is a measure of last resort. Alternative protection mechanisms, like the Annexed Protocol, should be favored. It is also noted that in the Court's current budgetary and resource constraints in which it operates, all alternative measures to the ICCPP should be favored, where applicable. The Protocol submitted by the Prosecution in Annex A is similar to best practices that were adopted in other cases in consultation with the VWU.⁷ The Prosecution submits that they should be adopted also in this case.

13. Annex A contains the result of the parties' exchanges. The Prosecution sent a first draft to the Defence, which submitted amendments in track changes, including comments. The Prosecution reviewed these proposals and accepted all changes it deemed appropriate, deleted proposals it could not agree to and re-inserted information it felt was essential, and sent this new draft to the Defence. Following the reception of this new draft, the Defence and Prosecution concluded they had exhausted all efforts to reach an agreement. The Prosecution provides, in Annex A, the last version sent to the Defence. The deletions to the Defence's counter-proposal and re-insertion of the Prosecution's proposed language have been kept in track changes for the Chamber's benefit. All comments of the parties have been removed since the Prosecution considers these as *inter partes* discussions.⁸

⁷ See for instance ICC-01/04-01/06-1372; ICC-01/05-01/08-813-Red; ICC-01/04-01/07-2007-Anx1 and ICC-01/04-01/07-2047. Although the Prosecution did not address in the Protocol the question of the contacts with the other parties' witnesses since it does not intend to call any live witnesses, this situation was also addressed in the following decisions ICC-01/04-01/07-1134 and ICC-01/04-01/10-258.

⁸ If the Defence was to annex a version that contains such exchanges, the Prosecution submits that although it maybe interesting, the Chamber should disregard them.

Applicability of the Protocol to all persons interacting with the Court

14. The Prosecution submits that the distinction drawn upon by the Defence between witnesses and “protected witnesses” – and its efforts to confine the Protocol to only the latter -- is both artificial and inappropriate. The Statute is clear: all victims and witnesses (or other persons at risk on account of the activities of the Court) benefit from the protection of Article 68.

15. To be sure, a Protocol adopted in the *Katanga/Ngudjolo* case limited itself to protected witnesses,⁹ but the Prosecution submits that the context that led to its adoption was very different. In the *Katanga/Ngudjolo* case, the Trial Chamber ordered in-court protective measures with respect to, among other things, the identity of Prosecution witnesses (including to witnesses who were not in the ICCPP). After the start of the Prosecution case, the Defence sought “*instructions on the manner in which it might approach third parties material to its investigations, drawing the Chamber’s attention to the fact that on such occasions it could not rule out the possibility of the identities of protected witnesses being disclosed* (emphasis added).”¹⁰ The Protocol thereafter was created to protect witnesses who were now coming to testify before the Trial Chamber with in-court protective measures. Contrary to the Pre-Trial stage, the emphasis in the *Katanga/Ngudjolo* trial case was to protect witnesses who were clearly identified as trial witnesses and who may be the subject of investigations by the other party not calling them.

⁹ ICC-01/04-01/07-2007-Anx1 and ICC-01/04-01/07-2047.

¹⁰ ICC-01/04-01/07-1702-Red

The ICC Professional Code of Conduct

16. The Code of Professional Conduct for Counsel, by its very wording, is not applicable to the Prosecution.¹¹ The Defence is seeking to bind its application to the Office of the Prosecutor by inserting language to that effect in the Protocol. The Prosecution contends that this would be *ultra vires* and stepping into the legislator's arena, and additionally it would override the deliberate decision of the legislators to exclude the Prosecution. It is for the Assembly of State Parties to decide such issue,¹² and the Code itself sets out an "amendment procedure"¹³ that does not include *ad hoc* protocols in individual cases.

17. This is not to say that the Prosecution is completely unfettered by ethical obligations. The Prosecution recalls that its duties to protect persons at risk on account of their interaction with the Prosecution are regulated by the Statute¹⁴ and the Regulations of the Office of the Prosecutor.¹⁵ Prosecution investigators are further bound by the Code of Conduct for Investigators that has been adopted pursuant to Rule 17(2)(a)(v) of the Rules of Procedure and Evidence "in relation to the protection of all witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses".¹⁶ Moreover, staff members of the Prosecution are bound to comply with the core values laid out in Section 1.2 of the Staff Regulations of the Court, which include a duty to respect the principles embodied in the Rome Statute and to uphold the highest standard of integrity.¹⁷

¹¹ See Article 1 of the Code (« This Code shall apply to defence counsel, counsel acting for States, amici curiae and counsel or legal representatives for victims and witnesses [...], hereinafter referred to as 'counsel' »).

¹² See ICC-ASP/4/Res.1, Code of Professional Conduct for Counsel, adopted on 2 December 2005 and into force since 1 January 2006.

¹³ Code, Article 3.

¹⁴ See in particular Articles 54(3)(f) and 68(1).

¹⁵ See in particular Regulations 44-48.

¹⁶ Code of Conduct for Investigators, ICC/AI/2008/005.

¹⁷ Annex to presidential directive ICC/PRESG/2004/001 on Promulgation of Staff Regulations.

18. These duties collectively provide a sufficient regulatory basis to ensure that all persons at risk on account of their interaction with the Prosecution are appropriately protected.

A handwritten signature in blue ink, appearing to read 'Luis Moreno-Ocampo', is positioned above a horizontal line.

Luis Moreno-Ocampo, Prosecutor

Dated this 8th day of February 2012

At The Hague, The Netherlands