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**International
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PRE-TRIAL CHAMBER II

Before: Judge Tomoko Akane, Single Judge

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM***

**Public Document
with
Public Annexes A and B**

**Prosecution's submission 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. The Office of the Prosecutor (“Prosecution”) proposes that Pre-Trial Chamber II (“Chamber”) adopt the annexed Protocol on the handling of confidential information during investigations and contacts between a party or participant and witnesses of the opposing party or participant (“Proposed Protocol”).

2. The Proposed Protocol is based on the protocol annexed to the Chambers Practice Manual (“Practice Manual Protocol”)¹, recently amended by the Single Judge of Pre-Trial Chamber I, in light of the parties’ observations in the *Al Hassan* case (“*Al Hassan* Protocol”).² The Practice Manual Protocol as amended, is based on previous protocols adopted by the Chambers in *Al Mahdi*,³ *Gbagbo & Blé Goudé*,⁴ *Bemba et al.*⁵ and *Ntaganda*,⁶

3. As detailed below, the Proposed Protocol advances a few minor modifications either based on the *Al Hassan* Protocol, or on the language adopted in the *Bemba et al.* Protocol. In addition, the Proposed Protocol clarifies some of the previous definitions and language used, without departing from the general principles. Adopting the Proposed Protocol at this early stage will provide clarity to all Parties and participants involved, while ensuring consistency with the Court’s prior practice.

¹ [Chambers Practice Manual](#), May 2017, pp. 32-38.

² See ICC-01/12-01/18-40-tENG and the annexed Protocol (ICC-01/12-01/18-40-Anx-tENG).

³ ICC-01/12-01/15-40-AnxA.

⁴ ICC-02/11-01/15-200-Anx.

⁵ ICC-01/05-01/13-1093-Anx.

⁶ ICC-01/04-02/06-412-Anx.

II. SUBMISSIONS

A. General

4. 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. It constitutes “‘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 [...]”⁷

5. 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.”⁸

6. 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. In addition, respect for the confidentiality of *inter partes* disclosure, including the identity of witnesses, sources, or intermediaries, reduces the risks to their security and can lessen the need for the Court to undertake additional protective measures.

⁷ 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.

⁸ ICC-01/04-01/07-585, para. 10.

7. As noted, the Proposed Protocol builds on the Practice Manual Protocol, with four limited kinds of modifications: (a) modifications adopted in the *Al Hassan* Protocol (identified in red at Annex A); (b) modifications adopted in the *Bemba et al.* Protocol (identified in yellow at Annex A); (c) modifications to clarify some of the previous definitions and/or language used or to correct typographical errors (identified in grey at Annex A); and (d) some corresponding deletions to improve comprehensibility (indicated by strike-through edits at Annex A). For ease of reference, both highlighted and clean versions of the Proposed Protocol are annexed as Annex A and Annex B respectively.

B. Modifications adopted in the Al Hassan Protocol

8. The Prosecution proposes the Chamber's incorporation of six amendments adopted in the *Al Hassan* Protocol. These comprise (i) the need to clearly convey a Party or participant's intention to rely on a given individual as a witness for the Protocol to apply;⁹ (ii) the group of individuals to whom the Protocol applies;¹⁰ (iii) the type of witnesses protected;¹¹ (iv) the obligation to cease any use of, and return confidential material disclosed inadvertently;¹² (v) the obligation to seek *inter partes* resolution of issues related to inadvertent disclosure of confidential information;¹³ and (vi) the procedure for objecting to the opposing Party's request to contact a witness.¹⁴

9. The Prosecution further concurs with the Single Judge in the *Al Hassan* case that the Protocol should apply to contacts made during the courtesy meetings organised by the VWU.¹⁵ A party must always seek the consent to interview a

⁹ Proposed Protocol, para. 4(f); ICC-01/12-01/18-40-tENG, para. 11.

¹⁰ Proposed Protocol, para. 5; ICC-01/12-01/18-40-tENG, para. 11.

¹¹ Proposed Protocol, para. 10; ICC-01/12-01/18-40-tENG, para. 11.

¹² Proposed Protocol, para. 21; ICC-01/12-01/18-40-tENG, para. 15.

¹³ Proposed Protocol, para. 22; ICC-01/12-01/18-40-tENG, para. 11.

¹⁴ Proposed Protocol, paras. 41-42; ICC-01/12-01/18-40-tENG, para. 16.

¹⁵ ICC-01/12-01/18-40-tENG, para. 13.

witness of another party or participant through such party or participant – and not through the witness directly. However, the juxtaposition in the *Al Hassan* Protocol of the words “or during VWU-organized courtesy meetings” to inadvertent contacts by the opposing party or participant¹⁶ gives the erroneous impression that inappropriate contacts occurring during VWU-organised courtesy meetings are sanctioned. To clarify any ambiguity, the Prosecution proposes adding a stand-alone paragraph indicating that while VWU-organised courtesy meetings necessarily involve contact between a Party or participant and the witness of the opposing party or participant, the prohibition on directly seeking the witnesses’ consent to be interviewed during any such meeting violates the Protocol.¹⁷

C. Modifications adopted in the Bemba et al. Protocol

10. The Prosecution proposes to incorporate two modifications adopted by Trial Chamber VII in *Bemba et al.* *First*, in relation to the prohibition on a third party to retain a copy of any confidential document shown to him or her, the Prosecution proposes to add a reference to rule 112(1)(e) and (3) of the rules¹⁸ to ensure the requirement does not infringe a suspect’s right of to have a copy of his or her recorded interview or statement pursuant to article 55(2) of the Statute.

11. *Second*, the Prosecution proposes to add language clarifying that the Proposed Protocol applies to witnesses subject to protective measures imposed in other cases before the Court.¹⁹ This will safeguard their continued protection.

¹⁶ See *Al Hassan* Protocol, para. 31.

¹⁷ See Proposed Protocol, para. 29.

¹⁸ See Proposed Protocol, para. 9, as adopted in the *Bemba et al* Protocol: ICC-01/05-01/13-1093, para. 6; ICC-01/05-01/13-1093-Anx, para. 9.

¹⁹ See Proposed Protocol, para. 10, as adopted in the *Bemba et al* Protocol: ICC-01/05-01/13-1093, para. 6; ICC-01/05-01/13-1093-Anx, para. 19.

D. Modifications clarifying some of the definitions/language or correcting typographical errors

12. The Prosecution proposes three further modifications at paragraphs 4 and 40 of the Proposed Protocol. At paragraph 4(d), the definition of a “confidential document” should include ‘any other type of material’ (such as, audio or video materials).²⁰ This ensures that information contained therein is also protected.²¹ Likewise, and for the same reason, the Prosecution proposes that the definition of “confidential information” should encompass information contained in confidential documents and ‘obtained during a confidential discussion’ (for example, during a discussion with a source).²² At paragraph 40, with regards to the provision of video or audio recordings of a witness interview to the calling party or participant, the Prosecution proposes the addition of the language “or as soon as practicable thereafter” to take into consideration possible delays in processing the recordings.

13. The Prosecution further proposes the correction of two typographical errors in the Practice Manual Protocol.²³ Finally, the Proposed Protocol adds the wording ‘information’ at paragraph 8 to be consistent with other references in that section to “confidential document or information”.²⁴

E. Proposed deletion

14. The Proposed Protocol removes the paragraph included in the Practice Manual Protocol regarding the “consent to disclosure by witnesses.”²⁵ A Party’s obtaining of their witness’s consent prior to disclosure falls beyond the scope of the Proposed

²⁰ See Proposed Protocol, para. 4(d).

²¹ In the alternative, the reference to “Confidential document” could be replaced throughout the Protocol by “Confidential material”.

²² See Proposed Protocol, para. 4(e).

²³ Practice Manual Protocol, paras. 7 and 18; Proposed Protocol, paras. 8 and 19.

²⁴ See Proposed Protocol, para. 8.

²⁵ See Practice Manual Protocol, Section VI, para. 25. See also *Al Hassan* Protocol, Section VI, para. 26.

Protocol, as it concerns dealings with one's 'own' witness – and not the practical modalities for handling confidential information during investigations, nor the contacts between a party or a participant and a witness of *another* party or of a participant.

15. The proposed deletion is consistent with the *Al Hassan* Protocol whereby the Single Judge excluded similar provisions, considering that “by their nature” they should not be included in a Protocol on the handling confidential information.²⁶ For the same reason, the Prosecution proposes deletion of section VI, paragraph 25 of the Practice Manual Protocol.²⁷

III. RELIEF SOUGHT

16. For the above reasons, the Prosecution requests the Chamber adopt the Proposed Protocol, attached as Annex B.



Fatou Bensouda, Prosecutor

Dated this 17th day of December 2018
At The Hague, The Netherlands

²⁶ See ICC-01/12-01/18-40-tENG, para. 18, referring to ICC-01/12-01/18-30-tENG, para. 13.

²⁷ See Proposed Protocol, section VI, para. 26.