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TRIAL CHAMBER VII

Before: Judge Olga Herrera Carbuccion
Judge Chile Eboe-Osuji
Judge Bertram Schmitt

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA
WANDU AND NARCISSE ARIDO

Public Document
with
Public Annexes A and B

**Prosecution's Submissions on a Proposed Protocol on the Handling of
Confidential Information and Contacts with Witnesses**

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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I. Introduction

1. Pursuant to the Trial Chamber VII's 23 February Order,¹ the Office of the Prosecutor ("Prosecution") proposes the adoption of the annexed Protocol on the handling of confidential information during investigations and contacts between a party and witnesses of other parties ("Proposed Protocol").

2. The Proposed Protocol is based on a similar protocol adopted recently by Trial Chamber VI in the *Ntaganda* case ("Established Protocol").² This Protocol, in turn, was based on similar protocols and decisions adopted by the Trial Chambers in *Katanga*,³ *Bemba*,⁴ *Banda & Jerbo*,⁵ *Lubanga*,⁶ both the *Kenyatta*⁷ and *Ruto & Sang*⁸ cases, as well as the Pre-Trial Protocol established in *Ntaganda*⁹ and *Gbagbo*¹⁰.

3. As detailed below, the Proposed Protocol modifies only slightly the Established Protocol, in four ways: (a) it omits all references to the rights granted to participating victims, considering that there are none in the present case; (b) it removes the references to protections applicable only to extremely vulnerable witnesses, in particular the victims of sexual violence; (c) it regulates in more detail the modalities of the conduct of interviews between witnesses of the calling party and the investigating party, including the presence of representatives of the calling party at interviews of witnesses conducted by the investigating party. It further attends to the appropriate behavior of the parties

¹ ICC-01/05-01/13-824.

² ICC-01/04-02/06-412-Anx (the protocol), ICC-01/04-02/06-412 (the decision adopting the protocol).

³ ICC-01/04-01/07-1134, ICC-01/04-01/07-2007-Anx1 and ICC-01/04-01/07-2047.

⁴ ICC-01/05-01/08-813-Red.

⁵ ICC-02/05-03/09-451-Anx.

⁶ ICC-01/04-01/06-1372.

⁷ ICC-01/09-02/11-469-Anx.

⁸ ICC-01/09-01/11-458-AnxA-Corr.

⁹ ICC-01/04-02/06-185.

¹⁰ ICC-02/11-01/11-49.

during such interviews; and d) it provides for facilitated access to the investigating party's records of disclosure of confidential information.

4. The Proposed Protocol also clarifies some of the language for greater clarity and precision, or retains language proposed by the Prosecution in some previous protocols, without effectively departing from the approaches adopted therein.

5. Adopting the Proposed Protocol in this case would clarify expectations in handling confidential information and the process of contacting witnesses of other parties. It would also promote uniformity in the Court's practice by building on the Established Protocol.

II. Submissions

A. General

6. The purpose of the Proposed Protocol is to protect all witnesses who cooperate with the Court, while respecting the rights of the parties to investigate. As Chambers of this Court have held, such protocols reflect the principles of necessity and witness security and constitute "[A] set of minimum rules' which are designed to safeguard, to the greatest degree possible, the security of witnesses during investigations, whilst taking into account the rights and the obligations of the parties [...]."¹¹

¹¹ ICC-02/11-01/11-49, para.13 (footnotes omitted), citing ICC-01/05-01/08-813-Red, para.80 and ICC-01/04-01/06-1372, para.8.

7. The Victims and Witnesses Unit ("VWU") has noted that good investigative practices by the parties and participants are the first step in the protection system available to witnesses:

[t]he 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.¹²

Consequently, the parties must ensure best practices not only when interacting with witnesses, but also when potentially exposing witnesses' interactions with the Court to third parties.

8. Respect for the confidentiality of *inter partes* disclosure, including the identity of witnesses, sources or intermediaries, reduces the risks to their security and can avoid triggering the Court's duty to take additional protective measures. Alternative protection mechanisms, such as detailed in the Proposed Protocol, should be established.

9. As noted, the Proposed Protocol limitedly modifies the Established Protocol in relation to the issues referred to above at paragraph 3. These modifications are more fully discussed below.

10. For ease of reference, the Proposed Protocol is attached to this filing with comments and track-changes at Annex A. A clean version thereof is attached at Annex B.

¹² ICC-01/04-01/07-585, para.10.

B. The Proposed Protocol does not refer to “participants”

11. In contrast to the protocols established in other cases, the Prosecution has removed from the Proposed Protocol all references to “participants” because there are no participating victims in this case.

C. The Proposed Protocol does not contain most provisions applicable to vulnerable witnesses, in particular victims of sexual violence

12. Given the absence of vulnerable witnesses in this case, in particular victims of sexual violence, the Prosecution has removed the following from the Proposed Protocol: a) the provisions regarding the investigation of information of sexual violence;¹³ b) the provisions allowing objections the calling party can make to the interview of investigating party with a witness of the calling party;¹⁴ and c) the provision regarding the right of the witness to have a representative present at the interview.¹⁵

13. The Prosecution considers that, in the absence of severely traumatised and vulnerable witnesses requiring this level of protection, such provisions are not required and, if adopted, some would potentially delay continuing investigations.

14. *First*, it is difficult to imagine on what basis the calling party could formulate an objection to an interview with one of its witnesses, especially given that such interview cannot in any event take place without the witness’s

¹³ Contrast with ICC-01/04-02/06-412-AnxA, para.25.

¹⁴ Contrast with ICC-01/04-02/06-412-AnxA, paras.38-39.

¹⁵ Contrast with ICC-01/04-02/06-412-AnxA, para.40.

consent.¹⁶ In the absence of clearly articulated legal or factual bases, the provision for objections could be used tactically to cause delay. To streamline the proceedings and avoid unnecessary delays, the Prosecution therefore proposes that the Proposed Protocol not provide *pro forma* for this possibility.

15. *Second*, the right of a witness to have a representative attend the interview, a provision present in the *Ntaganda* Protocol,¹⁷ aims to provide an additional layer of protection for very vulnerable witnesses. That is not required here. In the unlikely event that a witness is assessed to be vulnerable in this case, under the Proposed Protocol, the VWU should be informed and provide the required assistance.¹⁸ Additionally, removing this provision in the Proposed Protocol does not prejudice the right of suspects to have counsel present because that right will still be guaranteed under article 55(2) of the Rome Statute.

D. The procedure for interviewing the witnesses of the calling party

16. The Prosecution has, by and large, adopted the approach to interviews conducted with witnesses of the calling party taken in the *Ntaganda* case, with a few distinctions.

17. *First*, the Proposed Protocol adds an express provision allowing for the presence of the representative of the calling party at the interview of the witness with the investigating party.¹⁹ This approach is consistent with those adopted in the *Katanga*,²⁰ *Ruto & Sang*,²¹ *Kenyatta*²², and *Banda and Jerbo*²³ cases. The only

¹⁶ Contrast with ICC-01/04-02/06-412-AnxA, paras.38-39.

¹⁷ Contrast with ICC-01/04-02/06-412-AnxA, para.40.

¹⁸ See Annex B, para.38.

¹⁹ See Annex B, paras.39-40.

²⁰ ICC-01/04-01/07-1134, para.28.

²¹ ICC-01/09-01/11-449-Anx, paras.10-11.

²² ICC-01/09-02/11-469-Anx, paras.10-11.

difference is that the Proposed Protocol requires that the witness affirmatively request the presence of the representative of the calling party at the interview, as opposed to merely requiring his or her consent. Additionally, the representative of the calling party may inform the witness of this possibility.²⁴ The Prosecution considers that this modification more appropriately addresses the circumstances of this case given the nature of the allegations against the accused.²⁵ Including the provision in the form proposed will ensure that witnesses are interviewed in the presence of the calling party's representative only if they are truly comfortable with that prospect.

18. *Second*, the Proposed Protocol further details the behaviour expected of the representative of the calling party present at the interview, as well as the remedies available for inappropriate behaviour. The additional specifics in this area serve to facilitate effective investigations and clarify the expected conduct among the parties.

19. For example, the representative of the calling party is not allowed to prevent or dissuade the witness from answering questions freely.²⁶ Should the representative of the calling party object to the manner in which the interview is proceeding, he or she may raise the issue outside of the witness' presence. The disagreement shall be recorded.²⁷ This ensures that any legitimate concerns of the calling party are addressed and preserved, and, avoids needless disruption to the interview. In the unlikely event of continuous disagreement and disruption, the investigating party can request that the calling party's

²³ ICC-02/05-03/09-451-Anx, para.26.

²⁴ Annex B, para.39.

²⁵ See CAR-OTP-0080-1364 (intercept), CAR-OTP-0082-0877 (translation), at 0896, lns.697-706 (directing a witness on what to say about the witness' reasons for declining an interview); CAR-OTP-0080-1366 (intercept), CAR-OTP-0082-1087 (translation), at 1089, lns.32-37 (same).

²⁶ Annex B, para.40.

²⁷ *Ibid.*

representative leave the place of the interview. The investigating party may further bring the matter before the Trial Chamber.²⁸ This measure is proposed to give effect to the right of the investigating party to conduct the interview without undue interference, at the same time protecting the right of the calling party by affording it a chance to address the Chamber with its concerns.

E. Access to records of disclosure of confidential information

20. The Prosecution has added a paragraph that regulates and facilitates access of the requesting party to records of disclosure of confidential information.²⁹ According to the proposed amendment, such access may be requested in the event there are allegations that the investigating party disclosed the information in question in a manner prohibited by the Proposed Protocol. This measure serves to eliminate potential delays in accessing such information and thus provide for heightened and more effective protection for protected witnesses.

III. Relief Requested

21. The Prosecution requests that the Chamber adopt the Proposed Protocol, attached at Annex B.



Fatou Bensouda, Prosecutor

Dated this 20th day of March 2015
At The Hague, The Netherlands

²⁸ *Ibid.*

²⁹ Annex B, para.11.