

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 18 February 2013

TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Silvia Fernández de Gurmendi
Judge Chile Eboe-Osuji

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
*THE PROSECUTOR v. ABDALLAH BANDA ABAKAER NOURAIN
AND SALEH MOHAMMED JERBO JAMUS***

**Public
With public Annex**

**Decision on the Protocol on the handling of confidential information and
contact of between a party and witnesses of the opposing party**

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Adebowale Omofade

Counsel for the Defence

Mr Karim A.A. Khan

Mr Nicholas Koumjian

Legal Representatives of Victims

Ms Hélène Cissé

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Unrepresented Victims

Legal Representatives of Applicants

**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

Deputy Registrar

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IV ("Chamber") of the International Criminal Court ("Court") in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, issues, pursuant to Articles 64(6)(c), 64(6)(e), 67(2) and 68 of the Rome Statute ("Statute"), Rules 76, 77, 87 and 88 of the Rules of Procedure and Evidence ("Rules"), Regulations 23bis(3) and 41 of the Regulations of the Court ("Regulations") and Article 8 of the Code of Professional Conduct for Counsel ("Code of Conduct"), the following Decision on the Protocol on the handling of confidential information and contact of a party with witnesses of the opposing party.

I. PROCEDURAL BACKGROUND AND SUBMISSIONS

1. On 12 July 2012, the Chamber held an *ex parte* confidential status conference with the Office of the Prosecutor ("prosecution") and the Registry, at which the prosecution was directed to commence *inter partes* discussions with the defence of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus ("defence") in order to file a joint protocol on the handling of confidential information and contact of a party with witnesses of the opposing party for investigation purposes ("Protocol"). The prosecution submits that by way of this protocol, identities of witnesses relevant to the preparation of the defence presentation of evidence could be disclosed to the defence under conditions to be determined in the said protocol.¹

2. On 27 August 2012, after having consulted the Victims and Witnesses Unit

¹ Transcript of hearing on 12 July 2012, ICC-02/05-03/09-T-19-CONF-EXP-ENG ET, page 19, lines 15 to 25, page 24, lines 18 to 22, page 26, lines 13 to 25, page 28, lines 1 to 8, page 29, line 17 to page 30, line 15, page 32, lines 13 to 25, page 33, lines 20 to 23, page 34, lines 10 to 13. The Chamber notes that the present decision refers to information considered as confidential at the status conference. While some of the matters referred to in this transcript should remain confidential at this stage, the Chamber is of the view that in light of the principle of publicity of the proceedings enshrined in Articles 64(7) and 67(1) of the Statute, this Decision makes reference to information that the Chamber considers not to warrant confidential treatment at this time.

("VWU") on 23 August 2012,² the prosecution filed separately its own confidential proposed protocol ("Prosecution Protocol").³ The Prosecution Protocol seeks to prevent the disclosure to the public by a party or participant of non-public evidence and information disclosed to them by a party or participant in the proceedings except to the limited extent that such disclosure is directly and specifically necessary for the preparation and presentation of their case.⁴

3. On 18 September 2012, the defence filed its confidential "Defence Response to Prosecution's Submission of a Draft Protocol on the Handling of Non-Public Information and Contact of a Party with Witnesses of the Opposing Party" ("Defence Response"),⁵ together with three annexes including a proposed protocol in public Annex A ("Defence Protocol").⁶ It is submitted that the prosecution has made no meaningful efforts to engage with the defence.⁷ The defence objects to the Prosecution Protocol, arguing that it is unnecessary because, *inter alia*, disclosure of confidential information has already taken place for more than two years and because "no cause has been shown nor any justification advanced as to why the regime governing the handling of non-public information in this case needs to be

² Victims and Witnesses Unit's observations following Trial Chamber V's [sic] instructions dated 21 September 2012, 5 October 2012, ICC-02/05-03/09-400-Conf, paragraph 5.

³ Annex to Prosecution's Submission of a Draft Protocol on the Handling of Non-Public Information and Contact of a Party With Witnesses of the Opposing Party, and Prosecution's Update on Expert Witness, 27 August 2012, ICC-02/05-03/09-389-AnxA.

⁴ ICC-02/05-03/09-389-AnxA paragraph 2.

⁵ Defence Response to Prosecution's Submission of a Draft Protocol on the Handling of Non-Public Information and Contact of a Party with Witnesses of the Opposing Party, 18 September 2012, ICC-02/05-03/09-394-Conf. A public redacted version was filed on the same day: ICC-02/05-03/09-394-Red.

⁶ Public Annex A to Defence Response to Prosecution's Submission of a Draft Protocol on the Handling of Non-Public Information and Contact of a Party with Witnesses of the Opposing Party, 18 September 2012, ICC-02/05-03/09-394-AnxA.

⁷ ICC-02/05-03/09-394-Red, paragraphs 10 to 14 and public redacted Annex B to Defence Response to Prosecution's Submission of a Draft Protocol on the Handling of Non-Public Information and Contact of a Party with Witnesses of the Opposing Party, 18 September 2012, ICC-02/05-03/09-394-AnxB-Red.

changed at this stage in proceedings”.⁸ Moreover, the defence states that with regard to the regulation of contact with witnesses of the opposing party, a similar procedure was agreed upon last January 2011.⁹ In addition, the defence submits that the Prosecution Protocol does not capture the unique circumstances of the case¹⁰ and is unduly burdensome to the defence.¹¹ The defence also makes “other comments” to the Prosecution Protocol the purpose of which is to show that such a procedure will not be workable.¹² In this respect, the defence submits, *inter alia*, that the prosecution fails to clearly outline the purpose of the Prosecution Protocol, its intended subjects and consistent definitions.¹³ The defence further claims that the Prosecution Protocol lacks precision and is duplicative.¹⁴ The defence therefore requests the Chamber to reject the Prosecution Protocol and adopt the proposed Defence Protocol, annexed to the Defence Response.¹⁵

4. On 21 September 2012, the common legal representatives of victims (“CLR”) filed their observations on the Prosecution Protocol (“CLR Observations”), requesting the Chamber to add to the proposed Prosecution Protocol provisions regulating the contacts between the defence and the prosecution witnesses who have been granted the status of victim in the case (“dual status individuals”).¹⁶

⁸ ICC-02/05-03/09-394-Red, paragraph 15.

⁹ ICC-02/05-03/09-394-Red, paragraph 16 and Confidential Annex C to Defence Response to Prosecution's Submission of a Draft Protocol on the Handling of Non-Public Information and Contact of a Party with Witnesses of the Opposing Party, 18 September 2012, ICC-02/05-03/09-394-Conf-AnxC.

¹⁰ ICC-02/05-03/09-394-Red, paragraph 19.

¹¹ ICC-02/05-03/09-394-Red, paragraphs 20 to 29.

¹² ICC-02/05-03/09-394-Red, paragraphs 30 to 39.

¹³ ICC-02/05-03/09-394-Red, paragraph 31.

¹⁴ ICC-02/05-03/09-394-Red, paragraphs 32 and 33.

¹⁵ ICC-02/05-03/09-394-Red, page 15; ICC-02/05-03/09-394-AnxA.

¹⁶ Observations en Réponse des Représentants Légaux Communs à la Version Publique Expurgée de la Soumission du Procureur relative au Projet de Protocole Concernant la Gestion des Informations Non Publiques et des Contacts par une

Partie des Témoins de la Partie Adverse (ICC-02/05-03/09-389-31/08/2012) avec la Version Publique de son Annexe A (ICC-02/05-03/09-AnxA-31/08/2012), 21 September 2012, ICC-02/05-03/09-396, paragraphs 16 to 19.

5. On the same day, the Chamber directed the VWU to file its observations to the Defence Protocol and to propose to the Chamber a consolidated protocol that would combine the parties' proposed protocols to the extent possible.¹⁷
6. On 4 October 2012, the defence replied to the CLR Observations¹⁸ opposing the CLR's proposed additions and in the alternative, requesting further amendments to the said additions to be adopted by the Chamber.¹⁹ To this end, the defence proposes a procedure "aiming at preventing interference with the Defence's investigation and preparation and the contamination of the evidence before the Court".²⁰ The defence also submits that access to confidential information by the CLR should be regulated.²¹
7. On 5 October 2012, the VWU filed the confidential "Victims and Witnesses Unit's observations following Trial Chamber V's [sic] instructions dated 21 September 2012",²² to which it appended public Annex 2 containing the VWU's comments to the protocols filed by both parties, underlining in particular the similarities and the differences between the two documents ("Proposed Protocol").²³
8. On 15 October 2012, the defence filed an application for leave to reply to the VWU's

¹⁷ Email from a Legal officer of the Trial Chamber to the VWU, 21 September 2012 at 15:18.

¹⁸ Defence Reply to the « Observations en Réponse des Représentants Légaux Communs à la Version Publique Expurgée de la Soumission du Procureur relative au Projet de Protocole Concernant la Gestion des Informations Non Publiques et des Contacts par une Partie des Témoins de la Partie Adverse (ICC-02/05-03/09- 389-31/08/2012) avec la Version Publique de son Annexe A (ICC-02/05-03/09-AnxA- 31/08/2012) », 4 October 2012, ICC-02/05-03/09-399.

¹⁹ ICC-02/05-03/09-399, pages 13 to 15.

²⁰ ICC-02/05-03/09-399, paragraph 15.

²¹ ICC-02/05-03/09-399, paragraphs 21 to 30.

²² ICC-02/05-03/09-400-Conf.

²³ Annex 2 to Victims and Witnesses Unit's observations following Trial Chamber V's [sic] instructions dated 21 September 2012, 5 October 2012, ICC-02/05-03/09-400-Anx2.

observations and the Proposed Protocol.²⁴ The defence filed its application confidentially without stating, pursuant to Regulation 23*bis*(1) of the Regulations, the legal and factual basis for the chosen classification. The defence submits in particular that the VWU has mischaracterised on three different occasions the defence's original submissions.²⁵ By way of email and pursuant to Regulations 24(5) and 34(c) of the Regulations of the Court, the defence was granted leave to reply as the Chamber considered that it had shown good cause.²⁶

9. On 18 October 2012, the defence filed its confidential "Defence Reply to the "Victims and Witnesses Unit's observations following Trial Chamber V's [sic] instructions dated 21 September 2012" ("Defence Reply").²⁷ Once again, the defence failed to justify its chosen classification as "confidential". The defence clarifies three "inadvertent mischaracterisations" made in the VWU's observations and reiterates its initial submissions on its opposition to five articles of the Proposed Protocol.²⁸ The defence insists on the lack of precise definitions in the Prosecution Protocol, in particular what "public knowledge" should mean,²⁹ opposes the provisions creating an obligation to maintain a record of disclosed non public information and a log³⁰ and finally requests the Chamber to adopt a narrower approach as regards the nature of non-public information that needs to be notified to the VWU Head of Protection.³¹

²⁴ Defence Application for Leave to Reply to the Victims and Witnesses Unit's observations following Trial Chamber V's [sic] instructions dated 21 September 2012, 15 October 2012, ICC-02/05-03/09-405-Conf.

²⁵ ICC-02/05-03/09-405-Conf, paragraph 15.

²⁶ Email from the Legal Officer of the Trial Chamber to the defence, 16 October 2012 at 10:45.

²⁷ Defence Reply to "Victims and Witnesses Unit's observations following Trial Chamber V's [sic] instructions dated 21 September 2012", 18 October 2012, ICC-02/05-03/09-406-Conf.

²⁸ Articles 7 to 10 and 25 of the Proposed Protocol in ICC-02/05-03/09-400-Anx2.

²⁹ ICC-02/05-03/09-406-Conf., paragraphs 3 and 4.

³⁰ ICC-02/05-03/09-406-Conf., paragraphs 5 to 7.

³¹ ICC-02/05-03/09-406-Conf., paragraph 8.

10. Bearing in mind the parties' submissions and the VWU's observations, the Chamber will, in the present Decision, rely on the Proposed Protocol as the reference document to adopt a final Protocol, which is appended in the Annex.

II. ANALYSIS

11. At the outset, the Chamber regrets that the VWU was unable to facilitate meaningful *inter partes* discussions due to late communication of the Prosecution Protocol to the unit.³² In addition, the VWU did not receive the Defence Protocol before it was filed with the Chamber³³ and this protocol was not prepared in consultation with the VWU.³⁴

a) Justification for the adoption of a Protocol at this stage in the proceedings

12. Due to the unique circumstances of this case and the difficult security situation in the Republic of Sudan and in particular in Darfur, the prosecution claims to be unable to disclose to the defence identities of some individuals who were previously in a working relationship with the prosecution and who now appear to be relevant for the preparation of the defence. However, the prosecution is under an obligation to reveal such information to the defence pursuant to Article 67(2) of the Statute and Rule 77 of the Rules.

13. The Chamber is of the view that a protocol for the handling of confidential information is necessary at this stage of the proceedings. It will assist the

³² Indeed, *inter partes* discussions only started on 17 August 2012 and the VWU received the Prosecution Protocol on Thursday 23 August 2012, only few days before the deadline set by the Chamber on Monday 27 August 2012.

³³ ICC-02/05-03/09-400-Conf, paragraphs 5 and 6.

³⁴ ICC-02/05-03/09-400-Conf, paragraph 6.

prosecution to discharge its disclosure obligations under Article 67(2) of the Statute and Rule 77 of the Rules, without unduly exposing the witnesses to security risks. Pursuant to Articles 64(6)(e) and 68(1) of the Statute the Chamber has the obligation to provide for the protection of witnesses and it shall take appropriate measures to protect their safety, physical and psychological well-being, dignity and privacy. The Protocol, as approved by the Chamber, offers a degree of protection whilst allowing for meaningful investigations.

14. The defence claims that the Prosecution Proposal goes beyond a disclosure protocol as it also regulates contacts between a party and the witnesses of the opposing party. In this respect, it is submitted that, such contacts have already taken place without any difficulty and in the absence of such a protocol.³⁵

15. The Chamber is of the view that the specific issue at hand is that some individuals with an established working relationship with the prosecution, who will not be relied upon at trial by the prosecution and who, however, may be relevant to the preparation of the defence are facing security concerns. As a result, they have refused to date to disclose their identities and to be interviewed by the defence. The Chamber considers that the relevant parts of the annexed Protocol relating to the handling of confidential information, including the identities of the individuals mentioned above will properly address this issue. The Chamber is therefore of the view that further regulations on the contacts between the individuals concerned and the defence are unnecessary.

16. With regard to contacts by the defence of witnesses to be relied upon by the prosecution, the Chamber notes the defence's argument that such contacts have

³⁵ ICC-02/05-03/09-394-Red, paragraph 37.

already taken place without any difficulty and in the absence of a protocol. However, considering the difficulty to obtain the consent of any witnesses to be interviewed by the opposing party,³⁶ the Chamber deems it necessary to regulate any further contacts between a party and witnesses of the opposing party. In addition, regulations of contacts as foreseen in the Protocol in the Annex will apply not only to the prosecution witnesses but also to witnesses the defence intends to rely on. Therefore, as set out in the Prosecution Protocol and in line with the jurisprudence of the Court,³⁷ provisions on regulations of such contacts have been included.³⁸

b) Scope of application of the Protocol and general considerations

17. In the view of the Chamber, the Protocol does not deviate from the standing practice of the parties regarding the disclosure of confidential information and the interviewing of witnesses of a party by the opposing party. It will apply throughout the proceedings and for witnesses of either party from the date of notification of the

³⁶ Transcript of hearing on 11 July 2012, ICC-02/05-03/09-T-17-ENG ET, page 36 line 2 to 15, with regard to witnesses 307 and 446 who are not willing to be interviewed by the defence; Transcript of hearing on 29 January 2013, ICC-02/05-03/09-T-21-Red-ENG, page 26 lines 9 to 13 and page 26 line 22 to page 27 line 2, where interviews with prosecution witnesses 439 and 442 have not yet taken place although it is submitted that witnesses consent to be interviewed by the defence.

³⁷ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, 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, paragraph 14; Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Annex to Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, 24 August 2012, ICC-01/09-01/11-449-Anx, paragraphs 4 to 13; Trial Chamber V, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Annex to Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, 24 August 2012, ICC-01/09-02/11-469-Anx, paragraphs 4 to 13; See also for witnesses included in the ICC Protection Program, Pre-Trial Chamber III, *The Prosecutor v. Laurent Gbagbo*, 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, 6 March 2012, ICC-02/11-01/11-49, paragraphs 29 to 32.

³⁸ Paragraphs 20 to 31 of the Protocol.

present Decision.

18. In addition, the Chamber has considered whether a protocol on the handling of confidential information and the regulation of contacts of a party with witnesses for investigation purposes should apply, at this stage, to victims who have been authorised to participate in the case.
19. The Chamber finds that the Protocol as adopted in the present Decision concerns only one aspect of the broader victims' right to participate, namely the access by the victims and their common legal representatives to confidential information during interviews of dual status individuals. Considering the primary purpose of the adopted Protocol, which is to enable the disclosure to the defence of the identities of individuals whom the prosecution does not intend to call at trial and who are not dual status individuals, the Chamber finds it more appropriate to deal with the issue of access to confidential information in the forthcoming decision on the modalities of victims' participation.
20. The Chamber therefore will not analyse the CLR's Observations and the defence reply thereto in the present Decision.

c) Methodology used for the Review of the Proposed Protocol by the Chamber

21. Having reviewed the Proposed Protocol and the related comments by the VWU, the Chamber has adopted the following methodology for the purpose of the final Protocol as set out in the Annex:
 - a) Where there was no significant disagreement between the parties as to a particular paragraph of the Proposed Protocol, the Chamber has adopted the

most detailed provision, which is specific to the circumstances of the present case. The Chamber also retained the most suitable provisions for investigation purposes. Furthermore, for the sake of clarity, the Chamber avoided adopting repetitive provisions;

- b) Where a party requested the inclusion of a provision that was not reflected in the Proposed Protocol by the other party, the Chamber adopted the provision only when necessary, bearing in mind the fact that the Chamber needs to strike a balance between the security concerns and the need to ensure that investigations remain effective;
- c) The Chamber has underlined below the differences of approach in the instances in which the parties proposed conflicting provisions. Ultimately, it has followed the VWU's recommendations, where appropriate and the common approach taken by the different Trial Chambers of this Court, as the case may be.

d) Analysis of the main points of contention to be resolved by the Chamber

(i) Criteria for disclosing confidential evidence and information

22. The Chamber notes the parties' disagreement concerning the criteria to be used in the disclosure of confidential evidence and information. The prosecution argues that such disclosure should take place only to a limited extent and when "directly and specifically necessary" for the presentation and preparation of a party's case,³⁹ whereas the defence contends that the test should be based on the simple criterion of "necessity".⁴⁰

³⁹ ICC-02/05-03/09-389-AnxA, paragraphs 2 and 17.

⁴⁰ ICC-02/05-03/09-394-Red, paragraph 29.

23. The Chamber, upon review of the approach adopted so far at the Court,⁴¹ notes that other Trial Chambers decided that disclosure of confidential information should remain exceptional and limited to the necessity of the investigative activities of a party. It is the view of this Chamber that the test of “necessity” should be specific. Adopting a broader terminology and allowing disclosure of confidential information as soon as it is “necessary for the presentation and presentation of the [parties’] case”, as proposed by the defence,⁴² would jeopardise the exceptional nature of the disclosure of confidential information. The Chamber therefore favours the terminology chosen by the prosecution, namely that disclosure should take place only to a limited extent and when “directly and specifically necessary” for the preparation and preparation of a party’s case. The Protocol reflects this approach.⁴³

(ii) Maintenance of a record and a log

24. The parties disagree on the necessity of maintaining a record of all confidential information in order to keep track of all the circumstances in which disclosure of confidential information has taken place or may take place. The Chamber notes the defence’s concern with regard to the maintenance of such a record at this stage of the proceedings when, *inter alia*, confidential information has already been shared with the public for investigation purposes without such record being in place.⁴⁴

25. Although indeed not maintained at an earlier stage in the present case, the

⁴¹ ICC-01/04-01/06-1372, paragraph 12, using the terms “truly necessary”; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Annex 1: Victims and Witnesses Unit’s observations on the “Protocol on investigations in relation to witnesses benefiting from protective measures”, ICC-01/04-01/07-2007-Anx1, page 1, paragraph b); ICC-01/09-01/11-449-Anx, paragraph 19; ICC-01/09-02/11-469-Anx, paragraph 19; ICC-02/11-01/11-49, paragraphs 19 and 20.

⁴² Article 6 of the Defence Protocol.

⁴³ Articles 6, 8, 13 and 14 of the Protocol.

⁴⁴ ICC-02/05-03/09-394-Red, paragraphs 23 and 24. See also ICC-02/05-03/09-406-Conf, paragraphs 5 and 6.

Chamber shares the VWU view that such a record is, for the future, “a useful tool to ensure the security of witnesses” during the parties’ investigations.⁴⁵ The VWU underlines that the record would also assist the unit in conducting security assessments when necessary. Moreover, the Chamber has heard submissions to the effect that the relationship between the accused and the Government of Sudan is in flux.⁴⁶ Depending on how this situation unfolds, the record may become even indispensable to ensure adequate witnesses’ protection. Therefore, the Chamber considers that, as proposed by the prosecution, a record should be maintained by both parties as of the date of notification of the present Decision. This equally applies to the log that both parties should maintain for the purpose of their future investigative activities.⁴⁷

(iii) Issue of signed statements for non-disclosure of confidential information

26. Paragraph 9 of the Prosecution Proposal states that “[T]he [confidential] information shall be made available to only identified members of the public, who shall give a written and signed undertaking not to reproduce or publicise its content, in whole or in part, or to show or disclose it to any other person”.⁴⁸ This proposal stems from the case of *The Prosecutor against Thomas Lubanga Dyilo*.⁴⁹ However, the Chamber notes the defence’s submission that most of the witnesses interviewed or to be interviewed are usually contacted by phone and, in addition,

⁴⁵ ICC-02/05-03/09-400-Anx2, pages 5 and 6.

⁴⁶ Prosecution’s Response to the “Defence Request for a Temporary Stay of Proceedings” and to the “Defence Request for an Oral Hearing”, 30 January 2012, ICC-02/05-03/09-286-Conf, paragraph 25. A public redacted version was filed on 1 February 2012, Public Redacted Version of “Prosecution’s Response to the ‘Defence Request for a Temporary Stay of Proceedings’ and to the ‘Defence Request for an Oral Hearing’”, ICC-02/05-03/09-286-Red; Transcript of hearing on 11 July 2012, ICC-02/05-03/09-T-17- ENG ET, page 31, lines 12 to 16; Transcript of hearing on 19 June 2012, ICC-02/05-03/09-T-15-CONF-ENG ET, page 18, lines 8 to 11.

⁴⁷ Paragraph 10 of the Protocol.

⁴⁸ ICC-02/05-03/09-389-AnxA, paragraph 9.

⁴⁹ ICC-01/04-01/06-1372, paragraph 12.

may be illiterate.⁵⁰ Although the Chamber stresses that there exist ways for illiterate persons to sign a document, the Chamber considers that requiring a written and signed undertaking as proposed by the prosecution would be too burdensome on the defence in the present case. The prosecution's proposal in this respect cannot be accepted.

(iv) Use of photographs during interviews of witnesses or other individuals relevant to the preparation and presentation of either party's case

27. The Chamber notes the defence's opposition to paragraph 11 of the Prosecution Protocol, with regard to the procedure to be followed when a photograph needs to be shown to a witness during an interview.⁵¹ Paragraph 11 of the Prosecution Protocol requires that each time a party wishes to disclose a photograph depicting the images of persons, leave should be sought from the Chamber.⁵² The defence submits that this is not possible in practice and unfair to the defence as investigations so far conducted by the prosecution did not follow this same regime of prior authorisation.⁵³

28. In this respect, the Chamber follows the approach taken by Trial Chamber III and "does not consider it appropriate to order a party to make a discrete application in advance, whenever a photograph is to be shown during the course of investigations. This proposal does not sufficiently reflect the exigencies of *in situ* enquiries which have a significant degree of unpredictability. In the circumstances of the present case, given the obstacles faced by the defence in conducting

⁵⁰ ICC-02/05-03/09-394-Red, paragraph 19.

⁵¹ ICC-02/05-03/09-394-Red, paragraphs 25 to 28; ICC-02/05-03/09-389-AnxA, paragraph 11.

⁵² ICC-02/05-03/09-389-AnxA, paragraph 11.

⁵³ ICC-02/05-03/09-394-Red, paragraphs 26 and 28.

meaningful investigations, this additional requirement would pose a disproportional burden on it. However, the Chamber emphasises that a very high degree of care is to be taken to ensure that the use of photographs does not unnecessarily link the individuals depicted therein with the Court, and particularly the way in which they are involved with the ICC. They should only be used when no satisfactory alternative investigative avenue is available. As with all other confidential information, a detailed record of the disclosure shall be kept by the investigating party".⁵⁴ The Protocol as set out in the Annex reflects this approach.⁵⁵

(v) Information to the Head of the VWU in case of breach of confidentiality

29. The Chamber notes that the parties have disagreed on the procedure to be followed to inform the VWU Head of Protection when confidential information is being exposed. The prosecution argues that the VWU Head of Protection should immediately be informed "if a party [...] exposed confidential information or has become aware of any breach of the confidentiality of information".⁵⁶ The defence argues that this provision overlaps with other provisions of the Prosecution Protocol⁵⁷ and most importantly, that "an absolute obligation to inform the VWU Head of Protection of all confidentiality breaches is not merited" (emphasis omitted).⁵⁸

30. As explained above, in case of disagreement, the Chamber's review of the proposed protocols focuses on the most specific provisions. The Chamber finds that the Prosecution Protocol is too general on the procedure in question. The Chamber

⁵⁴ Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public 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, paragraph 87.

⁵⁵ Paragraphs 8, 14 and 15 of the Protocol.

therefore has adopted, for the sake of clarity, a more detailed provision relating to the disclosure of identifying information of witnesses who are part of the ICCPP or of a person who is otherwise protected by the VWU.⁵⁹

(vi) Investigation on the location of a protected witness involved in the ICC Protection Program ("ICCP")

31. The Chamber notes the defence's suggestion that investigations concerning the location of a protected witness involved in the ICCPP or of a witness whose location has been protected by the Chamber may be possible with the leave of the Chamber. The prosecution is in favour of a prohibition of such inquiry⁶⁰ and the VWU shares this view, specifying further that the Chamber can only lift the protection accorded to a witness whose location should not be revealed to the public.⁶¹

32. The Chamber considers that the Prosecution Protocol sets the appropriate principle in this respect.⁶² Any inquiry on the location of an ICCPP witness would defeat the purpose of the protection program and this approach appears to be the most commonly adopted before the Court.⁶³ In addition, with regard to these witnesses, the VWU is the appropriate unit to organise the contacts with a party, seek the witness' consent to be interviewed by either party and make all necessary arrangements for the interview to take place. Provisions to this effect are contained

⁵⁶ ICC-02/05-03/09-389-AnxA, paragraph 24.

⁵⁷ ICC-02/05-03/09-394-Red, paragraph 33 and footnote 27; ICC-02/05-03/09-389-AnxA, paragraphs 18, 19, 22 and 23.

⁵⁸ ICC-02/05-03/09-394-Red, paragraph 34; See also ICC-02/05-03/09-406-Conf, paragraph 8.

⁵⁹ Paragraphs 13, 15 and 18 of the Protocol.

⁶⁰ ICC-02/05-03/09-389-AnxA, paragraph 21.

⁶¹ ICC-02/05-03/09-400-Anx2, pages 11 and 12.

⁶² ICC-01/04-01/07-2007-Anx1, page 2; ICC-02/11-01/11-49-Anx, page 2.

⁶³ ICC-02/11-01/11-49-Anx, page 2, paragraph e); ICC-01/04-01/07-2007-Anx1, page 2.

in the Protocol.

(vii) Consent by a witness or an individual subject to investigative activities for the preparation and presentation of either party's case to disclosure of identifying information

33. The Chamber agrees with the VWU and the prosecution that witnesses or individuals who may be interviewed by a party for the preparation of its case, may perceive themselves to be at very high risk by realising that investigative activities relating to them are conducted in the field.⁶⁴ While this perception does not always correspond with the objective level of risk, it may still cause difficulties in the management of expectations and may ultimately have an effect on the willingness of those affected to cooperate with the Court.

34. These concerns are amplified with regard to vulnerable individuals. The VWU reproduces the prosecution proposal that "a key element in the process of traumatisation arises from the sense of loss of control (of their lives, wellbeing and/or physical and psychological integrity) and unwanted intrusion that may occur within a single traumatic event or series of traumatic events. In a similar way, treatment for many survivors of traumatic abuse can involve processes to aid the individual in resuming control and psychosocial integrity. Given these considerations, the disclosure of identifying information related to these individuals without prior informed consent may reinforce a sense of helplessness and represent a further intrusion. In order to avoid such an adverse reaction to investigative activities, the individuals concerned must be informed from the outset that their

⁶⁴ICC-02/05-03/09-400-Anx2, paragraphs 27 to 29 and related VWU's comment at pages 14 and 15; See also ICC-02/05-03/09-389-AnxA, paragraphs 26 to 28.

involvement with the Court may also entail being the subject of investigations.”⁶⁵

35. The Chamber considers providing this information to witnesses and any individuals to be interviewed by a party as being part of good practices. Considering the specific circumstances of the present case and, in particular, the difficulty for both parties to investigate for the purpose of preparation and presentation of their respective cases, the Chamber does not deem it necessary to include further provisions in the Protocol in this respect.

36. However, the Chamber specifies that, as examples of good practices, witnesses and the individuals to be interviewed by a party may be informed from the outset that their involvement with the Court may also entail being the subject of investigations for the purpose of preparation and presentation of the opposing party’s case. As the case may be, the parties carry the responsibility of ensuring that the persons concerned provide their informed written consent to their involvement with the Court. This consent may be provided before the provision of any witness statement. The parties bear a higher responsibility in this regard when their activities may involve vulnerable individuals. In the event the witness or the individual to be interviewed by a party is a minor (i.e. under the age of 18), the informed consent should also be provided by their legal guardian, if at all possible.

37. When informing witnesses and the individuals to be interviewed by a party, parties may, as a good practice, explain (i) the nature of the information to be revealed; (ii) to whom it may be revealed; (iii) the purpose for which the information will be disclosed; and (iv) the possible consequences for them. In order to be able to provide informed consent, the individual should be given enough time to be able to

⁶⁵ ICC-02/05-03/09-400-Anx2, paragraphs 28 and 29.

comprehend, retain and balance the information provided before arriving at a decision. If a party collects visual and/or non-textual material from a witness or an individual interviewed by a party, it may clarify explicitly how these materials may be disclosed. If any of the information provided above changes, the parties may endeavour to inform the witness or the individual concerned of such a change.

(viii) Procedure to contact a witness for investigation purposes

38. The Chamber first underlines that the procedure to contact a witness for investigation purposes concern only witnesses to be called at trial. Second, the Chamber notes that both parties agree on the general principle that an interview with a witness of the opposing party requires the witness's consent. In addition to the parties' proposals, the Chamber specifies that once consent has been given, the calling party, the interviewing party and the VWU, where necessary, should liaise and take all reasonable steps to facilitate contact between the interviewing party and the witness.⁶⁶ The Chamber considers that contact of a party's witness should therefore be made through the said party and where appropriate with the VWU facilitation. This approach is reflected in the Protocol.

39. Furthermore, the Chamber notes that parties have not proposed to regulate the situation where a party would object to the interview of a witness of the opposing party. Considering the circumstances of the present case and the issue of disclosure to the defence of some witnesses' identities, the Chamber has included provisions

⁶⁶ Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the "Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure", 4 September 2012, ICC-01/05-01/08-2293, paragraph 19.

to this effect in the Protocol.⁶⁷

(ix) Required presence of the VWU during the interview of a witness

40. The Chamber observes that the defence required the presence of a representative of the VWU in the event that a witness interviewed by the opposing party refuses to consent to the presence of a representative of the calling party.⁶⁸ The VWU, however, submits that such a presence should only be required when the witness is vulnerable or needs specific assistance.⁶⁹

41. The Chamber agrees with the VWU's approach as it is in compliance with its mandate under the legal framework of the Court. Therefore, the related defence proposal is not included in the protocol.

(x) Recording of a witness' interview by the investigating party

42. Although the parties agree on the need for recording the witness' interview, their submissions differ on the format of such recording. Indeed, while the prosecution has not specified in which format the recording should be made, the defence requires that the interview should be recorded in "a comprehensive and well-organised written record in narrative form".⁷⁰

43. The Chamber considers that a recording is indeed necessary, in particular in cases

⁶⁷ See for a similar approach, Annex to Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, 24 August 2012, ICC-01/09-02/11-469-Anx, paragraphs 8 and 9.

⁶⁸ ICC-02/05-03/09-394-AnxA, paragraph 21.

⁶⁹ ICC-02/05-03/09-400-Anx2, VWU comment at page 17, paragraph 38.

⁷⁰ ICC-02/05-03/09-394-AnxA, paragraph 23.

where a representative of the calling party is not present during the interview for any reason. As already stated by Trial Chamber III, “in cases where the calling party does not attend such meetings, the Chamber considers the impact on its rights and interests will be minimal due to the requirement that the interviewing party must [...], at a minimum, provide the calling party with a copy of an audio/video recording of the full interview as soon as practicable after the meeting is concluded”.⁷¹ The Chamber therefore finds it necessary that a record should be made. In this respect, the Chamber leaves the investigating party some flexibility as to the format of such recording, which could be either an audio or video recording.

III. CONCLUSION

44. For the foregoing reasons, the Chamber hereby:

- (a) **adopts** the Protocol as set out in Annex to the present Decision;
- (b) **orders**, pursuant to Regulation 23(*bis*)3 of the Regulations of the Court and for the reasons stated in paragraph 8 above, the reclassification as public of document ICC-02/05-03/09-405-Conf.
- (c) **orders**, pursuant to Regulation 23(*bis*)3 of the Regulations of the Court and for the reasons stated in paragraph 9 above, the reclassification as public of document ICC-02/05-03/09-406-Conf.

⁷¹ ICC-01/05-01/08-2293, paragraph 31.

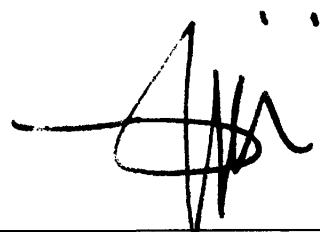
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch



Judge Silvia Fernández de Gurmendi



Judge Chile Eboe-Osuji

Dated this 18 February 2013

At The Hague, The Netherlands