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PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

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

Public

**Prosecution's Reply to the Defence's Response to the Prosecution's submission on a
Proposed Protocol on the Handling of Confidential Information and Contacts with
Witnesses (ICC-01/14-01/18-51)**

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I. INTRODUCTION

1. Pursuant to the 11 January 2019 Order of the Single Judge of Pre-Trial Chamber II (Chamber)¹ the Prosecution hereby replies to two suggestions advanced by the Defence in its “Response to the Prosecution’s submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses”.² Although the purpose of the Proposed Protocol is to protect confidential information within the parties’ and participants’ possession and control, the Defence suggestions are predicated on the assumption that its object is to regulate who, within the context of proceedings before the Court, may gain access to confidential information in the first instance. The Defence suggestions misunderstand this core distinction and should be rejected.

2. *First*, the Chamber should reject the Defence’s restrictive construction of the terms “Party”, “Participant”, “Confidential information”, and “Witness” as set out in the Defence’s Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses (“Proposed Protocol”).³ The construction urged by the Defence unreasonably limits the scope and purpose of the Protocol, impeding the Court’s obligation to protect the safety of witnesses and victims in accordance with article 68. The Chamber should instead adopt the definitions contained in the Annex to the Chambers Practice Manual of May 2017⁴ (“Chambers Practice Manual”), with the amendments suggested by the Prosecution.⁵

3. *Second*, limiting the parties’ and participants’ obligation to report all breaches of confidentiality under the Proposed Protocol as the Defence urges⁶ would potentially

¹ See ICC-01/14-01/18-55, para. 8.

² See ICC-01/14-01/18-51.

³ See ICC-01/14-01/18-51-AnxA, para. 4(a),(b),(e), and (f).

⁴ The Annex is available at pages 32-38 of the Chambers Practice Manual.

⁵ In the Annex to the Prosecution’s submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses (“Prosecution Proposed Protocol”): see ICC-01/14-01/18-35-AnxA, para. 4(a),(b),(e), and (f).

⁶ See ICC-01/14-01/18-51-AnxA, para. 25.

deprive the Victims and Witnesses Unit (“VWU”) of information necessary to a holistic assessment of the security situation attendant to the case. The Chamber should instead adopt the language used in the Chambers Practice Manual.⁷

II. SUBMISSIONS

A. Definitions of the terms “Party”, “Participant”, “Confidential information”, and “Witness”

4. The Defence’s restrictive construction of the terms “Party”, “Participant”, “Confidential information”, and “Witness” should be rejected.⁸ These key terms determine the scope of the Proposed Protocol and the protections that it affords.

5. The Defence’s suggestion to limit the definition of “Party” (as concerns the Prosecution) to personnel ‘properly designated in the present case’⁹ is misguided and undermines the purpose of the Proposed Protocol.

6. *First*, the Prosecution is a singular entity within the statutory framework. Its status as a party in this context is not dependent on the particular access rights accorded to any given member of the Office of the Prosecutor or team composition. The proposed limitation is not in accord with the statutory framework, nor would its adoption further any core interest underlying the Proposed Protocol or the Court’s well-established practices.

7. *Second*, as noted, the Defence confuses the regulation of access to confidential information with the protective purpose and function of the Proposed Protocol. The Proposed Protocol dictates how parties and participants handle confidential information in their possession or control. It thus constitutes a protection that the

⁷ As set out in Chambers Practice Manual, para. 24.

⁸ See ICC-01/14-01/18-51-AnxA, para. 4(a),(b),(e), and (f).

⁹ See ICC-01/14-01/18-51-AnxA, para. 4(a); ICC-01/14-01/18-51, paras. 16-19.

Chamber should apply *broadly* to ensure the security and safety of persons and sensitive information. The fewer people that are bound by its terms, the greater the risks. By limiting the individuals which comprise a “Party”, the Defence equally limits the group of individuals bound by the Proposed Protocol. This would mean that fewer personnel would have to comply with the Protocol and its protective scope therefore would be reduced. The Chamber should retain the relevant definition as set out in the Chambers Practice Manual.¹⁰

8. The Chamber should reject the Defence’s suggested restrictive definition of “Participant” for similar reasons. Restricting the term “Participant” to ‘the Principal Counsel of the Office of the Public Counsel for Victims, Legal Representatives duly assigned to represent participating victims and States in the present case, and any other persons properly designated as members of their teams’¹¹ presents the same problem of limiting the group of individuals bound by the Proposed Protocol, reducing its scope and protection. It increases the risk of compromise to sensitive information and the attendant consequences. The Chamber should retain the definition of “Participant” set out in the Chambers Practice Manual which includes, but is not limited to legal representatives of participating victims and states.¹² Doing so ensures that any other participant who may gain access to confidential information in the case will be bound by the Proposed Protocol.

9. The Defence’s objection to the Prosecution’s suggested expansion of the definition of “Confidential Information” to include information obtained verbally as ‘vague and ambiguous’¹³ misunderstands the issue. The Proposed Protocol should protect all types of confidential information, including confidential information not yet reduced to writing, and for which the Chamber has yet to issue a non-disclosure

¹⁰ See Chambers Practice Manual, para. 4(a).

¹¹ See ICC-01/14-01/18-51-AnxA, para. 4(b); ICC-01/14-01/18-51, paras. 20-21.

¹² See para. 4(b).

¹³ See ICC-01/14-01/18-51-AnxA, para. 4(e); ICC-01/14-01/18-51, paras. 26-27.

order.¹⁴ For example, if during a conversation with a witness, a party becomes aware of new confidential information, this would not fall under the definition of “Confidential Information” (without the modification suggested by the Prosecution). It would not be protected from further dissemination. Contrary to the Defence’s contentions, the inclusion of confidential information obtained verbally within the definition of “Confidential Information” is fully consonant with the express purpose of the Proposed Protocol. The Chamber should reject the Defence’s submission.

10. Finally, the Defence’s proposed restriction of the definition of “Witness” should be rejected. Limiting the definition, as the Defence suggests, to (1) individuals whom the Prosecution officially intends to call to testify; (2) individuals whom the Defence intends to call to testify, as soon as such intention has been communicated *ex parte* to VWU; and (3) victims authorised by the Chamber to provide views or to testify in the proceedings,¹⁵ is unworkable and undermines the purpose of the Proposed Protocol.

11. *First*, regarding the definition of Prosecution witnesses, the formal decision to call witnesses to testify occurs usually months, if not years after the Prosecution has relied on their statements in the arrest warrant application, the document containing the charges, and/or any other filing (for example, a Rule 68 request). By restricting the definition of “Witnesses” to individuals for whom a formal decision has been made, the pool of individuals benefitting from the protection of the Proposed Protocol is significantly reduced and their protection considerably delayed. The suggested definition would allow the Defence to freely disclose the identity of individuals on whose statements the Prosecution relies to third parties before the confirmation decision¹⁶ without condition.¹⁷ Likewise, at that stage, the status of any

¹⁴ Under the Chambers Practice Manual “Confidential information” means “any information contained in a confidential document which has not otherwise legitimately been made public, and any information ordered not to be disclosed to third parties by any Chamber of the Court” (*see* para. 4(e)).

¹⁵ *See* ICC-01/14-01/18-51-AnxA, para. 4(f); ICC-01/14-01/18-51, paras. 29-30.

¹⁶ Logically, the Prosecution only decides which witnesses to call to testify after the charges are confirmed.

victim of sexual crimes for instance, could be openly discussed with family members without restriction.¹⁸ The Proposed Protocol is designed to protect against precisely this.

12. Moreover, adopting the Defence's proposed definition of Prosecution witnesses in the procedure for obtaining the consent to interview the witnesses of an opposing party¹⁹ would mean that any Prosecution witness could be interviewed without consent before a formal decision to call them is made, i.e., by definition before the confirmation decision is issued. In short, adopting the proposed definition nullifies important safeguards the Proposed Protocol intends to provide to witnesses beginning much earlier in the process.

13. *Second*, regarding the definition of Defence witnesses, it is unclear how the Prosecution could implement its obligations under the Protocol in respect of individuals whose names would have been 'communicated *ex parte* to the VWU' and whose identities 'have not yet been disclosed to the Prosecution'.²⁰ Contrary to the Defence's position, an *ex parte* notification to the VWU cannot serve as the 'appropriate hallmark' for defining a Defence witness under the Protocol.²¹ An *ex parte* notification, which by definition excludes all parties and participants from knowing the identity of such witnesses, renders compliance with the Proposed Protocol in respect of these individuals impossible.

14. *Third*, the Chamber should reject the Defence's proposal to limit the definition of witnesses of participants to "victims".²² This restrictive construction excludes other individuals who may need the protection provided by the Proposed Protocol,

¹⁷ As, for instance, paragraphs 10-14 of the Proposed Protocol would not apply to these individuals.

¹⁸ As, for instance, paragraph 15 of the Proposed Protocol would equally not apply to them.

¹⁹ As set out by the Defence in ICC-01/14-01/18-51-AnxA, paras. 27-28.

²⁰ See ICC-01/14-01/18-51-AnxA, para. 4(f), ICC-01/14-01/18-51, paras. 29-30.

²¹ See ICC-01/14-01/18-51, paras. 29-30.

²² See ICC-01/14-01/18-51-AnxA, para. 4(f).

such as witnesses relied upon by Legal Representatives of States or by other Legal Representatives participating in the case.

15. The Chamber should thus retain the definition of a “Witness” as set out in the Chambers Practice Manual with the amendments suggested by the Prosecution.²³

B. Reporting of breaches of confidentiality

16. The Defence suggests limiting the reporting of confidentiality breaches to VWU to those instances ‘where the revelation of confidential information or breach of confidentiality involves a witness²⁴ whose identity has not been made public’.²⁵ When such breach does not involve a particular witness, or when it involves confidential information regarding a witness whose identity (but not the confidential information) is public, no reporting of confidentiality breaches to VWU would be required. Adopting this approach would be erroneous for several reasons.

17. *First*, unlike any party or participant, the VWU is privy to all the witnesses and their security concerns in the case, including those unknown to other parties or participants. The VWU is therefore in a position to assess the consequences of any kind of confidentiality breach holistically.

18. *Second*, without any reporting obligations, the nature and frequency of those breaches cannot be evaluated, nor additional remedies imposed.

19. *Third*, maintaining a reporting obligation in the Proposed Protocol will help ensure that the parties and participants take seriously their obligations to secure and appropriately manage confidential information.

²³ See ICC-01/14-01/18-35-AnxA, para. 4(f).

²⁴ Defined restrictively by the Defence.

²⁵ See ICC-01/14-01/18-47, para. 25.

20. The Chamber should thus retain the reporting obligations as set out in the Chambers Practice Manual.²⁶

III. RELIEF SOUGHT

21. For the above reasons, the Prosecution requests that the Chamber reject the Defence's (1) suggested restrictive construction of the terms "Party", "Participant", "Confidential information", and "Witness"; and (2) proposal to limit the parties' and participants' obligation to report all breaches of confidentiality thereunder.



Fatou Bensouda, Prosecutor

Dated this 16th day of January 2019
At The Hague, The Netherlands

²⁶ See para. 24.