

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13

Date: 20 July 2015

TRIAL CHAMBER VII

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

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

**Decision adopting a Protocol on the Handling of Confidential Information during
Investigations and Contact Between a Party and Witnesses of the Other Parties**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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Counsel for Jean-Jacques Mangenda Kabongo

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Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

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Mr Nigel Verrill

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Victims Participation and Reparations Section

Others

Trial Chamber VII (the ‘Chamber’) of the International Criminal Court (the ‘Court’ or ‘ICC’), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (the ‘Case’), having regard to Articles 43(6), 54(1)(b) and (3)(f), 67(1) and 68(1) of the Rome Statute (the ‘Statute’), Rules 17, 18 and 87 of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Decision adopting a Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party and Witnesses of the Other Parties’.

I. PROCEDURAL HISTORY

1. On 20 March 2015, the Office of the Prosecutor (the ‘Prosecution’) filed the ‘Prosecution Submissions on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses’,¹ annexing its proposed protocol text.²
2. On 13 April 2015, the Defence of all five accused (together the ‘Defence’) jointly filed their ‘Joint Defence Submissions on Witness Contact and Familiarisation’,³ also annexing a proposed protocol text.⁴
3. On 18 May 2015, the Registry filed its ‘Registry Observations Pursuant to Rule 24bis of the Regulations of the Court Concerning Protocol Matters’ (the ‘Observations’).⁵

¹ ICC-01/05-01/13-858.

² ICC-01/05-01/13-858-AnxA with comments and track-changes; ICC-01/05-01/13-852-AnxB.

³ ICC-01/05-01/13-898.

⁴ ICC-01/05-01/13-898-AnxA with comments and track-changes; ICC-01/05-01/13-898-AnxB.

⁵ ICC-01/05-01/13-953.

II. ANALYSIS

4. Protocols on Witness Contact and Confidential Information in Investigations have been adopted in a number of cases before the Court,⁶ and it was in agreement with the need for such a Protocol in this Case that the Chamber solicited submissions from the parties on its content. The Chamber notes that both the Prosecution and Defence take as a starting point the protocol adopted by Trial Chamber VI in *The Prosecutor v. Bosco Ntaganda* (the '*Ntaganda Protocol*').⁷ In this regard, the Chamber notes that both the Prosecution and Defence have annexed proposed protocols to their submissions, and will consider the changes made thereto as substantive submissions.

A. Points of Agreement

5. A number of proposals do not appear to be at issue between the parties, as the Defence proposed protocol adopts some amendments proposed by the Prosecution. Such amendments, set out below, will be considered, in light of the Defence submissions, to have been agreed to by the Defence.
6. Turning to the substance, the Chamber accepts the Prosecution submission,⁸ adopted by the Defence, that all references to 'participants' may be omitted in light of the fact that there are no participating victims in this Case. The Chamber also accepts the Prosecution's proposed changes for greater precision or clarity in paragraphs 3(c), 6, 7, 9-10, 14-17, 19-20, and 24 of its proposed protocol,⁹ which the Defence have adopted. Both parties have also removed the paragraph concerning the investigation of information of sexual violence,¹⁰ and the reference to a higher responsibility in ensuring vulnerable witnesses

⁶ For the decisions adopting these protocols in Ntaganda, ICC-01/04-02/06-412; Katanga ICC-01/04-01/07-1134, ICC-01/04-01/07-2007-Anx1 and ICC-01/04-01/07-2047; Bemba ICC-01/05-01/08-813-Red; Banda & Jerbo ICC-02/05-03/09-451-Anx; Lubanga ICC-01/04-01/06-1372; Kenyatta ICC-01/09-02/11-469-Anx; and Ruto & Sang ICC-01/09-01/11-458-AnxA-Corr.

⁷ ICC-01/04-02/06-412-Anx.

⁸ ICC-01/05-01/13-858, para 11.

⁹ ICC-01/05-01/13-858-AnxA with comments and track-changes. Note that para references in Anx-A are references to the new paragraph numbers as they appear in track-changes.

¹⁰ ICC-01/05-01/13-858-AnxA, para 21; ICC-01/05-01/13-898-AnxA.

give informed consent to involvement with the Court.¹¹ The Chamber accepts those amendments. Additionally the Prosecution proposal,¹² adopted by the Defence,¹³ to remove the right of the calling party to object to interviews between their witnesses and investigating parties is accepted by the Chamber.

B. Interviews between Investigating Parties and witnesses

1. Representatives

7. The Prosecution submits that, as a result of the absence of vulnerable witnesses in this Case, the entitlement of witnesses to have a representative present in interviews with investigating parties should be removed.¹⁴ The Prosecution proposes instead that a witness must affirmatively request the presence of a representative of the calling party in interviews with the investigating party.¹⁵ The Defence contest the Prosecution proposal as disproportionately prejudicial, in light of the Prosecution's power to initiate Article 70 investigations,¹⁶ as well as the Prosecution's assertion that there are no vulnerable witnesses in this Case.¹⁷ The Defence propose an alternative which provides for the entitlement of the calling party to have a representative present, absent objection from the witness or the Chamber ruling otherwise.¹⁸
8. The Chamber recalls that the entitlement of a representative is intended as a protection for any witness, not simply those who are vulnerable,¹⁹ and does not accept the Prosecution view that the particular allegations in this Case or the absence of extremely vulnerable witnesses abrogates this entitlement. The Chamber sees no reason to depart from the *Ntaganda* Protocol which provides

¹¹ ICC-01/05-01/13-858, paras 12 -14, ICC-01/05-01/13-858-AnxA, para. 30.

¹² ICC-01/05-01/13-858, paras 12-14.

¹³ ICC-01/05-01/13-898-AnxA, para. 32.

¹⁴ ICC-01/05-01/13-858, paras 12-15.

¹⁵ ICC-01/05-01/13-858, para. 17.

¹⁶ ICC-01/05-01/13-898, paras 57-59.

¹⁷ ICC-01/05-01/13-898, para. 60.

¹⁸ ICC-01/05-01/13-898, paras 61.

¹⁹ See, for example, ICC-01/04-01/07-1134, para 28; ICC-01/09-01/11-449-Anx, paras 10-11; ICC-01/09-02/11-469-Anx, paras 10-11.

that the presence of a representative is an entitlement of a witness. It thus rejects both proposed alternatives.

2. Conduct of Representatives during interview

9. The Prosecution proposes further regulation of expected conduct of the calling party representative at the interview, and proposes text providing that if the representative interferes with the interview, the investigating party may eject them and continue without them.²⁰ The Defence adopt the first part of the proposed text detailing expected behaviour, but disagree with the Prosecution's proposed procedure for excluding the representative of the calling party from the interview in the event of interference, submitting that a fairer approach would be to stop the interview and refer the matter to the Chamber.²¹
10. The Chamber considers that a party representative should neither intervene to dissuade witnesses from answering freely, nor should they be reduced to a mute bystander, ejectable at the will of the investigating party. The Chamber thus prefers the Defence proposal on this point. That is, if the interviewing party wishes to eject the representative, it should adjourn the interview and apply to the Chamber.²² The Chamber has therefore inserted text to this effect.²³

3. Modalities of the interview

11. The Defence propose that if the calling party is unable to travel to attend the interview *in situ*, the parties shall endeavour to agree to alternative arrangements, for example by video-link or holding interviews at the seat of the Court.²⁴ The Chamber concurs that the parties should endeavour to make

²⁰ ICC-01/05-01/13-858, paras 18-19; ICC-01/05-01/13-858-AnxA, para 41.

²¹ ICC-01/05-01/13-898, para. 64.

²² ICC-01/05-01/13-898, para. 64.

²³ See paragraph 42 of the Protocol annexed hereto.

²⁴ ICC-01/05-01/13-898, paras 62-63.

arrangements to accommodate one another, and accepts the proposed text concerning the location and modalities of the interview.

12. The Defence further seek to remove the compulsory recording of all interviews and submit that interviews should only be recorded and disclosed if the calling party is unable to be present or to participate *via* alternative means, based on the argument that the practice of recording such interviews arose in the Main Case to address the scenario where the defence could not attend in person.²⁵ The Chamber sees no reason to depart from the *Ntaganda* Protocol in this regard providing for the recording of interviews. The original paragraph concerning the recording of interviews is maintained and the Prosecution's clarification thereto is accepted.²⁶

4. Costs

13. Finally, the Defence request that the Court bear the costs of calling party representatives attending any interviews,²⁷ while the Registry opposes this proposal.²⁸ The Chamber considers the costs of attending any interviews as a representative of a calling party to fall within the ordinary expenses budget of a party, and shall not be borne as additional costs by the Court.

C. Other Interview situations

1. Post testimonial interviews

14. The Defence submit that they should be permitted to make post-testimony contact with Prosecution witnesses, *via* the VWU, with notification made to the Prosecution unless the witness does not consent, and without a Prosecution representative present (but with VWU staff if requested by the witness).²⁹ They further submit that the different stages of the Prosecution and Defence

²⁵ ICC-01/05-01/13-898, para. 65, citing ICC-01/05-01/08-2293, para.31; ICC-01/05-01/13-898-AnxA, para. 53.

²⁶ ICC-01/05-01/13-858-AnxA, para. 47.

²⁷ ICC-01/05-01/13-898, paras 62-63; ICC-01/05-01/13-898-AnxA, para. 51.

²⁸ ICC-01/05-01/13-953, para. 11.

²⁹ ICC-01/05-01/13-898, paras 9-22; ICC-01/05-01/13-898-AnxA, paras 56-63.

investigations mean that the Prosecution should not have the same opportunity for post-testimony contact with Defence witnesses, as the Prosecution should have concluded its investigations by that stage.³⁰ To this effect the Defence propose text within Section VI concerning interviews;³¹ however, they also submit that the regulations concerning interviews in Section VI should not apply after a witness's testimony.³² The Chamber will treat these as alternative submissions.

15. The Registry submits that the Defence proposal is of an *inter partes* nature and impacts on the neutrality of the VWU in the services it provides.³³ It is submitted that the VWU should only be involved in contacting witnesses for the purpose of party interviews in exceptional situations, or on a case-by-case basis on the instruction of the Chamber, so as to avoid the appearance of the VWU representing the parties.³⁴ In respect of post-testimonial contact, the VWU observes that the cooling down period regulated in the Familiarisation Protocol focuses on the psychological and security matters for the benefit of the witness, and that making enquiries on behalf of parties during this period may compromise the trust built between the witness and the VWU as an impartial actor, and thus should only be done exceptionally where the Chamber considers it necessary.³⁵

16. Concerning first the proposed text excluding post-testimonial contact from Section VI regulating interviews, the Chamber considers that a blanket exclusion is inappropriate. Turning to the alternative proposal, the Chamber rejects the approach of only extending the right of post-testimonial contact to the Defence and not the Prosecution. Therefore the Chamber shall not deviate from the *Ntaganda* Protocol in this respect.

³⁰ ICC-01/05-01/13-898, para. 23.

³¹ ICC-01/05-01/13-898-AnxA, paras 56-63.

³² ICC-01/05-01/13-898-AnxA, para. 36.

³³ ICC-01/05-01/13-953, paras 4-8.

³⁴ ICC-01/05-01/13-953, para. 6.

³⁵ ICC-01/05-01/13-953, paras 7-8.

2. *Where the calling party is unable to contact the witness*

17. The Defence submit that, where the calling party is unable to contact its own witness, the other parties should not be barred from contacting the witness, and as a result proposes wording allowing the interviewing party to request the VWU to contact the witness and, should that fail, for the interviewing party to contact the witness directly, without the witness having to communicate their consent to be interviewed through the calling party.³⁶
18. The Registry again submits that this requires the VWU to undertake tasks which are of an *inter partes* nature and impact on the neutrality of the VWU in the services it provides.³⁷ It is submitted that the VWU should only be involved in contacting witnesses for the purpose of party interviews in exceptional circumstances, and upon the instruction of the Chamber.³⁸
19. The Chamber agrees with the necessity of maintaining the neutrality of the VWU and considers the proper approach to be that if the calling party is unable to contact a witness after an appreciable period of time, the investigating party may apply to the Chamber to instruct the VWU to contact the witness concerning an interview. The Chamber has inserted text into the attached Protocol to this effect.³⁹

D. Investigations

1. *Visual depictions of witnesses*

20. The Prosecution proposes adding language making the use of photographs or other visual material depicting witnesses contingent on the specific permission of the Chamber,⁴⁰ citing the Protocol concerning disclosure of the identity of witnesses of the other party and the handling of confidential information in the

³⁶ ICC-01/05-01/13-898, paras 51-56; ICC-01/05-01/13-898-AnxA paras 41-43.

³⁷ ICC-01/05-01/13-953, paras 4-5.

³⁸ ICC-01/05-01/13-953, para. 6.

³⁹ See paragraph 37 of the Protocol annexed hereto.

⁴⁰ ICC-01/05-01/13-858-AnxA, para. 10.

course of investigations used in the *Prosecutor v. Laurent Gbagbo*, adopted 6 March 2012,⁴¹ and a decision on the use of photographs in *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.⁴²

21. The Defence respond that it is unreasonable and unduly time-consuming to require the filing of an application to the Chamber each time the Defence wish to use a photograph of a witness during investigations, and that this requirement is inconsistent with the preponderance of ICC jurisprudence, citing the decision in *The Prosecutor v. Bosco Ntaganda* on the handling of confidential information during investigations and a decision in the Main Case.⁴³ The Defence propose the addition of alternative text allowing their use only when no satisfactory alternative investigative avenue is available, and clarifying that the restraint only applies to witnesses whose identity is not public knowledge.⁴⁴

22. The Chamber agrees that the text should clarify that visual material of witnesses who testified in public session without protective measures are not a disclosure of confidential information and thus inserts a reference into the Protocol to witnesses 'who testified in open session without protective measures'.⁴⁵ Further, the Chamber concurs with Trial Chamber VI which, in formulating the *Ntaganda* Protocol, found 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.'⁴⁶ The proposal in question was further recognised by Trial Chamber III in the Main Case not to 'reflect the exigencies of *in situ* enquiries which have a significant degree of

⁴¹ ICC-02/11-01/11-49-AnxA.

⁴² ICC-01/04-01/07-2148.

⁴³ ICC-01/05-01/13-898, paras 25-31; citing ICC-01/04-02/06-412, para 14 and ICC-02/05-03/09-451, para 28; and the Main Case ICC-01/05-01/08-813-Red, para 87.

⁴⁴ ICC-01/05-01/13-898, para. 32.

⁴⁵ See paragraph 10 of the Protocol annexed hereto.

⁴⁶ ICC-01/04-02/06-412, para 14.

unpredictability'.⁴⁷ The Chamber thus declines the Prosecution proposal to depart from the *Ntaganda* Protocol in this regard.

2. *Disclosures during the Course of Investigations*

23. The Defence propose removing the prohibition on referring to a person as a witness or as involved in ICC proceedings, submitting that it will be practically impossible to properly investigate the allegations in this Case without being able to ask about, for example, the presence of specific persons at specific locations on specific dates.⁴⁸ The Defence propose instead text which will allow parties, after prior consultation with the Head of the VWU, to communicate the fact that a witness was or is involved in ICC proceedings, where it is directly and specifically necessary.⁴⁹ The Chamber, mindful of its obligation to protect the safety, physical and psychological well-being, dignity and privacy of witnesses in accordance with Article 68(1) of the Statute, will not allow the general disclosure of the fact that witnesses are involved in ICC proceedings, in light of the serious effect this may have on their protection in connection with the Main Case.

24. The Defence submit that the requirement of communication to the VWU before any mission that will result in the likely disclosure of the identity of a witness is an unreasonable and prejudicial restriction in light of limited Defence investigative resources and opportunities.⁵⁰ They propose a paragraph superseding Section V and permitting the use of a witness's name as long as their role as a witness is not indicated and care is taken. They further propose the insertion of text that allows a party, in the event of a unique investigative opportunity, to disclose the identity of a protected person or persons in the ICCPP or otherwise relocated with the assistance of the Court, in accordance

⁴⁷ ICC-01/05-01/08-813-Red, para. 87.

⁴⁸ ICC-01/05-01/13-898, paras 44-45.

⁴⁹ ICC-01/05-01/13-898, para. 50.

⁵⁰ ICC-01/05-01/13-898, paras 37-41; ICC-01/05-01/13-898-AnxA, paras 22, 24-27.

with best practice training, after making good faith attempts to contact the VWU during the mission,⁵¹ and with an additional requirement of prior VWU training on investigative best practices.⁵²

25. The Registry opposes as insufficient the alternative paragraph proposed by the Defence to supersede Section V.⁵³ It strongly opposes any disclosure of the identity of protected witnesses prior to consultation with the VWU, given the Unit's responsibility for the safety and security of witnesses.⁵⁴

26. Concerning first the paragraph proposed to supersede Section V, the Chamber agrees with the Registry that it is insufficient. Use of the identity of a witness in the context of investigations may lead to inferences about that witness's relevance to the investigation, and thus to their identity as a witness. Turning to the alternative proposed text within Section V, provisions which allow for such disclosure without consultation with the VWU or approval by the Chamber, even in the context of a unique investigative opportunity, represent an unacceptable risk to protected persons. At the same time, the Chamber stresses that the VWU should be available at all times for party communications.

E. General Disclosure Issues

1. Records of Confidential Disclosure

27. The Prosecution proposes a paragraph providing that, in the event of a concrete and credible allegation of prohibited disclosure of confidential information, the Chamber may instruct the investigating party to provide records of such disclosure to the requesting party.⁵⁵ The Defence object that such logs may contain information which is privileged or otherwise non-

⁵¹ ICC-01/05-01/13-898, paras 34-36.

⁵² ICC-01/05-01/13-898, paras 42-43.

⁵³ ICC-01/05-01/13-953, para. 9.

⁵⁴ ICC-01/05-01/13-953, para. 10.

⁵⁵ ICC-01/05-01/13-858, para. 20; ICC-01/05-01/13-858-AnxA, para. 12.

disclosable to the Prosecution, and that the question of whether disclosure should be mandated by a 'concrete and credible basis' cannot be determined in the abstract.⁵⁶

28. The Chamber considers that the inclusion of such language would not oblige any party to automatically disclose logs which are not subject to disclosure, but rather provides a method of bringing before the Chamber concerns of prohibited disclosure in an efficient manner and may decide whether disclosure is justified on a case-by case-basis. The Chamber thus accepts the insertion.

1. Prosecution's Ongoing Disclosure Obligations

29. The Defence propose the insertion of text reiterating that the Protocol is without prejudice to the Prosecution's ongoing obligations to record (whether audio- or by prepared statement) and disclose all meetings with all witnesses, including post-testimonial.⁵⁷ The Chamber considers that this text is unnecessary, given its above finding at paragraph 12 (on the obligation to record all meetings with witnesses).

F. Other amendments

30. The Defence propose text to confine the obligations in the Protocol to the present Case and clarify that it does not affect the obligations of parties in the Main Case.⁵⁸ The Chamber accepts the proposed text.

31. The Chamber accepts the introductory Defence reference to intermediaries and respect for the Code of Conduct for Intermediaries.⁵⁹

⁵⁶ ICC-01/05-01/13-898, para. 33.

⁵⁷ ICC-01/05-01/13-898, para. 24; ICC-01/05-01/13-898-AnxA, para 37.

⁵⁸ ICC-01/05-01/13-898, paras 7-8; ICC-01/05-01/13-898-AnxA, para. 3.

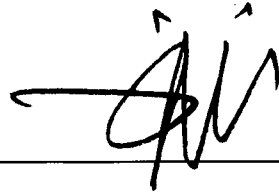
⁵⁹ ICC-01/05-01/13-898-AnxA with comments and track-changes, para. 2. See also Code of Conduct for Intermediaries, March 2014, http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/CCI-Eng.pdf.

32. The Chamber finds it unnecessary to point out the severability of the Defence teams when defining 'parties' in paragraph 4(a), as proposed by the Defence.⁶⁰

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

ADOPTS the Protocol, as set out in the Annex.

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



Judge Chile Eboe-Osuji, Presiding



Judge Olga Herrera Carbuca



Judge Bertram Schmitt

Dated 20 July 2015

At The Hague, The Netherlands

⁶⁰ ICC-01/05-01/13-898-AnxA with comments and track-changes, para. 4(a).