

PUBLIC ANNEX

Protocol on the handling of confidential information and contact between a party and witnesses of the opposing party

I. Introduction

1. The present protocol applies to the investigative activities for the purpose of preparation and presentation of the case of:
 - a. all prosecution and defence team members, resource persons and investigators;¹
 - b. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus.²

2. In this protocol, the following terms shall have the following meanings:³
 - a. “party” shall mean the Prosecutor or Mr. Banda and Mr. Jerbo, as the case may be, and their respective teams;⁴
 - b. “public” shall include all persons, governments, organizations, entities, associations and groups but shall not include a “party” as defined above, Mr. Banda and Mr. Jerbo, a judge or legal officer of the International Criminal Court (“Court”) or a member of the Registry of the Court.⁵
 - c. “confidential information” shall mean any information classified as such in accordance with Regulation 14(b) of the Regulations of the

¹ Annex A to Defence Response to Prosecution’s Submission of a Draft Protocol on the Handling of Non-Public information and Contact of a Party with Witnesses of the Opposing Party, 18 September 2012, ICC-02/05-03/09-394-AnxA, paragraph 2(a).

² ICC-02/05-03/09-394-AnxA, paragraph 2(c).

³ ICC-02/05-03/09-394-AnxA, paragraph 3.

⁴ ICC-02/05-03/09-394-AnxA, paragraph 3(a).

⁵ See for example Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the prosecution’s application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses, 3 June 2008, ICC-01/04-01/06-1372, paragraph 12; See also Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Annex to Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, 24 August 2012, ICC-01/09-01/11-449-Anx, paragraph 3.

Registry or classified as “*ex parte*” or “under seal”, only known to the parties and not to be disclosed to the public as defined above.⁶

- d. “Witness” shall refer to a person whom a party intends to call to testify during the trial proceedings, provided that such intention has been conveyed to the non-calling party, either by the calling party including the individual on its witness list, or by the witness informing the non-calling party that he or she has agreed to be called as another party's witness, or by any other means that establish a clear intention on behalf of the calling party to call the individual as a witness and that this individual has consented thereto.⁷

3. Unless stated otherwise, the Protocol also applies to any individual whom a party is aware of or has reasonable grounds to believe has provided a statement to or otherwise met with members of the opposing party as part of that party's investigation into *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* case and that the party has reasonable grounds to believe that the other party may call the individual as a witness.⁸

II. Limited disclosure and use of confidential information in the course of the parties' investigations for the purpose of preparation and preparation of their respective cases

4. The provision of confidential information, *inter partes*, and its subsequent use and disclosure is governed by the legal instruments of this Court,

⁶ Regulations of the Registry, Regulation 14(b).

⁷ ICC-01/09-01/11-449-Anx, paragraph 1.

⁸ ICC-02/05-03/09-394-AnxA, paragraph 3(d).

including without limitation the Rome Statute (“Statute”), the Rules of Procedure and Evidence (“Rules”), and the Code of Professional Conduct for counsel, and the relevant jurisprudence of the Court.⁹

5. Every party shall apply good practices throughout the investigations. An integral part of these good practices is to minimise the risk of exposing non-public information to the greatest extent possible.¹⁰
6. Confidential information disclosed to a party by the opposing party may only be disclosed to the public where such disclosure is directly and specifically necessary for the preparation and presentation of their case.¹¹
7. When confidential information is made known to a member of the public by a party, that party will explain to such a person the confidential nature of the information and that such information shall not be reproduced or disclosed to any one else in whole or in part.¹²
8. The disclosure of identifying information contained in visual and/ or non-textual material such as photographs or audio-tapes, which may reveal the involvement of the person or persons depicted in the activities

⁹ ICC-02/05-03/09-394-AnxA, paragraph 4.

¹⁰ ICC-02/05-03/09-394-AnxA, paragraph 5; See also ICC-01/09-01/11-449-Anx, paragraph 16; Annex A to Prosecution’s Submission of a Draft Protocol on the Handling of Non-Public Information and Contact of a Party With Witnesses of the Opposing Party, and Prosecution’s Update on Expert Witness, 27 August 2012, ICC-02/05-03/09-389-AnxA, paragraph 13.

¹¹ ICC-02/05-03/09-389-AnxA, paragraph 2; Trial Chamber V, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Annex to Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, 24 August 2012, ICC-01/09-02/11-469-Anx, paragraph 19; Pre-Trial Chamber III, *The Prosecutor v. Laurent Gbagbo*, Annex to Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations, 6 March 2012, ICC-02/11-01/11-49-Anx, page 1; ICC-01/04-01/06-1372, paragraph 9; ICC-02/05-03/09-394-AnxA, paragraph 6.

¹² ICC-02/05-03/09-394-AnxA, paragraph 7; See also ICC-02/05-03/09-389-AnxA, paragraph 8.

of the Court, can have a significant impact on the level of risk for the individuals concerned. The parties should only disclose such material where alternative modes of investigations have proved ineffective or are not feasible, and shall limit the disclosure of such material to what is directly and specifically necessary in the circumstances. To reduce the risk of disclosing the involvement in the activities of the Court of the persons depicted, the parties shall only disclose materials which do not contain elements which tend to reveal such involvement.¹³

9. The party disclosing confidential information shall keep a record of all of the circumstances in relation to such disclosure during their investigation and/ or preparation of the case. This record shall contain (i) the name and particulars of the person(s) to whom the information was communicated; (ii) the name of the person who communicated the information; (iii) the date at which the information was communicated; (iv) the location where the information was communicated; and (v) the purpose for which the information was disclosed.¹⁴

10. The party shall, in addition to keeping a record as indicated above in paragraph 9, also keep a log of all the members of the party's team having access to this material and the period in which they had such access.¹⁵ Any member of the legal teams of the prosecution or the defence

¹³ Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 20 July 2010, ICC-01/05-01/08-813-Red, paragraph 87; ICC-01/09-02/11-469-Anx, paragraph 21.

¹⁴ ICC-01/09-02/11-469-Anx, paragraph 22; ICC-02/05-03/09-389-AnxA, paragraph 8.

¹⁵ ICC-01/09-02/11-469-Anx, paragraph 23.

shall, upon no longer being part of those teams, return all confidential material in their possession to the relevant person within the team.¹⁶

III. Disclosure of identity of witnesses of the opposing party and other individuals as defined under paragraph 3 of the Protocol

11. This section of the protocol applies to both 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.¹⁷
12. The parties shall adhere to the high standards of confidentiality set out in the Code of Professional Conduct for counsel and the Code of Conduct for Investigators. The VWU remains available to provide training on good practices and advice to the Court staff and parties who are in direct contact with potential witnesses.¹⁸
13. The investigating party must use the names of the witnesses of the opposing party or of the individuals as defined under paragraph 3 of the Protocol with caution and in a targeted way, only when directly and specifically necessary for the purposes of its investigation or research. The requirement for caution is even more important when witnesses are in the Court's protection program (ICCPP).¹⁹

¹⁶ ICC-01/04-01/06-1372, paragraph 13; ICC-02/11-01/11-49-Anx, page 4; ICC-02/05-03/09-389-AnxA, paragraph 10.

¹⁷ ICC-02/05-03/09-389-AnxA, paragraph 12; ICC-02/05-03/09-394-AnxA, paragraph 9.

¹⁸ ICC-02/05-03/09-389-AnxA, paragraph 14; ICC-02/05-03/09-394-AnxA, paragraph 10.

¹⁹ ICC-02/05-03/09-389-AnxA, paragraph 16; ICC-02/05-03/09-394-AnxA, paragraph 11.

14. If the investigating party finds it directly and specifically necessary to disclose to a member of the public the identity or identifying information, including photographic images of any witness or individual for the purposes of preparation and presentation of their case, the party shall under no circumstances reveal (i) that the person is involved, directly or indirectly, with the activities of the Court; or (ii) the nature of such involvement.²⁰
15. Should the investigating party need to disclose the identity or photographic image of a witness who is in the ICCPP or of a person otherwise protected by the VWU, the VWU Head of Protection shall be informed of such intention as soon as possible. Additionally, the way disclosure will take place will be discussed with VWU.²¹
16. If the investigating party finds that the recipient of the information knows or understands that the witness whose identity is disclosed is involved with the Court, it must expressly inform the recipient of the confidential nature of this information and instruct her/him not to disclose the same. The investigating party must also inform the VWU Head of Protection of such an occurrence at the earliest possible moment.²²
17. In cases where there is a specific need to carry out inquiries as to the current location of protected witnesses, who are not participants in the ICCPP, or who have not been assisted by the Court to move away from

²⁰ ICC-02/05-03/09-389-AnxA, paragraph 17.

²¹ ICC-02/05-03/09-389-AnxA, paragraph 18; ICC-02/05-03/09-394-AnxA, paragraph 13.

²² ICC-02/05-03/09-389-AnxA, paragraph 19; ICC-02/05-03/09-394-AnxA, paragraph 14.

their initial place of residence, the investigating party or participant must inform the VWU Head of Protection before such an inquiry is to take place. Such needs may include investigations into the credibility of a witness where there is a reasonable basis for suspecting that the witness' location establishes a relevant association with another person.²³

18. The investigating party shall not make inquiries relating to the current location of protected witnesses who are participants in the ICC Protection Program (ICCPP), who have been assisted by the Court to move away from their initial place of residence or those whose location has been protected by the Chamber. The investigating party will inform the VWU Head of Protection as soon as possible, should the location of such protected witnesses become apparent to the investigating party. In addition, the investigating party shall bring to the attention of the VWU Head of Protection any reasonable suspicion that a witness may have been placed at risk for any reason (for example his/her participation as a witness is known) as soon as possible.²⁴

19. Furthermore, if it comes to the attention of a party that a third party knows or has become aware of information in violation of this Protocol, it shall inform the third party about the confidential nature of such information and that it should not be disclosed any further.²⁵

²³ ICC-02/05-03/09-389-AnxA, paragraph 20; ICC-02/05-03/09-394-AnxA, paragraph 15; ICC-01/04-01/07-2007-Anx1, page 1.

²⁴ ICC-02/05-03/09-389-AnxA, paragraphs 21 to 23; ICC-02/05-03/09-394-AnxA, paragraphs 16 to 18; ICC-01/09-01/11-449-Anx, paragraphs 24 and 25; ICC-01/09-02/11-469-Anx, paragraphs 24 and 25; ICC-02/11-01/11-49-Anx, page 2; ICC-01/04-01/07-2007-Anx1, page 2.

²⁵ ICC-02/05-03/09-389-AnxA, paragraphs 24 and 25; ICC-01/09-01/11-449-Anx, paragraph 36 and ICC-01/09-02/11-469-Anx, paragraph 36

IV. Regulation of contacts between a party and a witness of the opposing party

20. This section applies only to a “witness” as defined under paragraph 2(d) of the Protocol.
21. A party interviewing a witness can only do so if the witness consents to such interview.²⁶
22. The party seeking to contact a witness of the opposing party will provide the latter with reasonable notice of its intent to do so. Such a procedure will allow the opposing party to ask the witness whether he/she agrees to be contacted or interviewed and whether there are any objections to the opposing party disclosing their contact details and whereabouts to the party seeking contact if not already known.²⁷
23. If the party who intends to call a witness objects to the interview of that witness, it shall inform the non-calling party. If the parties cannot reach an agreement, despite their best efforts, they shall promptly raise the matter with the Chamber.²⁸
24. Without prejudice to Article 56 of the Statute, Rule 114 of the Rules and Article 57(3)(b) of the Statute, the non-calling party shall not proceed with the interview until the Chamber rules on the matter.²⁹

²⁶ ICC-02/05-03/09-394-AnxA, paragraph 19; See also ICC-02/05-03/09-389-AnxA, paragraph 34; ICC-01/04-01/06-1372, paragraphs 11 and 14; ICC-01/05-01/08-813-Red, paragraphs 66 to 68.

²⁷ ICC-02/05-03/09-389-AnxA, paragraph 35.

²⁸ ICC-01/09-01/11-449-Anx, paragraph 8; ICC-01/09-02/11-469-Anx, paragraph 8.

²⁹ ICC-01/09-01/11-449-Anx, paragraph 9; ICC-01/09-02/11-469-Anx, paragraph 9.

25. Once the witness has given her/his consent to be interviewed, the opposing party and the VWU are to make the necessary arrangements with respect to the date and location of the interview, which shall then be communicated to the party requesting the interview.³⁰ However, should there be any remaining security concerns, in particular in relation to an ICCPP witness, the calling party shall inform the VWU who will take the necessary steps in order to assist the parties in organising the meeting in a safe manner.³¹

26. The party calling the witness or relying on his or her statement at trial is entitled to have a representative attend the interview. However, if the interviewing party objects to such a presence, an application may be filed with the Chamber for a decision on the matter.³²

27. If the witness agrees to be interviewed by the opposing party without a representative of the calling party, there is no need for an application to the Chamber, as the witness' consent is sufficient.³³

28. In the event that a witness refuses the presence of the representative of the calling party, the interview shall take place without such a representative.³⁴

29. In addition, in the case of a particularly vulnerable witness or a witness in need of assistance during the interview, it is the responsibility of the

³⁰ ICC-02/05-03/09-394-AnxA, paragraph 19.

³¹ ICC-02/05-03/09-389-AnxA, paragraph 38.

³² ICC-02/05-03/09-389-AnxA, paragraph 36; ICC-02/05-03/09-394-AnxA, paragraph 20.

³³ ICC-02/05-03/09-389-AnxA, paragraph 36.

³⁴ ICC-02/05-03/09-389-AnxA, paragraph 37.

calling party to ensure that the appropriate assistance is provided to that witness and independent of her/his wishes. Where necessary, the calling party shall contact the VWU well in advance of the scheduled interview in order to arrange for an assessment of the need for assistance and/or to provide instruction about the modalities of questioning.³⁵

30. All contact with witnesses who are participants within the ICCPP will be facilitated by the VWU. In the event that the investigating party wishes to meet a witness who is a participant within the ICCPP, the VWU will inform the investigating party of the location at which the meeting will take place and the VWU will undertake all necessary logistical arrangements for the witness to be present in the location specified on the date previously agreed with the investigating party.³⁶

31. A video or audio record of the interview will be provided to the party calling the witness or relying on his or her statement at the conclusion of the interview.³⁷

V. Derogation

32. Any deviation from this Protocol requires the prior authorisation of the Trial Chamber.³⁸

³⁵ ICC-02/05-03/09-389-AnxA, paragraph 39; ICC-02/05-03/09-394-AnxA, paragraph 22.

³⁶ ICC-02/05-03/09-389-AnxA, paragraph 40.

³⁷ ICC-02/05-03/09-389-AnxA, paragraph 41; See also ICC-02/05-03/09-394-AnxA, paragraph 23 and Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the "Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure", 4 September 2012, ICC-01/05-01/08-2293, paragraph 31.

³⁸ ICC-02/05-03/09-389-AnxA, paragraph 42 and ICC-02/05-03/09-394-AnxA, paragraph 24.