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No.: **ICC-01/04-01/07**

Date: **26 April 2010**

TRIAL CHAMBER II

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public Document

**Decision on the “Protocol on investigations in relation to witnesses benefiting
from protective measures”**

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, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Éric MacDonald, Senior Trial Lawyer

Counsel for Germain Katanga

Mr David Hooper
Mr Andreas O'Shea

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

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

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Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

TRIAL CHAMBER II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 67 and 68 of the Rome Statute (“the Statute”), to rules 87, 88 and 134(3) of the Rules of Procedure and Evidence (“the Rules”) and to regulation 23*bis* of the Regulations of the Court, decides the following.

I. Background

1. On 23 November 2009, the Chamber ordered protective measures for a certain number of the Prosecutor’s witnesses.¹ In that order, the Chamber *inter alia* prohibited the Defence and the Legal Representatives of the Victims from disclosing to a third party the identities of witnesses for whom it wished to provide protective measures (“the Order of 23 November 2009”). On 2 December 2009, the Defence for Mathieu Ngudjolo submitted to the Chamber an application for 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.²

2. Mindful of the importance of the issue raised by that application, the Chamber sought via e-mail the observations of the Victims and Witnesses Unit (“the VWU”) and those of the parties and the participants. On 11 December 2009, it received the observations of the Legal Representative of the main group of victims³ and those of the Prosecutor⁴ and then, by e-mail on 15 December 2009, the VWU’s recommendations.

¹ *Ordonnance relative aux mesures de protection de certains témoins cités à comparaître par le Procureur et par la Chambre*, 23 November 2009, ICC-01/04-01/07-1667-Conf.

² Defence for Mathieu Ngudjolo, “*Requête de la Défense en vue d’obtenir de la Chambre des instructions précises sur la manière d’approcher des tiers qui lui sont très utiles en vue du recueil des éléments à décharge et des éléments pouvant décrédibiliser certains témoins du Procureur*”, 2 December 2009, ICC-01/04-01/07-1702-Conf-Exp and 8 December 2009, ICC-01/04-01/07-1702-Red (public, redacted version).

³ Legal Representatives of the Victims, “*Observations du Représentant légal du groupe principal des victimes sur la requête de la Défense de Mathieu Ngudjolo Chui visant à obtenir de la Chambre des instructions*”

3. Following that initial consultation, by an order dated 18 December 2009⁵ (“the Order of 18 December 2009”), the Chamber instructed the VWU and the Defence teams to consult one another and to draft a protocol specifying concrete procedures for the disclosure of protected witnesses’ identities, in order to reconcile the necessary protection of witnesses with the effective conduct of the Defence’s investigations (“the Protocol”). In the meantime, the Chamber requested the Defence provisionally to implement the instructions set out for guidance purposes in its order.

4. On 28 December 2009, the Defence for Germain Katanga filed its observations.⁶ Following the submission of a VWU report on the risks to victims participating in the proceedings,⁷ in which it recommended applying the Protocol to victims, on 19 January 2010 the Legal Representatives of the Victims submitted observations on the Chamber’s instructions and requested leave to participate in the process of drafting the Protocol.⁸

5. On 27 January 2010, the VWU and the Defence teams finally presented to the Chamber a joint draft protocol,⁹ which the Defence teams undertook to follow during their investigations. The Legal Representatives of the Victims submitted

sur la manière d’approcher des tiers quant à certains témoins à charge (article 64(2) et 68(1) et (3) du Statut)”, 11 December 2009, ICC-01/04-01/07-1719.

⁴ Office of the Prosecutor, “Observations regarding the disclosure of the identity of Prosecution witnesses to third parties”, 11 December 2009, ICC-01/04-01/07-1720-Conf-Exp and ICC-01/04-01/07-1720-Red (public, redacted version).

⁵ *Instructions sur la manière d’approcher des tiers utiles aux enquêtes de la Défense*, 18 December 2009, ICC-01/04-01/07-1734.

⁶ Defence for Germain Katanga, “Defence Provisional Observations on the Meaning and Execution of the Trial Chamber’s Instructions re: Approaching Third Parties during Defence Investigations”, 28 December 2009, ICC-01/04-01/07-1745.

⁷ Registry, “*Rapport de l’Unité d’aide aux victimes et aux témoins sur les risques encourus par les victimes qui participent à la procédure*”, 11 January 2010, ICC-01/04-01/07-1757-Conf.

⁸ Legal Representatives of the Victims, “*Observations conjointes des représentants légaux des victimes sur le rapport de la DAVT du 11 janvier 2010 et sur d’autres questions connexes relatives à la protection des victimes*”, 19 January 2010, ICC-01/04-01/07-1776.

⁹ Registry, “*Protocole présenté conjointement par l’Unité d’aide aux victimes et aux témoins et les équipes de la Défense aux fins de préciser les modalités concrètes de divulgation de l’identité des témoins protégés*”, 27 January 2010, ICC-01/04-01/07-1797 (confidential annex, ICC-01/04-01/07-1797-Conf-Anx1).

joint observations on the draft on 7 February 2010,¹⁰ and then again on 16 February 2010.¹¹ On that same day, the Prosecutor filed his observations.¹² At the Chamber's suggestion, the Legal Representatives of the Victims,¹³ the Defence teams for Mathieu Ngudjolo¹⁴ and Germain Katanga¹⁵ responded on 1 March 2010.

6. Concerned to reach the broadest possible consensus, the Chamber invited the VWU to organise a series of meetings with the Defence and with the Legal Representatives of the Victims, and then to prepare final proposals. Furthermore, the Chamber undertook to rule on the reclassification of the observations of the parties and participants on the Protocol once it had been finalised. In accordance with the Chamber's instructions, on 10 March 2010 the VWU submitted an amended version of the draft Protocol,¹⁶ on which the Prosecutor filed his observations on 18 March 2010.¹⁷ In the meantime, the Legal Representatives of the Victims and the Defence having submitted additional

¹⁰ Legal Representatives of the Victims, "*Observations conjointes des Représentants légaux des victimes sur le Protocole sur les modalités de divulgation de l'identité de témoins protégés à des tiers*", 7 February 2010, ICC-01/04-01/07-1846-Conf.

¹¹ Legal Representatives of the Victims, "*Observations supplémentaires et conjointes des représentants légaux sur le Protocole sur les modalités de divulgation de l'identité de témoins protégés à des tiers*", 16 February 2010, ICC-01/04-01/07-1878-Conf.

¹² Office of the Prosecutor, "Prosecution's response to 'Victims and Witnesses Unit and Defence Teams joint protocol specifying concrete modalities of disclosure of protected witnesses' identities'", 16 February 2010, ICC-01/04-01/07-1879-Conf.

¹³ Legal Representatives of the Victims, "*Observations des représentants légaux sur la réponse du Procureur quant au 'Protocole sur les modalités de divulgation de l'identité de témoins protégés à des tiers'*", 1 March 2010, 01/04-01/07-1924-Conf.

¹⁴ Defence for Mathieu Ngudjolo, "*Observations de la Défense de Mathieu Ngudjolo relatives aux observations des représentants légaux des victimes et à la réponse de l'Accusation sur le 'Protocole commun précisant les modalités concrètes de divulgation de l'identité des témoins protégés'*", 1 March 2010, 01/04-01/07-1926-Conf.

¹⁵ Defence for Germain Katanga, "Defence Response to the Prosecution's and Legal Representatives' Observations on Joint VWU-Defence Protocol specifying concrete Modalities of Disclosure of Protected Witnesses", 1 March 2010, 01/04-01/07-1927-Conf.

¹⁶ Registry, "Victims and Witnesses Unit's observations on the 'Protocol on investigations in relation to witnesses benefiting from protective measures'", 10 March 2010, 01/04-01/07-1956-Conf (confidential annex, ICC-01/04-01/07-1956-Conf-Anx1).

¹⁷ Office of the Prosecutor, "Prosecution's Response to Victims and Witnesses Unit's observations on the 'Protocol on investigations in relation to witnesses benefiting from protective measures'", 18 March 2010, ICC-01/04-01/07-1975-Conf.

comments, on 12 March 2010 the VWU sent to the Chamber via e-mail a new, non-definitive version of the draft.

7. At the hearing of 18 March 2010, the Chamber asked the VWU to hold one last meeting in order to finalise the document.¹⁸ Thus, on 26 March 2010 the VWU presented the final version of the “Protocol on investigations in relation to witnesses benefiting from protective measures”,¹⁹ which had been approved both by the Legal Representatives of the Victims and by the two Defence teams.²⁰

II. Analysis

8. The Chamber notes first of all that it now considers itself to be sufficiently well informed to render a final decision on the Protocol. Although the Prosecutor’s most recent observations referred to the version of 10 March 2010, nevertheless the Chamber considers that it is not necessary to consult him again on the most recent amendments to that document, since he has already stated his position, which has remained unchanged, on three occasions.²¹
9. The Chamber would further recall that its instructions of 18 December 2009, which were issued in order to clarify those set out in its Order of 23 November 2009, were not intended to constitute a final, binding framework, with which the Protocol’s authors must comply, but rather to form a basis for discussion accompanied by provisional instructions, which were given purely for guidance purposes and in light of the urgency of the situation. The Chamber notes that a consensus has now been reached and that it must therefore satisfy itself that the agreement thus obtained accords with the Statute, with articles 67 and 68 in

¹⁸ ICC-01/04-01/07-T-119-CONF-ENG CT 18-03-2010 1-70 RM T, page 3, lines 1 to 22.

¹⁹ Registry, “Victims and Witnesses Unit’s observations on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’”, 26 March 2010, ICC-01/04-01/07-2007-Conf (confidential annex, ICC-01/04-01/07-2007-Conf-Anx1).

²⁰ ICC-01/04-01/07-2007-Conf, p. 3, final paragraph.

²¹ ICC-01/04-01/07-1720-Conf-Exp; ICC-01/04-01/07-1879-Conf; ICC-01/04-01/07-1975-Conf.

particular, and with the Rules, whilst taking into consideration the various observations which the Prosecutor wished to make.

10. As regards the use of the names of protected witnesses in investigations, the Protocol states that “[i]t is crucial that any investigating party or participant strictly avoids the risk of exposing the identity of protected witnesses to a third party to the extent possible” and that “[i]n cases where this may become necessary and no alternatives are available” “[t]he investigating party should use the names of the protected witnesses in a careful and focused manner and only when necessary for the purposes of the investigation or inquiry”.²² The Chamber considers that the language of the Protocol places sufficient emphasis on the fact that the names of protected witnesses should be disclosed only in exceptional circumstances, whilst proposing a realistic approach which enables the Defence to investigate effectively the credibility of prosecution witnesses. Moreover, the Chamber is of the view that it is not so much using the name of a protected witness during investigations that is a risk factor, but rather disclosing the fact that the person is a Court witness.

11. In this respect, the Chamber notes with satisfaction that the final version of the Protocol clearly prohibits disclosure to a third party of the fact that a protected witness is a witness or is involved with the Court.²³ It is satisfied with the actions required where an investigating party becomes aware that the third party knows or understands that the protected witness whose identity has been disclosed to him or her is connected with the Court. It also satisfied with the obligation explicitly to inform the third party in question of the confidential nature of such information and to instruct him or her not to disclose that

²² ICC-01/04-01/07-1956-Conf-Anx1, second and third paragraphs.

²³ ICC-01/04-01/07-1956-Conf-Anx1, paras. (b) and (c).

information further and also to inform the VWU Head of Protection as soon as possible.²⁴

12. The Chamber notes that, under the Protocol, enquiries as to the current location of a protected witness who is not a participant in the Court's protection programme are subject to strict controls (namely, the obligation to inform the VWU Head of Protection in advance and the requirement that specific reasons be provided), and that it is forbidden to make enquiries relating to protected witnesses who are participants in the Court's protection programme.²⁵ The obligation to inform the VWU Head of Protection as soon as possible in the event that the investigating party becomes aware of the current location of such witnesses²⁶ clearly demonstrates the realistic approach of the Protocol's authors, inasmuch as provision is made for protective measures should any undesirable, but unavoidable, situation arise. Such is the Protocol's objective, as understood by the Chamber.

13. Thus, the Chamber considers that the terms of the Protocol accord with the provisions of the Statute and the Rules and do not contravene its Order of 18 December 2009. In effect, the Protocol succeeds in reconciling the duty to protect victims and witnesses with respect for the rights of the Defence. Furthermore, the Chamber recommends that the VWU keep the parties and participants informed of any instance in which certain protected individuals are exposed to exceptional or heightened risks, *a fortiori* where they are participants in the Court's Protection Programme, so that they can redouble precautions during their investigations. Finally, it would particularly draw the attention of the Defence teams and the Legal Representatives of the Victims to the importance of ensuring that the provisions thus adopted are strictly applied, especially by their resource persons.

²⁴ ICC-01/04-01/07-1956-Conf-Anx1, para. c.

²⁵ ICC-01/04-01/07-1956-Conf-Anx1, para. d.

²⁶ ICC-01/04-01/07-1956-Conf-Anx1, para. d.

14. As regards the Protocol's field of application, the Chamber notes that the Prosecutor considers that he does not have to apply the Protocol during his own investigations since he was not involved in drafting it.²⁷ However, the Chamber would recall that the purpose of the Protocol is to lay down a set of general guidelines which are to be applied on a case-by-case basis. Moreover, the Legal Representatives of the Victims have undertaken to comply with these good practices. The Chamber considers that the Protocol constitutes a set of minimum rules designed to safeguard the security of all protected witnesses, whether called by the Prosecutor or by the other participants. It is the Chamber's view that, although the Prosecutor is free to adopt practices which offer greater protection during his investigations, he cannot, however, disregard those minimum rules.
15. Furthermore, the Chamber notes that the Protocol only applies to protected *witnesses*. However, it considers that it should also apply to any *victims* to whom the Chamber has granted anonymity in relation to the public.²⁸ It does not consider it necessary to consult with the parties and participants again on this point, given that the Legal Representatives of the Victims were involved in developing the Protocol and that they themselves have acknowledged that it could be applied to victims.²⁹ Finally, the Chamber recalls that that document is only intended to apply to *protected* individuals, whether witnesses or victims. In fact, it has only become necessary because of the existence of protective measures prohibiting the disclosure to third parties of the identities of protected individuals.

²⁷ ICC-01/04-01/07-1879-Conf, paras. 10 and 11; ICC-01/04-01/07-1975-Conf, paras. 13 and 14.

²⁸ See in particular the oral decision rendered by the Chamber on 18 February 2010, ICC-01/04-01/07-T-104-CONF-ENG ET 18-02-2010 1-74 RM T, pp. 37-39.

²⁹ ICC-01/04-01/07-1776, paras. 29 to 31.

FOR THESE REASONS, the Chamber

DECIDES to approve the Protocol and **DECLARES** it applicable to all parties and participants;

RECOMMENDS that the VWU keep the parties and participants informed of any instance in which certain protected individuals are exposed to exceptional or heightened risks, especially where they are participants in the Court's Protection Programme;

RECOMMENDS extending the Protocol's field of application to include all protected persons, whether witnesses or victims; and

ORDERS the Registry to reclassify as public the following documents:

- ICC-01/04-01/07-1797-Conf-Anxl;
- ICC-01/04-01/07-1846-Conf;
- ICC-01/04-01/07-1878-Conf;
- ICC-01/04-01/07-1879-Conf;
- ICC-01/04-01/07-1924-Conf;
- ICC-01/04-01/07-1926-Conf;
- ICC-01/04-01/07-1927-Conf;
- ICC-01/04-01/07-1956-Conf-Anxl;
- ICC-01/04-01/07-1975-Conf; and

– ICC-01/04-01/07-2007-Conf-Anxl.

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

_____[signed]_____
Judge Bruno Cotte
Presiding Judge

_____[signed]_____
Judge Fatoumata Dembele Diarra

_____[signed]_____
Judge Christine Van den Wyngaert

Dated this 26 April 2010

At The Hague, The Netherlands