

**Cour
Pénale
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**International
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Court**

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Date: **18 March 2010**

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

**Prosecution's Response to Victims and Witnesses Unit's observations on the
"Protocol on investigations in relation to witnesses benefiting from protective
measures"**

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 submits that contrary to what is recommended by the Victims and Witnesses Unit ("VWU") in its latest filing regarding the Joint Protocol,¹ the latter's application should not extend beyond those parties and participants involved in its creation, and it should therefore not be applicable to the Prosecution. Moreover, the Prosecution maintains that the revised Joint Protocol does not meet the minimum requirements set out by the Chamber's decision² regarding the manner in which Defence teams must pursue their investigations regarding protected witnesses ("the Decision"). Consequently, it should not be endorsed by the Chamber.

Background

2. On 2 December 2009, the Defence for Mathieu Ngudjolo solicited guidelines from the Chamber regarding the manner in which it could conduct its investigations regarding protected witnesses.³
3. On 11 December 2009, the Prosecution filed its "Observations regarding the disclosure of the identity of Prosecution Witnesses to third parties".⁴
4. On 18 December 2009, the Chamber rendered a decision setting out the framework with which the Defence had to comply when investigating and in particular when disclosing the names of protected witnesses to third parties.⁵ The Chamber ordered the VWU and the Defence teams of Mathieu Ngudjolo

¹ ICC-01/04-01/07-1956-Conf, para. 4.

² « Instructions sur la manière d'approcher des tiers utiles aux enquêtes de la Défense » ICC-01/04-01/07-1734.

³ ICC-01/04-01/07-1702-Conf-Exp. *See also* public redacted version: ICC-01/04-01/07-1702-Red.

⁴ ICC-01/04-01/07-1720-Conf-Exp. *See also* public redacted version: ICC-01/04-01/07-1720-Red.

⁵ « Instructions sur la manière d'approcher des tiers utiles aux enquêtes de la Défense », ICC-01/04-01/07-1734, p. 13.

and Germain Katanga ("Defence teams") to agree on a joint protocol regarding the guidelines that should be followed by the latter when disclosing the names of protected witnesses to third parties during their investigations.

5. On 28 December 2009, the Defence team for Germain Katanga filed provisional observations regarding the Chamber's Decision.⁶
6. On 27 January 2010, the VWU and the Defence teams filed a joint protocol specifying concrete modalities of disclosure of protected witnesses' identities: the "Protocol on investigations in relation to witnesses benefiting from protective measures" ("Joint Protocol").⁷
7. On 16 February 2010, the Prosecution filed its response regarding the Joint Protocol ("the Response").⁸ In essence the Prosecution maintained that the Joint Protocol did not comply with the Chamber's Decision and that it should not extend to the Prosecution.⁹
8. On 17 February 2010, the Chamber ordered the VWU to organize a series of meetings in the month of March with the Defence teams and also with the Legal Representatives of Victims in order to collect their comments and answer their questions.¹⁰
9. On 1 March 2010, the Legal Representatives of the Victims filed their observations regarding the Prosecution's Response.¹¹
10. On 10 March 2010, the VWU filed its observations regarding the Joint Protocol¹² and submitted a revised version.¹³

⁶ ICC-01/04-01/07-1745.

⁷ ICC-01/04-01/07-1797 and ICC-01/04-01/07-1797-Conf-Anx1.

⁸ ICC-01/04-01/07-1879-Conf. *See also* public redacted version: ICC-01/04-01/07-1879-Red

⁹ ICC-01/04-01/07-1879-Conf, para. 3.

¹⁰ E-mail of the Legal Officers of the Chambers of 17 February 2010. N.B.: The Chamber ordered the VWU to submit the final proposals on the protocol by 10 March 2010.

¹¹ ICC-01/04-01/07-1924-Conf.

¹² ICC-01/04-01/07-1956-Conf.

¹³ ICC-01/04-01/07-1956-Conf-Anx1.

Confidentiality

11. This submission is filed as confidential since it refers to the Joint Protocol which was filed confidentially.

Prosecution's Submissions

12. In its last filing regarding the Joint Protocol, the VWU recommended extending its application to all parties and participants.¹⁴ The Prosecution reiterates that the Joint Protocol should not apply to its investigations since it was not afforded the opportunity to participate in the drafting of the Joint Protocol. Furthermore, the Prosecution submits that the revised version of the Joint Protocol does not comply with the minimum standards set out in the Chamber's decision and should therefore not be confirmed by the Chamber.

The Prosecution was not afforded the opportunity to participate in the development of the Joint Protocol

13. The Prosecution would like to recall that it has not been afforded the opportunity to participate in the development of the Joint Protocol or the revised version thereof. In fact, apart from the observations that it made in its two filings regarding the matter,¹⁵ it has been excluded from the process altogether. Had the Prosecution participated in the development of the Joint Protocol the latter would have been substantially different.
14. In this regard, the Prosecution submits it is implicit from the Chamber's Decision and its directives regarding the drafting of the Joint Protocol¹⁶ that the Joint Protocol would only apply to the Defence. It must be recalled that the Chamber's Decision responded to Mathieu Ngudjolo's request for guidance regarding its investigation of protected witnesses. The Decision essentially set

¹⁴ ICC-01/04-01/07-1956-Conf, p. 5.

¹⁵ See *supra* paras 3 and 7.

¹⁶ See *supra* paras 4 and 8.

out a framework which must be followed by the Defence during its investigative activities. Furthermore, as noted above, the Chamber did not request the participation of the Prosecution in the development of the Joint Protocol.¹⁷

The revised Joint Protocol does not comply with the Chamber's Decision and should therefore not be confirmed

15. Like the previous version of the Joint Protocol, the revised version does not comply with the minimum requirements set out by the Chamber in its Decision.¹⁸ It should therefore not be endorsed by the Chamber, as any such endorsement would effectively constitute reconsideration of the Chamber's previous Decision. The Prosecution therefore reiterates its arguments that have been advanced in relation to the prior version of the Joint Protocol,¹⁹ and highlights the points below.

16. First, contrary to the Chamber's Decision, the revised Joint Protocol does not require the existence of a "genuine and specific need for the preparation of the Defence case"²⁰ in order to justify the disclosure of a protected witness's identity to a third party. Nor does it require the existence of exceptional circumstances to do so. In essence, in accordance with the revised Joint Protocol, the Defence would be able to reveal the identity of protected witnesses for the purposes of any unspecified inquiry. This contradicts the spirit of the Decision which is to limit disclosure to specific instances which are objectively justifiable on the basis of set criteria.

17. Second, unlike the Chamber's Decision, the revised Joint Protocol does not require the Defence teams to contact the VWU prior to proceeding with

¹⁷ See *supra* paras 4 and 8.

¹⁸ ICC-01/04-01/07-1879-Conf, para. 3.

¹⁹ ICC-01/04-01/07-1879-Conf.

²⁰ See ICC-01/04-01/07-1734, para. 15, *in fine*.

disclosure. The Prosecution recalls that according to the Chamber's Decision the Defence must contact a representative of the VWU prior to the disclosure of the identity of a protected witness to a third party and furnish the latter with the relevant information on the matter.²¹ The VWU can then conduct an evaluation regarding the risks to the witness. The revised Joint Protocol omits these essential requirements thereby depriving the VWU of the ability to make an advance risk assessment and to take the necessary steps to prevent foreseeable risks before disclosure is effectuated and to maintain an appropriate level of protection.

The scope of the revised Joint Protocol should cover witnesses who face a foreseeable risk as a result of disclosure of their identities to third parties

18. The Prosecution submits that the revised Joint Protocol, once amended in order to comply with the minimum requirements set forth in the Chamber's Decision, may also be applied to all witnesses who face a foreseeable risk, regardless of whether they currently enjoy operational or procedural protective measures. Nevertheless, if there is no foreseeable risk linked to the disclosure of a witness's identity to third parties, the VWU should not have a role to play in such cases.

Conclusion

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

- a) Require the VWU and the Defence teams to amend the revised Joint Protocol in a manner which respects the minimum requirements set forth in the Chamber's Decision;

²¹ See ICC-01/04-01/07-1734, par. 17 and par. 19.

- b) Rule that the revised 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;
- c) Rule that the revised Joint Protocol is not applicable to the Prosecution but only to the parties and participants that participated in its creation.



Luis Moreno-Ocampo, Prosecutor

Dated this 18th day of March 2010

At The Hague, The Netherlands