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TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schimtt

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR

*v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO*

Public with Public Annex A and Public Annex B

Joint Defence Submissions on Witness Contact and Familiarisation

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

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Introduction

1. The Defence hereby submits its position on issues concerning
 - i. Protocols for using protected information during investigations; and
 - ii. Contact between parties and protected witnesses, called by the other party.

2. Any judicial determination on these issues must be guided by the following principles and considerations:
 - i. This is a case concerning Article 70 offences not Article 5 crimes. The witness security considerations governing Article 5 cases cannot be transposed automatically to this case, particularly as there is no evidence that there has been any form of threats to, or intimidation of witnesses as a result of their role in this case;¹
 - ii. Defence counsel must be presumed to act in good faith, and in compliance with their obligations under the Code of Conduct. The allegations in this case should not translate to a presumption of distrust *vis-à-vis* the Defence; and
 - iii. The Defence do not dispose of the time and resources of the Prosecution. The Defence have much more limited ability to meet witnesses. At the same time, the Defence have different rights and responsibilities than the Prosecution, which should be reflected in the final protocol.

Submissions

3. The current submissions only address the points of disagreement with the proposed Prosecution Protocol (hereinafter, "Protocol"), or additions which were not in the Protocol.

4. In summary, the additions relate to:
 - i. The relationship between the Protocol and the decisions issued in ICC-01/05-01/08;

¹ See also ICC-01/05-01/13-859-Conf, para. 19.

- ii. Post-testimony contact; and
- iii. The relationship between the Protocol and the Prosecution's disclosure obligations.

5. The points of disagreement concern:

- i. The use of photographs;
- ii. The procedure for disclosing the identity of a witness if a unique investigative opportunity arises;
- iii. The need to refer to the fact that a witness is involved in proceedings before the ICC;
- iv. The procedure for obtaining consent in relation to interviews with witnesses of the other party; and
- v. The modalities concerning the presence of the calling party during an interview by the other party.

6. A word version setting out the additions and deletions to the Protocol proposed by the Defence is attached as Annex A. A clean version is attached as Annex B.

A. Proposed additions

Relationship to the Main Case

7. The proceedings in ICC-01/05-01/08 are ongoing. The Defence in the Main Case has an ongoing right to contact its own witnesses,² and to elicit further evidence from existing and new witnesses on issues that might be relevant to a potential sentencing or reparations phase, or an appeal. The Defence in the Main Case also has an ongoing duty to liaise with the Victims and Witnesses Unit (VWU) in relation to any issues concerning the protection and security of Defence witnesses in the Main Case.

8. The text "[t]he scope of this Protocol is confined to the case ICC-01/05-01/13. It does not create any new obligations or modify existing obligations or rights in

² ICC-01/05-01/08-1081-Anx, para. 10.

case ICC-01/05-01/08” has therefore been inserted in order to clarify and confirm that the Protocol does not amend existing rights and obligations in the Main Case.

Post-testimony contacts

9. The Protocol must be framed in such a way that it allows the Defence to obtain any information that might be relevant to the preparation of the Defence, in a manner that respects the defendant’s right to silence and privilege against self-incrimination, and the overall confidentiality of Defence investigations.

10. Whereas these rights might be modified in order to implement safeguards to ensure that contacts between the Defence and Prosecution witnesses do not interfere with or impede the future testimony of such witnesses, this imperative diminishes after the witness has testified.

11. A new section has therefore been inserted into the Protocol in order to regulate the situation of post-testimony contacts, in a manner which recognises the different positions and rights of the Prosecution and the Defence.

12. In this regard, the case law of the ICC is clear: there is no property in a witness.³ The Defence therefore has the right to contact any person (with the person’s consent), who could have information that could assist the investigations of the Defence. This right is of heightened importance in a case such as the present, in which the Prosecution has itself disclosed very little exculpatory information.

13. During the testimony of a Prosecution witness, it might become apparent that the witness in question has information of an exculpatory nature, or that would otherwise assist the Defence case.

³ ICC-01-04-01-06-679, para. 26.

14. However, whereas the Prosecution should have completed its investigations at this juncture, the Defence investigations are likely to be at a preliminary stage. If issues arise spontaneously during a witness's testimony, it might be difficult for the Defence – without the benefit of further investigations or inquiries – to reach an informed decision as to whether to pursue certain issues, or to advance a positive case on these points during the cross-examination of the witness in question.

15. Alternatively, the information could relate to potential investigative leads and sources. Addressing the matter in cross-examination could force the Defence to disclose, prematurely, its future investigative strategies and activities, which could compromise the effectiveness and confidentiality of such investigations.

16. For this reason, in the *Ruto and Sang* case, the Trial Chamber recognised that it would create an unreasonable burden to require the Defence to explore all potential issues concerning its case with a witness during the witness's testimony.⁴ This point is discussed in further details in the Joint Defence submissions on Rule 140.

17. Proposed wording has therefore been inserted into the Protocol in order to allow the Defence to request the VWU to ask the witness, after the conclusion of the witness's testimony, whether the witness would consent to being interviewed by the Defence party in question.

18. If the witness does not consent to meet with the Defence, then it is unnecessary for the Prosecution to have been notified that the Defence considered the witness to have information that might have been relevant to Defence investigations.

⁴ ICC-01/09-01/11-900, para 20.

19. If the witness consents to be interviewed by the Defence, the Prosecution will be notified of the date and location of the interview, unless the witness informs the VWU that it does wish for the Prosecution to be notified.⁵

20. Since the interview relates to post-testimonial contact,⁶ the Prosecution does not have the right to be present. The presence of the Prosecution at such interviews would force the Defence to reveal information, which the Prosecution would not otherwise be entitled to receive. The Defence is not required to disclose information concerning potential contacts or persons met by the Defence unless the Defence has formed a concrete intention to call the person as a witness.⁷ Even when this juncture is reached, the Defence is not required to provide records of any discussions between the Defence and the witness on issues, which the Defence does not intend to address during the future testimony of the witness.

21. It would also be impossible for the Defence to explore potential investigative leads or matters pertaining to the credibility of other potential Defence witnesses, without compromising the confidentiality of Defence preliminary investigations, and disclosing lines of inquiry that could, depending on the answers of the witness, potentially incriminate the defendant.

22. Security or protection concerns can be addressed through the presence of a VWU staff member (if requested by the witness). Any concerns regarding improper questioning can be raised by the Prosecution during its cross-examination of the witness (if the witness is recalled).

⁵ An automatic requirement that the Prosecution must be notified of all such meetings could have a chilling effect on certain witnesses. This is elaborated further at para. 58 below.

⁶ According to Trial Chamber III and the Single Judge, the Protocol based requirement that the Defence had a right to be present during meetings between the Prosecution and Defence witnesses did not apply once witnesses had completed their testimony: ICC-01/05-01/08-3070, para. 15, ICC-01/05-50, para. 11. If the Defence had no right to attend such meetings, there is no basis for the Prosecution to attend meetings between the Defence and Prosecution witnesses, who have completed their testimony.

⁷ ICC-01/04-01/06-2192-Red, paras. 64, and 72.

23. With respect to the situation of post-testimony contacts between the Prosecution and Defence witnesses, the position of the Prosecution cannot be equated to the above position of the Defence. During the Prosecution stage, the Defence will be in the process of investigating and defining the potential contours of its future case. In contrast, at the time when Defence witnesses testify, the Prosecution should have concluded its investigations into incriminating issues and, accordingly, has no need for post-testimonial interviews with Defence witnesses. If issues concerning the credibility of a witness arise during the witness's testimony, fairness to the witness dictates that the Prosecution should put its case to the witness, and address such issues during the witness's testimony, rather than afterwards.

The relationship between the Protocol and the Prosecution's disclosure obligations.

24. Proposed wording has been inserted in order to clarify the relationship between the Protocol and the Prosecution's ongoing disclosure obligations. The question of the modalities of disclosure are further addressed in a separate filing.

B. Areas of disagreement

The use of photographs

25. The text proposed by the Prosecution is not consistent with the preponderance of ICC jurisprudence on this point, and would constitute an unreasonable barrier to effective Defence investigations.

26. The five Defence teams are likely to experience significant problems in conducting investigations *in situ*. The security situation in the CAR is extremely grave, and could worsen throughout the case. The upcoming elections in the DRC, and the perceived nexus between the Defence teams and the MLC/Mr. Bemba are also likely to hinder the ability of the Defence to meet with potential witnesses in the DRC. Last but not least, a large number of potential witnesses are refugees in

Cameroon. In light of the fact that it is not a state party, investigations may also prove challenging.

27. In stark contrast to the Prosecution,⁸ the Defence has been accorded no investigations budget and will not be in a position to conduct multiple missions to the same country.

28. It is therefore imperative that the Defence teams are in a position to conduct focussed, effective, and expeditious investigations, and can, if necessary, pursue investigative leads that might arise or develop in an unforeseen manner.

29. It is therefore unreasonable, and unduly time-consuming to require the Defence to file an application to the Chamber each and every time that the Defence wishes to show a photograph of a person, who is a witness, during the course of its investigations.

30. As concluded by the Trial Chamber in the *Ntaganda case*:⁹

The Chamber accepts the Defence's argument that investigations are unpredictable by nature, in particular in a context such as that of the Ituri region, in which the security situation is volatile. The Chamber therefore considers that requiring a party to make an application each time it intends to show a photograph would impose an excessive burden, as it may prove impracticable while in the field and may lead to the de facto impossibility of using such photographs.

31. Most importantly, in the Main Case, the Trial Chamber has ruled that the Defence is not required to obtain judicial authorisation in order to show photographs during its investigations.¹⁰ The Prosecution has never applied to the

⁸ ICC-ASP/13/10, paras. 198, 206, 227, 235,255.

⁹ ICC-01/04-02/06-412, para. 14. See also ICC-02/05-03/09-451, para. 28.

¹⁰ ICC-01/05-01/08-813-Red, para. 87.

Trial Chamber to vary this requirement. As a result, photographs of witnesses in the Article 70 case may have already been used in past investigations in the Main Case, and might continue to be used in accordance with the procedures set down in the Main Case. The adoption of a different or more restrictive Protocol in the current case would therefore be both illogical and futile.

32. In terms of other amendments, the phrase “whose identity is not known to the public” has been inserted into paragraph 10 in order to clarify that the restraint on the use of photographs/visual materials only applies to witnesses who have not testified in public session, or whose involvement with the Court is not otherwise known to the public.¹¹

33. Finally, the text concerning the disclosure of logs to the Chamber has been deleted. This language has not been included in any other protocols before the ICC. The logs may contain information that is privileged or otherwise non-disclosable to the Prosecution. The question as to whether disclosure should be regulated by a “concrete and credible basis” threshold cannot be determined in the abstract, as it might depend on the type of information in the logs, the stage of the investigations, the potential prejudice to ongoing investigations caused by such disclosure, and the basis for requesting disclosure (for example, whether disclosure is attributable to a party, or a third person).

The procedure for disclosing the identity of a witness if a unique investigative opportunity arises

34. It is the primary position of the Defence that the mere disclosure of the name of a witness, without any suggestion or disclosure of further information that would identify the person is a witness before the ICC, does not violate protective

¹¹ This is consistent with the *Banda* case, which the Protocol specified that the procedure only applies “to witnesses and individuals whose identity or relationship with the court has not yet been made public by a party or by the Chamber or who have other protective measures known to the investigating party”, ICC-02/05-03/09-451-Anx, para. 11.

measures. This is consistent with the ruling by the ICTR Appeals Chamber that a prohibition on the "disclosure of information that would, directly or indirectly, reveal that the person is a witness", does not translate to a prohibition on the use of the witness's name to make reasonable inquiries.¹²

35. The following paragraph has therefore been inserted into the Protocol in order to reflect this position:

The use of a witness's name or otherwise referring to a witness shall not constitute disclosure of confidential information unless their role as a witness in the case, expressly or impliedly, is indicated. Care shall be taken in such references to avoid indicating that the person to whom reference is made is a witness before the ICC.

36. Should this proposition not be accepted, the proposed text has been modified to firstly, impose a more stringent requirement on the parties to undertake training from the VWU on best practices before any future investigations are conducted, and secondly, to afford the parties greater flexibility to investigate the case in an effective manner that allows the parties to respond to the exigencies of the situation.

37. The text proposed by the Prosecution requires the parties to communicate with the VWU before going on any mission, in which it is likely that the party may need to disclose the identity of a witness to be a person during the course of its investigations.

38. In light of the differences between the Prosecution and the Defence, this requirement translates to an unreasonable and prejudicial restriction on the effectiveness of Defence investigations.

¹² *Prosecutor v. Bagasora et al.*, Decision on Interlocutory Appeals on Decision on Witness Protection Orders, 6 October 2005, para. 18.

39. The Prosecution has been investigating this case for several years, and for many years, was not bound by the terms of any Protocol as concerns the manner in which it conducted its investigations. In contrast, the Defence is only likely to receive full disclosure just before the commencement of the trial. It will therefore be faced with an extremely short window of opportunity to conduct its investigations. As noted above, the Defence also has very limited resources, and simply cannot afford to conduct multiple investigations into the same areas. Further, as a result of the trial budget's restraints, it may not be able to undertake significant investigations until the end of the Prosecution's case.

40. It is not possible for the Defence to anticipate in advance the type of information that a potential witness might be able to disclose to the Defence. Whereas in some circumstances, the Defence might have formed an intention in advance of the mission to question a potential witness in relation to information concerning another witness, this will not always be the case. For example, during a mission, one witness might inform the Defence of the identity of other potential witnesses, in the same area. A diligent Counsel should pursue such inquiries immediately, rather than scheduling a separate mission that might not occur if the security situation degenerates, or the potential witnesses subsequently become unavailable, or move to an unknown location.

41. It is therefore necessary for the Protocol to retain some flexibility to address unforeseen and unique investigative situations. As cautioned by Trial Chamber:¹³

An excessively regulated approach may prove inappropriate in response to specific and delicate situations.

42. Proposed wording has therefore been inserted in order retain the general presumption that the parties must consult with VWU before the mission in question. But, in the event that a unique investigative opportunity arises, the parties

¹³ ICC-01/04-01/07-T-333-Red-ENG, p.101, lines 19-21.

can also communicate with VWU regarding best practices during the mission itself (but before disclosure of the name is effected).

43. If the party makes good faith efforts to contact VWU during the mission but is unable to do so before the conclusion of the interview, the party may disclose the name in accordance with the best practices advised by the VWU during the general training on this point (see para 35 *supra*). Any risk is therefore mitigated by the fact that the party will have been instructed in best practices before the mission and will in any case be obliged to inform the VWU as soon as possible after the disclosure occurs.

The need to refer to the fact that a witness is involved in proceedings before the ICC

44. The Protocol has also been modified to delete the prohibition concerning the ability of the parties to refer to the fact that a person was/is a witness or was/is otherwise involved with the proceedings before the ICC.

45. The Protocol should not insist on superficial formalism which does not reflect the reality of this case, or the Prosecution's allegations. This is an Article 70 case, not a case under Article 5. The Protocols which apply to Article 5 cases cannot be applied *mutatis mutandis* to a case, which concerns a completely different type of allegations. In particular, in an Article 5 case, what is of primary relevance is the events which are the subject of the charges. It would therefore suffice to ask someone if they know whether X was present at a certain location on a certain date. In contrast, in this case, the allegations pertain to a variety of persons' role as witnesses before the Court. It is difficult to conceive of a situation in which it would be possible to question a person about another witness's alleged involvement in these charges without touching on issues pertaining to the latter's status as a witness.

46. This is demonstrated by the fact that throughout the course of its preliminary investigations, the Prosecution revealed either explicitly or implicitly the status of individuals as Defence witnesses to third persons, even though their identity was not known to the public.¹⁴

47. The Prosecution's case is also built on allegations that several individuals were in the same location, and were aware of each other's status as witnesses or potential witnesses. It is impossible for the Defence to investigate such allegations in a meaningful manner without referring in any way to a person's role as a witness in the Main Case.

48. For this reason, Trial Chamber II recognised that there may be circumstances in which the Defence cannot conduct its investigations in an effective manner, without disclosing the fact that a person is a witness before the Court. The Chamber thus ruled that:¹⁵

the Defence revealed to its witness that the victim concerned had testified in front of the Court, which is indeed contrary to the principle explicitly stated in the protocol which the Defence had approved. However, in this specific context, it can be noted that it is hardly possible for the Defence to have any other way of proceeding unless it would be through some artificial approach which would have made the

¹⁴ Communication between Prosecution Senior Trial Attorney and the anonymous source: ICC-01/05-01/13-292-Conf-AnxA-Red; Requests for assistance to national authorities regarding Defence witnesses: CAR-OTP-0079-0223; CAR-OTP-0079-0224; CAR-OTP-0079-0226; CAR-OTP-0079-0227; CAR-OTP-0079-0229; CAR-OTP-0079-02357; CAR-OTP-0085-0596; CAR-OTP-0085-0606; CAR-OTP-0082-2615; CAR-OTP-0085-2621; CAR-OTP-0075-0042; CAR-OTP-0069-0328; CAR-OTP-0075-0027; CAR-OTP-0075-0050; CAR-OTP-0075-0052; Requests for assistance to national authorities regarding money (bank accounts and transfers): CAR-OTP-0077-1434; CAR-OTP-0077-1443; CAR-OTP-0077-1467; CAR-OTP-0077-1472; CAR-OTP-0077-1483; CAR-OTP-0077-1553; CAR-OTP-0071-0524; Interviews of Defence Witnesses: CAR-OTP-0074-1091; CAR-OTP-0074-1112-R01; CAR-OTP-0074-1124-R01; CAR-OTP-0074-1155; CAR-OTP-0074-1169; CAR-OTP-0074-1189-R01; CAR-OTP-0074-1201; CAR-OTP-0074-1206-R01; CAR-OTP-0074-1229-R01; CAR-OTP-0074-1259; CAR-OTP-0077-0045; CAR-OTP-0077-0052; CAR-OTP-0077-0074; CAR-OTP-0077-0088; CAR-OTP-0077-0121; CAR-OTP-0077-0149; CAR-OTP-0077-0160; CAR-OTP-0077-0003; CAR-OTP-0077-0026; See in particular: CAR-OTP-0078-0248 at 0255, lines 256 - 0256, line 263; CAR-OTP-0078-0248 at 0256, lines 279-280; CAR-OTP-0078-0248 at 0256, lines 288-289; CAR-OTP-0078-0248-0262, lines 493-496; CAR-OTP-0078-0264 at 0270, lines 202-203.

¹⁵ ICC-01/04-01/07-T-333-Red-ENG, p.101 lines 7-19.

investigations ineffective and would have required witnesses without any real information giving testimony. They would have had no real information on the subject of their testimony. Such an attitude would not provide the clarity which a party has to have for the witnesses called to testify and it would not be designed to lead to the presentation of the truth.

49. Trial Chamber I has also recognised that the general prohibition should be relaxed in connection with investigations concerning the administration of justice. Thus, in connection with testimony related to abuse of process issues in the *Lubanga* case, the Trial Chamber authorised witnesses to be informed of the status of other persons as witnesses in the case. For example, a Prosecution intermediary was permitted to view the unredacted transcripts of a Defence witness prior to the intermediary's questioning.¹⁶ The Trial Chamber also authorised a Prosecution witness to view the closed session transcripts of two Defence witnesses prior to the Prosecution witness's testimony.¹⁷

50. The Protocol has therefore been amended to include the following provision:

If it is directly and specifically necessary for the purposes of its investigation, a party may, after prior consultation with the Head of the VWU, communicate the fact that a witness was or is involved in proceedings before the Court to a potential witness. The recipient of this information shall be instructed to maintain the confidentiality of this information.

The procedure for obtaining consent in relation to interviews with witnesses of the other party

51. The Protocol has been amended in order to regulate the situation in which the calling party has been unable to contact its own witness.

52. It is possible that a witness might, at some stage of the proceedings, refuse to cooperate with the party that first wished to call the witness. This does not,

¹⁶ ICC-01/04-01/06-T-303-Red-ENG, p.24, lines 12-25, p.25, lines 1-5.

¹⁷ ICC-01/04-01/06-T-330-Red-ENG, p.61, line 21 – p. 63, line 25.

however, create a presumption that the witness will not communicate with other sections of the Court or with the opposing party.

53. The inability of the calling party to communicate with the witness should not create an insurmountable barrier as concerns the ability of other parties to communicate with the witness in question.

54. Proposed wording has therefore been inserted in order to specify that if the calling party has been unable to contact the witness within five business days, the interviewing party may request the VWU to contact the witness. If the VWU is unsuccessful, the interviewing party may, with the leave of the Chamber, contact the witness directly.

55. Finally, it is possible that a witness might not be in a position to give a free and voluntary response to this question, if the question is communicated by the calling party. For example, a Prosecution witness might be concerned that if the witness provides his or her consent to be interviewed by the Defence to the Prosecution, the Prosecution might form an adverse view of the witness. This could be a particularly sensitive issue as concerns witnesses, interviewed under the Article 55 procedure.

56. Accordingly, in the event that the interviewing party has concerns in relation to whether the witness would wish to communicate their consent *via* the calling party, a clause has been inserted to allow the interviewing party to request the VWU to contact the witness in order to ascertain whether the witness consents to be interviewed.

The modalities concerning the presence of the calling party during an interview by the other party.

57. The Defence disagrees with the Prosecution proposal to eliminate the entitlement of the calling party to be present during meetings conducted before the witness testifies.

58. Absent an explicit request by the witness for the Defence not to be present, there can be no justification for the Prosecution meeting with a Defence witness in the absence of the Defence. The Prosecution is obliged to disclose any information in its custody concerning Defence witnesses.¹⁸ Any information exchanged between the Prosecution and the Defence witness would therefore be disclosable to the Defence.

59. The reversal proposed by the Prosecution, whereby the calling party is only present if the witness explicitly requests the calling party's presence, would also be disproportionately prejudicial to the Defence. It has to be recognised that the Prosecution's power to decide whether to initiate Article 70 investigations against specific individuals can intimidate and influence witnesses. A witness may also be concerned that if they expressly request the presence of the Defence during interviews with the Prosecution, it could create an adverse impression for the witness.

60. Finally, it is not correct that there are no 'vulnerable witnesses' in this case. Some of the witnesses who testified for the Defence in the Main Case did so in relation to allegations of significant harm either to themselves or their family members. It is possible that the Defence may call such persons to testify in the Article 70 case. Given that some of them are illiterate and might not understand the procedures of the Court fully, it would be unfair to require such persons to assert a positive request for the Defence to be present.

¹⁸ ICC-01/04-01/06-2624.

61. The Protocol has therefore been amended to specify that the calling party has the right to have a representative present, unless the witness objects, or the Chamber rules otherwise.

62. Since this is framed as an entitlement, the Defence should also be provided with adequate resources to avail itself of this right. Although equality of arms does not equate to the same level of material arms, it must allow the Defence to enjoy the same procedural rights as the Prosecution. Accordingly, if the Prosecution has the budget to attend such meetings (and to exercise its procedural rights therein), the Court must provide a similar budget to the Defence.¹⁹

63. If the Prosecution intends to conduct several interviews with Defence witnesses, this could also negatively impact on the human resources of the Defence, and divert resources from other critical preparation. Text has therefore been inserted in order to encourage the parties to reach agreement concerning the location and modalities of the interview in case the calling party does not have the time or resources to attend an interview *in situ*. This could include facilitating the calling party's participation by video link or holding the meetings at the seat of the Court (i.e. before or after the witness's testimony).²⁰

64. The Defence has also deleted the proposed text, which would allow the interviewing party to exclude the calling party from the interview, during the course of the interview. A party cannot arrogate to itself the power to decide if and when the calling party can be excluded from the interview. This is a matter that can

¹⁹ See in the Banda case: "The Chamber recognises the calling party's interest in being present at such meetings and stresses that its presence should be facilitated and ensured where possible, in ICC-01/05-01/08-2293, para. 24; "In particular, the Chamber considers that the parties may agree for the meeting to take place once the witness has arrived in The Hague. The Chamber notes that this would represent an exception to the familiarisation process as provided for in the "Unified Protocol", in ICC-01/05-01/08-2293, para. 26.

²⁰ See ICC-01/05-01/08-2293, para. 26.

only be determined by the Chamber. A fairer approach would be to stop the interview, refer the matter to the Chamber, and then reconvene the interview in the manner directed by the Chamber.

65. Finally, the text proposed by the Prosecution concerning the compulsory recording of all such meetings has been amended to provide that the meetings will only be recorded and disclosed if the calling party is entitled to be present, but is unable to be present or to participate *via* alternative means. This is consistent with the fact that the practice of recording such interviews arose in the *Bemba* case to address the scenario whereby the Defence could not attend in person.²¹ Moreover, if the calling party is the Prosecution, the Prosecution clearly would have no right to receive such a recording if the witness had indicated that he or she does not wish for the Prosecution to be present, and the Defence has questioned the witness in relation to matters concerning ongoing confidential Defence investigations.

66. The proposed amendment is without prejudice to the Prosecution's residual duty to record and disclose its interviews with any persons concerning the case.



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²¹ ICC-01/05-01/08-2293, para. 31.



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Dated this 13th day of April, 2015

The Hague, The Netherlands