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**International
Criminal
Court**

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Date: **7 January 2019**

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

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

Public with Annex A and Annex B

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

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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Further to the filing of the Prosecution's submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses on 17 December 2018 ("Prosecution Submission"), the Defence hereby submits this:

**"Response to the Prosecution's submission on a Proposed Protocol on the
Handling of Confidential Information and Contacts with Witnesses"
("Defence's Response").**

INTRODUCTION

1. A protocol governing the handling of confidential information and contacts with witnesses is a very important document as it aims to protect witnesses and victims. The parties and the Chamber should assess it very meticulously, as it will impact the parties' investigative work during the entire proceedings.
2. In order to guarantee the integrity of the investigations while protecting the rights of the suspects and/or the accused, such a protocol shall be interpreted restrictively and allow the parties to conduct meaningful investigations.
3. The Protocol should not be a document rehashing all of the duties and obligations of the parties and participants under the respective Codes of Conducts. On the contrary, the Protocol shall focus on issues that are otherwise not addressed in the various Codes and avoid, insofar as possible, being repetitive of what is already stipulated elsewhere.
4. The basis of any system aiming to control and protect confidential information requires (i) limiting access to confidential information solely to those who need the information; and (ii) maintaining a precise and up-to-date list of those who are granted access. This is the only effective way to control the dissemination of the information in order to avoid inadvertent disclosure and deliberate leak of

information.

PROCEDURAL BACKGROUND

5. On 17 November 2018, Mr. Yekatom was surrendered to the International Criminal Court (“Court”) pursuant to the arrest warrant issued by the Pre-Trial Chamber (“Chamber”) on 11 November 2018.¹

6. On 17 December 2018, three days into the Court 2018/2019 winter recess, the Prosecution submitted a proposed protocol on the handling of confidential information and contacts with witnesses.²

7. On 21 December 2018, the Defence requested for an extension of time limit to respond to the Prosecution Submission and the Proposed Protocol until 2 January 2009,³ which was granted by the Chamber on the same day.⁴

8. On 2 January 2019, the Defence requested a further extension to respond until 7 January 2019, which was granted by the Chamber on the same day.⁵

SUBMISSIONS

9. The Defence notes that the updated Chambers Practice Manual, as of May 2017, has provided an annex containing a “Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant” (“Chamber’s Protocol”).⁶

¹ Warrant of Arrest for Alfred Yekatom, ICC-01/14-01/18-1-US-Exp, 11 November 2018.

² Prosecution’s Submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses, 17 December 2018, ICC-01/14-01/18-35 (“Prosecution Submission”); Annex A, 17 December 2018, ICC-01/14-01/18-35-AnxA (“Prosecution Proposed Protocol”).

³ Expedited Request on Behalf of M. Yekatom Seeking a Limited Extension of the Delay to Respond to “Prosecution’s submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses”, 21 December 2018, ICC-01/14-01/18-41.

⁴ Decision Granting an Extension of Time, 21 December 2018, ICC-01/14-01/18-43.

⁵ Email from the Pre-Trial Division’s Senior Legal Advisor on behalf of the Single Judge on 2 January 2019 at 12:12.

⁶ Chambers Practice Manual, May 2017, pp. 32-38 (“Chamber’s Protocol”).

10. The Defence will therefore provide observations on the proposed text proposed in the Chamber's Protocol and thereafter address the Prosecution's proposed modifications, where applicable. For ease of reference, the following headings correspond to the headings and enumerated paragraphs in the Chamber's Protocol.

11. In addition, the Defence respectfully submits a proposed protocol modelled on the Chamber's Protocol.⁷

"I. Introduction"

"Paragraph 1"⁸

12. The Defence agrees to the content of the paragraph as it stands.

"Paragraph 2"⁹

13. The Defence agrees to the content of the paragraph as it stands.

"Paragraph 3"¹⁰

14. The Defence agrees that in principle any deviation from the Protocol requires prior authorization of the Chamber. However, this should be subject to some flexibility. The Defence therefore suggests an amendment whereby the Prosecution and the Defence can mutually agree to an *ad hoc* deviation without seizing the Chamber for authorization. This amendment is in the interest of judicial economy and will contribute to the expeditiousness of the trial.

"II. Definitions"

15. The Defence underlines the importance of an accurate and clear definition of the terms in the Protocol. Any definition should be rejected if it is antithetical to the purpose of the Protocol, which is to control and to protect the confidentiality of the

⁷ Annex A (annotated version) and Annex B (clean version) (collectively, Defence Proposed Protocol).

⁸ Chamber's Protocol, ¶1; Defence Proposed Protocol, ¶1; Prosecution Proposed Protocol, ¶1.

⁹ Chamber's Protocol, ¶2; Defence Proposed Protocol, ¶2; Prosecution Proposed Protocol, ¶2.

¹⁰ Chamber's Protocol, ¶1; Defence Proposed Protocol, ¶1; Prosecution Proposed Protocol, ¶1.

information.

“Paragraph 4(a)”¹¹

16. The Defence agrees with most of the definitions provided under subparagraph 4(a). The Defence proposes a clarification of the scope of the authorised personnel within the Prosecution to those who are properly assigned to the present case. This modification aims to reflect the same requirement for the Defence.

17. The Office of the Prosecutor as a whole is a vast organ comprising a large number of staff members where conflict of interest may arise in certain circumstances. To confine the authorised personnel to those who are duly assigned to the case at bar is consistent with the need to disclose information on a need-to-know basis, which can in turn reduce the risk of inadvertent or malicious disclosure insofar as possible.

18. The Defence notes that the Office of the Prosecutor is already divided in such a way that implementation of this proposal is entirely feasible.

19. The Chamber should therefore request the Parties to provide a list of (and any update thereof) authorized persons in order for the meaningful implementation of the Protocol.

“Paragraph 4(b)”¹²

20. The Defence agrees with most of the definitions provided under subparagraph 4(b). However, in order to properly reflect the definition of “participants”, the Defence proposes to slightly modify it by removing the term “any other entity” as it is too vague. For clarity purposes, the Defence proposes to replace the term “Participants” as Principal Counsel of the Office of the Public Counsel for Victims (“OPCV”), legal representatives of victims and States, and members of their teams.

¹¹ Chamber’s Protocol, ¶4(a); Defence Proposed Protocol, ¶4(a); Prosecution Proposed Protocol, ¶4(a).

¹² Chamber’s Protocol, ¶4(b); Defence Proposed Protocol, ¶4(b); Prosecution Proposed Protocol, ¶4(b).

21. Similarly, the OPCV and legal representatives shall also provide a list of their properly designated members to the Chamber and update that list on an ongoing basis.

“Paragraph 4(c)”¹³

22. The Defence agrees to the content of the paragraph as it stands.

“Paragraph 4(d)”¹⁴

23. The Defence agrees with the definition as it stands.

24. The Defence notes that the Prosecution suggests expanding the definition of “confidential document”.¹⁵ Even though it does not consider this amendment necessary, the Defence takes no issue with the Prosecution’s proposal as it could indeed add greater clarity to the type of documents covered by the definition.

“Paragraph 4(e)”¹⁶

25. The Defence agrees with the definition as it stands.

26. The Defence opposes the modification proposed by the Prosecution.¹⁷ The aim of the Protocol is to avoid improper dissemination of information contained in a document, whereas the term “confidential discussion” is vague and ambiguous. In absence of a proper procedure in place, it will become impractical to determine what can be considered as a “confidential discussion”.

27. The Defence believes that there is no need to go beyond the definition of “confidential information” as it is sufficiently clear as it stands.

“Paragraph 4(f)”¹⁸

¹³ Chamber’s Protocol, ¶4(c); Defence Proposed Protocol, ¶4(c); Prosecution Proposed Protocol, ¶4(c).

¹⁴ Chamber’s Protocol, ¶4(b); Defence Proposed Protocol, ¶4(b); Prosecution Proposed Protocol, ¶4(b).

¹⁵ Prosecution Submissions, para 12.

¹⁶ Chamber’s Protocol, ¶4(b); Defence Proposed Protocol, ¶4(b); Prosecution Proposed Protocol, ¶4(b).

¹⁷ Prosecution Submissions, para 12.

¹⁸ Chamber’s Protocol, ¶4(b); Defence Proposed Protocol, ¶4(b); Prosecution Proposed Protocol, ¶4(b).

28. The Defence notes that the Prosecution proposes a parameter to the Chamber's definition of witnesses.

29. The proposed modification would create an unfair situation given the fact that the Defence will not submit its list of witnesses until a much later stage than the Prosecution. Accordingly, the timeframe for the parties' respective disclosure obligation differs. Confining "witnesses" to those for whom the party has notified the opposing party of its intention to call, the Defence would effectively have to choose between allowing its prospective witnesses not to be covered by the protection of the Protocol on one hand, and prematurely disclosing its investigative plan on the other. This prejudice undermines significantly Mr. Yekatom's fair trial rights as protected by the Statute and the Rules.

30. To rectify this, the definition of "witness" should also cover potential witnesses whose identity have not yet been disclosed to the opposing party, but who have already been interviewed by the Defence and the identity of which has been communicated to the Victims and Witnesses Unit ("VWU"). The notification to the VWU is therefore an appropriate hallmark for the purpose of defining "witnesses".

Additional Paragraph 5¹⁹

31. The Prosecution suggested the addition of a paragraph 5.

32. The Defence always takes every measure and precaution to ensure that the confidentiality imposed is understood as such by the entire Defence team, including the intermediaries. It therefore agrees with the proposed addition of a new paragraph 5 as it confirms an existing obligation.

"III. Use of confidential documents and information in investigations"

"1. General provisions"

"Paragraph 5"²⁰ and "Paragraph 6"²¹

¹⁹ Defence Proposed Protocol, ¶5; Prosecution Proposed Protocol, ¶5.

33. The Defence agrees with both paragraphs as they stand.

“Paragraph 7”²²

34. The Defence agrees with almost the entire paragraph as it stands.

35. The Prosecution proposes to correct a typographic error included in the Chamber’s Protocol by adding the word “or” between “party” and “participant” which indeed seems to address a typographic error.²³ The Defence agrees with this proposed correction.

36. Additionally, the Defence suggests to replace “preparation and presentation” by “preparation or presentation” for the very reason that preparation of a case does not necessarily equal to presentation. A party can prepare and gather information that it might use in other phases of the case save for the presentation of the Defence case, if any. For instance, a party can prepare its case by searching for information during its investigation and that information might be used during the cross-examination of a witness of the opposing party but not necessarily during the presentation of the Defence case. A party can disclose documents during investigation in order to gather information on matters affecting the credibility of the witness and, and later on, use that information through a witness who is able to give evidence relevant to the case of the cross-examining party. This might not be considered “presentation of their case”. By adding the word “or” the Protocol will adequately contemplate such a scenario.

“Paragraph 8”²⁴

37. The Defence notes the Prosecution proposes an amendment that was first introduced in *Bemba et al.*, i.e., the addition of “and without prejudice to Rule

²⁰ Chamber’s Protocol, ¶5; Defence Proposed Protocol, ¶6; Prosecution Proposed Protocol, ¶6.

²¹ Chamber’s Protocol, ¶6; Defence Proposed Protocol, ¶7; Prosecution Proposed Protocol, ¶7.

²² Chamber’s Protocol, ¶7; Defence Proposed Protocol, ¶8; Prosecution Proposed Protocol, ¶8.

²³ Prosecution Submission, para 13.

²⁴ Chamber’s Protocol, ¶8; Defence Proposed Protocol, ¶9; Prosecution Proposed Protocol, ¶9.

112(1)(e) and (3) of the Rules”. The amendment aims at clarifying that individuals considered being suspects pursuant Article 55(2) of the Statute retains their right to have a copy of their recorded interview or statement, if any. The Defence agrees with the proposal as it does indeed clarify one of the suspect’s right as provided by the Statute.²⁵

“2. Witnesses whose identity has not been made public”

“Paragraph 9”²⁶

38. The Defence agrees with the paragraph as it stands in the Chamber’s Protocol, and opposes the Prosecution’s proposed additional restriction on contacting witnesses “who are subject to other protection measures, including those applicable in other cases before the Court”.

39. This proposal not only substantively deviated from the Chamber’s Protocol but also the established practices in previous cases. The adopted protocols in *Bemba et al.*, *Ntaganda*, and *Banda & Jerbo* contain a similar restriction but with a key parameter:

This section of the Protocol applies to witnesses [...] who have other protective measures known to the investigating party, including those applicable in other cases before the Court.²⁷

40. Indeed, the feasibility of this restriction hinges on this key parameter, which is missing from the Prosecution’s proposal in the present case. Without access to the confidential information in other cases, the Defence is simply unable to tell whether or not the person it is about to approach is subject to protective measures.

²⁵ Prosecution Submission, para 10.

²⁶ Chamber’s Protocol, ¶9; Defence Proposed Protocol, ¶10; Prosecution Proposed Protocol, ¶10.

²⁷ *Bemba et al.*, Annex A to Decision adopting a Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party and Witnesses of the Other Parties, 20 July 2015, ICC-01/05-01/13-1093-Anx, ¶19; *Ntaganda*, Annex A to Decision on adoption of a ‘Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or a Participant’, 12 December 2014, ICC-01/04-02/06-412-AnxA, ¶17; *Banda & Jerbo*, Annex to Decision on the Protocol on the handling of confidential information and contact of between a party and witnesses of the opposing party, 18 February 2013, ICC-02/05-03/09-451-Anx, ¶22 (emphasis added).

41. In addition, the proposal places unreasonable and unnecessary restrictions on the parties' and participant's ability to conduct its investigation. Given the overlaps between cases before the Court, some individuals are bound to be persons of interest in more than one case. The proposed amendment, however, is so broad that would inevitably lead to the application of the Protocol to those are only remotely linked to the Court and/or are unlikely to be called to testify in the present case at all. The expansion would exponentially increase the number of persons an investigating party or participant cannot approach on its own. Coupled with its unawareness of confidential protective measures in other cases, the proposal would drastically increase the number of incidents of inadvertent "violation". In the Defence's respectful submission, an investigating party or participant should be allowed to meet with and talk to protected witnesses from another case as long as the protective measures are duly respected.

42. Moreover, the restrictions, if adopted, would be unfairly biased against the Defence. Since the Prosecution in all cases is one single entity, the scope of "opposing party" significantly differs for the Defence from that for the Prosecution. In the CAR situation, in particular, the Prosecution investigation has lasted for years by now. Therefore, the scope of individuals within the meaning of the Prosecution's proposed addition is vastly broader for the Defence than that for the Prosecution. The proposal would effectively be a gross breach of equality of arms.

43. The Defence stresses, as indicated by the Single Judge in *Ongwen*, that:

[I]t is necessary to strike an appropriate balance between the different interests at stake and identify the best modalities for the protection of the safety of witnesses, victims and other individuals at risk, as well as the integrity of investigations, in a manner consistent with the rights of the suspect/accused and with the Prosecutor's duties and powers under the Statute.²⁸

²⁸ Order concerning the modalities for the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, ICC-02/04-01/15-339, 11 November 2015, para 1.

44. The Prosecution's proposal therefore must be rejected.

"Paragraph 10"²⁹

45. The Defence proposes the replacement of "preparation and presentation" to "preparation or presentation" for the same reason articulated above in relation to Paragraph 7.

"Paragraph 11"³⁰, "Paragraph 12"³¹, "Paragraph 13"³²

46. The Defence agrees with the paragraphs and their content as they stand.

"2. Investigation of allegations of sexual or gender based crimes"

"Paragraph 14"³³

47. The Defence agrees with the paragraph and its content as it stands.

"3. Records of the handling of confidential documents or information"

"Paragraph 15"³⁴, "Paragraph 16"³⁵, and "Paragraph 17"³⁶

48. The Defence agrees with the paragraphs and their content as they stand.

"IV. Inadvertent disclosure"

"Paragraph 18"³⁷

49. The Defence agrees with the paragraph and its content as it stands. However, as the Prosecution noted,³⁸ the word "a" appears to be missing in the Chamber's Protocol, the Defence also proposes the correction of the typographical error.

²⁹ Chamber's Protocol, ¶10; Defence Proposed Protocol, ¶11; Prosecution Proposed Protocol, ¶11.

³⁰ Chamber's Protocol, ¶11; Defence Proposed Protocol, ¶12; Prosecution Proposed Protocol, ¶12.

³¹ Chamber's Protocol, ¶12; Defence Proposed Protocol, ¶13; Prosecution Proposed Protocol, ¶13.

³² Chamber's Protocol, ¶13; Defence Proposed Protocol, ¶14; Prosecution Proposed Protocol, ¶14.

³³ Chamber's Protocol, ¶14; Defence Proposed Protocol, ¶15; Prosecution Proposed Protocol, ¶15.

³⁴ Chamber's Protocol, ¶15; Defence Proposed Protocol, ¶16; Prosecution Proposed Protocol, ¶16.

³⁵ Chamber's Protocol, ¶16; Defence Proposed Protocol, ¶17; Prosecution Proposed Protocol, ¶17.

³⁶ Chamber's Protocol, ¶17; Defence Proposed Protocol, ¶18; Prosecution Proposed Protocol, ¶18.

³⁷ Chamber's Protocol, ¶18; Defence Proposed Protocol, ¶19; Prosecution Proposed Protocol, ¶19.

³⁸ Prosecution Submission, para 13.

“Paragraph 19”³⁹

50. The Defence agrees with the paragraph and its content as it stand.

“Paragraph 20”⁴⁰

51. The Defence agrees with the paragraph and its content as it stand.

52. The Defence objects to the additional sentence proposed by the Prosecution.⁴¹ The addition is redundant and has already been sufficiently addressed by the preceding paragraphs. The obligation of the party receiving inadvertently disclosed materially are implied in the duty to return and destroy the material and any copy.

“Paragraph 21”⁴²

53. The Defence agrees with its content as it stands.

54. The Defence notes that this paragraph was removed from the Prosecution Proposed Protocol with neither an annotation to this effect nor explanation in its annex or in its submission. The Defence objects the deletion.

55. The Defence notes the Prosecution inserted a new paragraph numbered 22 addressing the dispute settlement as to the characterisation of “inadvertent disclosure”. The Defence agrees with its aim and the addition in general but suggests a different formulation as depicted at the end of paragraph 22 of the Defence Proposed Protocol.

“V. Breaches of confidentiality”“Paragraph 22”⁴³ and “Paragraph 23”⁴⁴

³⁹ Chamber’s Protocol, ¶19; Defence Proposed Protocol, ¶20; Prosecution Proposed Protocol, ¶20.

⁴⁰ Chamber’s Protocol, ¶20; Defence Proposed Protocol, ¶21; Prosecution Proposed Protocol, ¶21.

⁴¹ Prosecution Proposed Protocol, ¶21; Prosecution Submission, para 21.

⁴² Chamber’s Protocol, ¶21; Defence Proposed Protocol, ¶22; Prosecution Proposed Protocol, deleted and replaced by a different paragraph numbered 22.

⁴³ Chamber’s Protocol, ¶22; Defence Proposed Protocol, ¶23; Prosecution Proposed Protocol, ¶23.

⁴⁴ Chamber’s Protocol, ¶23; Defence Proposed Protocol, ¶24; Prosecution Proposed Protocol, ¶24.

56. The Defence agrees with both paragraphs and their content as they stand.

“Paragraph 24”⁴⁵

57. The Defence agrees with this paragraph in general but proposes to clarify that the VWU’s involvement is only necessary when the leak or breach of confidentiality pertains to a protected witness. Otherwise there is no reason to notify the VWU about an incident concerning information it has no access to in the first place.

“VI. Consent to disclosure by witnesses”⁴⁶ and “Paragraph 25”⁴⁷

58. The Defence agrees with both the section title and its content as they stand. The Defence opposes the removal of this section as proposed by the Prosecution.⁴⁸

59. When interviewing a witness, the investigating party or participant must always explain to the witness that the information provided will be disclosed to the opposing party, which is likely to scrutinise and investigate the same. The witness must also be informed that his identity will be disclosed to the opposing party. Accordingly, the investigating party must seek to obtain the witness’ consent to the disclosure of his identity and statement and the witness’s response must be featured in the statement. A witness providing any visual or non-textual material shall also be made aware that such material will be disclosed to the opposing party in order for the latter to investigate.

60. Such arrangements have previously been maintained by the Chamber,⁴⁹ despite the similar concern raised by the VWU.⁵⁰

⁴⁵ Chamber’s Protocol, ¶24; Defence Proposed Protocol, ¶25; Prosecution Proposed Protocol, ¶25.

⁴⁶ Chamber’s Protocol, §VI; Defence Proposed Protocol, §VI; Prosecution Proposed Protocol, deleted §VI.

⁴⁷ Chamber’s Protocol, ¶25; Defence Proposed Protocol, ¶26; Prosecution Proposed Protocol, deleted ¶26.

⁴⁸ Prosecution Submission, para 14.

⁴⁹ *Gbagbo & Blé Goudé*, Decision adopting the ‘Protocol on disclosure of the identity of witnesses of other parties and of the LRV in the course of investigations, use of confidential information by the parties and the LRV in the course of investigations, inadvertent disclosure and contacts between a party and witnesses not being called by that party’, 31 August 2015, ICC-02/11-01/15-200, para 30.

⁵⁰ *Gbagbo*, Victims and Witnesses Unit’s observations on the “divulgence de l’identité des témoins lors des enquêtes, l’utilisation de matériel confidentiel pendant les enquêtes, la divulgation d’information

61. The Prosecution's argument that this section should be deleted because it deals with the relationship between the investigating party and its own witness is inapposite. Indeed, it is essential for all parties to know pursuant to what norms witness interviews are conducted.

62. Publicity of the proceedings is the norm and confidentiality the exception. The witness must also be asked whether or not he consent to testify in public.

"VII. Contacts with witnesses of other parties or participants"⁵¹

63. The Defence is of the view that this section of the Chamber's Protocol is crucial as it governs the various obligations of the parties during their investigations and throughout the proceedings. Any and all obligation therein should be clear and unambiguous for all the parties and participants. Otherwise it would undermine the adequate protection of witnesses' safety as well as the mitigation of risks this section is meant to achieve. The Prosecution Proposed Protocol contains some amendments with which the Defence agrees, as they tend to add more clarity and cover some aspects that appear to have been overlooked in the Chamber's Protocol. However, the Defence opposes the Prosecution's other suggestions as they are repetitious.

64. As argued above, the importance of this section warrants clarity. To avoid confusion, ambiguity and unnecessary litigations, the Defence slightly reshuffled the paragraphs in a manner consistent with the scenarios that may occur when contacting witnesses of the other party and the obligations that follows. To that end, the titles were removed and no longer appear in the Defence Proposed Protocol. The Defence Proposed Protocol is clear, precise and achieves the aim of the Chamber's Protocol.

"Paragraph 26"⁵² and "Paragraph 28"⁵³

par inadvertence et les contacts entre une partie et un témoin de la partie adverse" pursuant to Order ICC-02/11-01/11-739, 27 February 2015, ICC-02/11-01/11-788, paras 1-3.

⁵¹ Chamber's Protocol, §VII; Defence Proposed Protocol, §VII; Prosecution Proposed Protocol, §VII.

⁵² Chamber's Protocol, ¶26; Defence Proposed Protocol, ¶27; Prosecution Proposed Protocol, ¶27.

65. The Defence agrees with the gist of both paragraphs. But it proposes to delete the second half of paragraph 26 for the sake of self-consistency with the definition of “witness” proposed by the Defence in paragraph 4(f). For clarity purposes, the Defence proposes to add the content of paragraph 28 of the Chamber’s Protocol here.

“Paragraph 27”⁵⁴

66. The Defence agrees with this paragraph and its content as it stands. However, this paragraph has been moved at the end of the Defence protocol as it considered it more logical.

“Paragraph 29”⁵⁵ and “Paragraph 30”⁵⁶

67. The Defence agrees with both paragraphs but proposes to reduce the time limit from five days to three or as soon as practically possible. Five days is too long and not responsive. The proposed amendment is in the interests of the expeditiousness of the proceedings and would adequately utilise the good faith of the parties and participants.

“Paragraph 31”⁵⁷

68. The Defence agrees with the paragraph but proposes to add “immediately” to highlight the importance of a timely notification. The proposal would contribute to both the expeditiousness and the transparency of the proceedings.

“Paragraph 32”⁵⁸, “Paragraph 33”⁵⁹, “Paragraph 34”⁶⁰, “Paragraph 35”⁶¹, “Paragraph 36”⁶²

69. The Defence agrees with the paragraphs and their content as they stand.

⁵³ Chamber’s Protocol, ¶28; Defence Proposed Protocol, ¶27; Prosecution Proposed Protocol, ¶30.

⁵⁴ Chamber’s Protocol, ¶27; Defence Proposed Protocol, ¶39; Prosecution Proposed Protocol, ¶28.

⁵⁵ Chamber’s Protocol, ¶29; Defence Proposed Protocol, ¶30; Prosecution Proposed Protocol, ¶31.

⁵⁶ Chamber’s Protocol, ¶30; Defence Proposed Protocol, ¶31; Prosecution Proposed Protocol, ¶33.

⁵⁷ Chamber’s Protocol, ¶31; Defence Proposed Protocol, ¶32; Prosecution Proposed Protocol, ¶34.

⁵⁸ Chamber’s Protocol, ¶32; Defence Proposed Protocol, ¶38; Prosecution Proposed Protocol, ¶35.

⁵⁹ Chamber’s Protocol, ¶33; Defence Proposed Protocol, ¶33; Prosecution Proposed Protocol, ¶36.

⁶⁰ Chamber’s Protocol, ¶34; Defence Proposed Protocol, ¶35; Prosecution Proposed Protocol, ¶37.

⁶¹ Chamber’s Protocol, ¶35; Defence Proposed Protocol, ¶37; Prosecution Proposed Protocol, ¶38.

⁶² Chamber’s Protocol, ¶36; Defence Proposed Protocol, ¶34; Prosecution Proposed Protocol, ¶39.

“Paragraph 37”⁶³

70. The Defence agrees with the gist of the paragraph but proposes to limit the applicable scenario to where the interview was taking place without the presence of a representative of the calling party in order to avoid unnecessary addition to the disclosure burden. The present representative can simply choose to make recordings for their own.

71. The Defence opposes the five days disclosure deadline proposed by the Prosecution as it may well be logistically impractical despite the party’s best effort. Rather than setting out a time limit that would likely be varied for practical reasons, the Defence submits it is sufficient to rely on the party’s good faith as reflected in the text of the Chamber’s Protocol.

“Paragraph 38”⁶⁴ and “Paragraph 39”⁶⁵

72. The Defence agrees with the paragraphs and their content as they stand.

Defence Addition of Paragraph 28⁶⁶

73. The Defence proposes an additional paragraph providing for an obligation of the representative of the investigating party or participant to adequately identify him/herself as well as his/her role and function when interviewing a person. This requirement can effectively avoid the interviewee misunderstanding the nature of the interview due to a deliberate or inadvertent omission of information by the interviewer. It is in turn crucial for the protection of the interviewee, which is consistent with the spirit of the Protocol.

Defence Addition of Paragraph 29⁶⁷

74. The Defence concurs with the Prosecution regarding the addition of a

⁶³ Chamber’s Protocol, ¶37; Defence Proposed Protocol, ¶36; Prosecution Proposed Protocol, ¶40.

⁶⁴ Chamber’s Protocol, ¶38; Defence Proposed Protocol, ¶40; Prosecution Proposed Protocol, ¶43.

⁶⁵ Chamber’s Protocol, ¶39; Defence Proposed Protocol, ¶41; Prosecution Proposed Protocol, ¶44.

⁶⁶ Defence Proposed Protocol, ¶28.

⁶⁷ Defence Proposed Protocol, ¶29; Prosecution Proposed Protocol, ¶32.

paragraph governing the inadvertent contact with the opposing party or participant's witness. Whilst it was not provided in the Chamber's Protocol, the Defence acknowledges the importance of adequately contemplating the situation beforehand and proposes a solution as reflected in its additional paragraph 29.

Prosecution Addition of Paragraphs 41-42⁶⁸

75. The Prosecution proposed the addition of a section consisting of two paragraphs regarding the Objection of a party or participant to the interview of a witness whom the opposing party intends to call to testify. The Defence opposes this addition in its entirety.

76. The proposed paragraphs are drafted in a vague manner, using abstract expressions such as "serious problem", "reasons related to the safety or physical or psychological well-being or dignity". Ambiguity as such can easily be abused and may, in practice, create obstacles to the course of investigation by the parties due to potential conflicted interpretation. They give the calling party every possible reason to object to the interview.

77. Further, the proposed paragraph would create an unjustified discretion to prevent an interview despite the witness' consent given in accordance with the Protocol. Consent to an interview is a matter for the witness, and the witness only, to decide. Passing this right onto the calling party is a clear breach of the guarantees provided to the witness against any attempts to influence her or his decision. Notably, the "right" of a calling party to object to interviews between their witnesses and investigating parties have been removed in the *Bemba et al.* protocol.⁶⁹

78. Meanwhile, the wording used in the Chamber's Protocol is sufficiently clear. It addresses the needs of vulnerable witnesses in a concrete and practical manner by

⁶⁸ Prosecution Proposed Protocol, ¶¶41-42.

⁶⁹ *Bemba et al.*, Annex A to Decision adopting a Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party and Witnesses of the Other Parties, 20 July 2015, ICC-01/05-01/13-1093-Anx.

directly referring to the context which is relevant the current Protocol, such as consent for disclosure, use of visual and/or non-textual material, and the role of VWU in interviews with vulnerable witnesses.

79. The Defence therefore submits the Prosecution's proposed addition should be rejected.

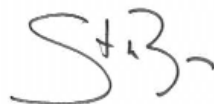
CONCLUSION

RELIEF SOUGHT

80. In light of the above observations, the Defence respectfully requests the Single Judge to:

ADOPT the Defence Proposed Protocol in Annex B.

RESPECTFULLY SUBMITTED ON THIS 7TH DAY OF JANUARY 2019



Me Stéphane Bourgon *Ad.E*, Counsel for Alfred Rombhot Yekatom

The Hague, the Netherlands