

**PROTOCOL ON THE HANDLING OF CONFIDENTIAL INFORMATION DURING
INVESTIGATIONS AND CONTACT BETWEEN A PARTY AND WITNESSES
OF THE OTHER PARTIES**

I. Introduction

1. This Protocol sets out the procedures governing the handling of confidential information during investigations, including the circumstances in which disclosure of the identity of a protected witness from another party can be effectuated, as well as the conditions under which the investigating party is authorised to contact witnesses of the other parties. The purpose of the Protocol is to protect the safety of witnesses and other individuals at risk, as well as the integrity of investigations, in a manner consistent with the rights of the accused.
2. The parties shall adhere to the high standards of confidentiality set out in the Code of Professional Conduct for Counsel, the Code of Conduct for Investigators and the Code of Conduct of the Office of the Prosecutor and any binding national codes of conduct, to the extent that these do not conflict with the above.¹ In addition, all intermediaries from both sides shall abide by the Code of Conduct for Intermediaries.
3. The scope of this Protocol is confined to the case ICC-01/05-01/13. It does not create any new obligations or modify existing obligations or rights in case ICC01/05-01/08.

II. Definitions

4. In this Protocol, the terms below shall have the following meaning:
 - a. “party” is the Prosecutor or Jean-Pierre Bemba, Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, or Narcisse Arido and their respective teams, including counsel, resource persons, and investigators;
 - b. “public” means all persons, governments, organisations, entities, associations and groups but shall not include a ‘party’ as defined above, a judge or legal officer of the International Criminal Court (“Court”) or a member of the Registry of the Court;²

¹ Trial Chamber VI, *Ntaganda*, 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, ICC-01/04-02/06-412-AnxA, para. 2; Trial Chamber IV, *Banda and Jerbo*, Protocol on the handling of confidential information and contact of between a party and witnesses of the opposing party, ICC-02/05-03/09-451-Anx, para. 12.

² ICC-01/04-02/06-412-AnxA, para. 3; ICC-02/05-03/09-451-Anx, para. 2.

- c. “others at risk” are persons at risk on account of their activities for the Court or on account of testimony or statements given by others;³
 - d. “confidential information” is any information classified as such in accordance with regulation 14(b) of the Regulations of the Registry or classified as “ex parte”, “confidential” or “under seal”, information only known to the parties and not to be disclosed to the public;⁴
 - e. “witness” is a person whom a party intends to call to testify or on whose statement the party intends to rely upon, provided that such intention has been conveyed to the non-calling party, by means that establish a clear intention on behalf of the calling party to rely upon the individual as a witness.⁵
5. All obligations listed in this protocol that apply to the parties also apply to their staff, any intermediaries they may use, any other individuals who perform tasks on the parties’ behalf, and the accused.

III. Use of Confidential Information in the Course of the Investigations

- 6. The provision of confidential information between parties and its subsequent use and disclosure are governed by the legal instruments of this Court, including the Rome Statute (“Statute”), the Rules of Procedure and Evidence (“Rules”), and the relevant jurisprudence of the Court.⁶
- 7. Throughout the investigation and proceedings, the parties shall undertake to minimise the risk of exposing confidential information to the greatest extent possible.⁷
- 8. Confidential information disclosed to a party by the other party/ies may only be disclosed to any members of the public where such disclosure is directly and specifically necessary for the preparation and presentation of their case.⁸ Members of the public should only be shown those portions of the confidential information that are directly and specifically necessary for the preparation and presentation of the party’s case.

³ ICC-01/04-02/06-412-AnxA, para. 3; Trial Chamber V, *Ruto and Sang*, Protocol on the handling of confidential information and contact between a party and witnesses whom the opposing party intends to call; ICC-01/09-01/11-449-Anx, para. 2.

⁴ ICC-01/04-02/06-412-AnxA, para. 3; ICC-02/05-03/09-451-Anx, para. 2.

⁵ ICC-01/04-02/06-412-AnxA, para. 3; ICC-02/05-03/09-451-Anx, para. 2.

⁶ ICC-01/04-02/06-412-AnxA, para. 5; ICC-02/05-03/09-451-Anx, para. 4.

⁷ See ICC-01/04-02/06-412-AnxA, para. 6; ICC-02/05-03/09-451-Anx, para. 5; Pre-Trial Chamber III, *Gbagbo*, Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations, ICC-02/11-01/11-49-Anx, 6 March 2012, p.1.

⁸ ICC-01/04-02/06-412-AnxA, para. 7; ICC-02/05-03/09-451-Anx, para. 5 (“directly and specifically necessary”); ICC-02/11-01/11-49-Anx, p. 3 (“necessary and inevitable”); Trial Chamber I, *Lubanga*, 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, ICC-01/04-01/06-1372, 3 June 2008, para. 12 (“truly necessary”).

9. When confidential information is made known to a member of the public by a party, that party shall explain to such a person the confidential nature of the information and that such information shall not be reproduced or disclosed to anyone else, in whole or in part.⁹ Unless otherwise authorised by the Chamber, and without prejudice to Rule 112(1)(e) and (3) of the Rules, members of the public should not retain a hard copy of the information.¹⁰
10. Visual and/or non-textual material such as photographs depicting witnesses, whose identity is not known to the public, should be used only when no satisfactory alternative investigative avenue is available.¹¹ To reduce the risk of disclosing the involvement in the activities of the Court of the persons depicted or otherwise reflected, the parties shall only show such visual and/or non-textual materials which do not contain elements which tend to reveal such involvement, and are in compliance with paragraph 23 of this Protocol.¹² Additionally, when photographs depicting witnesses are used, these shall only be shown together with other photographs of the same kind.¹³ Unless otherwise authorised by the Chamber, members of the public should not retain electronic or hard copies of photographs depicting witnesses or other individuals involved with the Court.¹⁴
11. The party disclosing confidential information shall keep a record in any form of the circumstances in relation to such disclosure during their investigation and/or preparation of the case,¹⁵ including: (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 on which the information was communicated; and (iv) the location where the information was communicated.¹⁶
12. In the event of an allegation by another party that confidential information has been disclosed in a manner prohibited under this Protocol, the Chamber may instruct the investigating party to disclose the records listed in paragraph 13 below, or part thereof, provided the party requesting disclosure satisfies the Chamber that there is a concrete and credible basis for the request. The Chamber, in its discretion, may consider whether to review the records prior to disclosure.

⁹ ICC-01/04-02/06-412-AnxA, para. 8; ICC-02/05-03/09-451-Anx, para. 7.

¹⁰ See ICC-01/04-02/06-412-AnxA, para. 8.

¹¹ ICC-01/04-02/06-412-AnxA, para. 9; see also ICC-02/11-01/11-49-Anx, p. 4; ICC-02/05-03/09-451-Anx, para. 8; Trial Chamber III, *Bemba Gombo*, Redacted decision on the Prosecution's requests to lift, maintain and apply redactions to witness statements and related documents, ICC-01/05-01/08-813-Red, 20 July 2010, para. 87.

¹² ICC-01/04-02/06-412-AnxA, para. 9; ICC-02/05-03/09-451-Anx, para. 8; ICC-01/05-01/08-813-Red, para. 87.

¹³ ICC-01/04-02/06-412-AnxA, para. 9.

¹⁴ See ICC-01/04-02/06-412-AnxA, para. 9.

¹⁵ ICC-01/04-02/06-412-AnxA, para. 10; ICC-02/05-03/09-451-Anx, para. 9; ICC-02/11-01/11-49-Anx, p. 4; ICC-01/04-01/06-1372, para. 12; ICC-01/05-01/08-813-Red, para. 87.

¹⁶ ICC-01/04-02/06-412-AnxA, para. 10; ICC-02/05-03/09-451-Anx, para. 9; Trial Chamber V, *Muthaura and Kenyatta*, Protocol concerning the handling of confidential information and contacts of party with witnesses whom the opposing party intends to call, ICC-01/09-02/11-469-Anx, 24 August 2012, para. 22.

13. The party shall keep a record of all the members of the party's team having access to this material and the period during which they had such access.¹⁷ Any member of the legal teams of the parties shall, upon separation from those teams, return all confidential material in their possession to the relevant person within the team.¹⁸ The head of such legal teams shall take reasonable measures to ensure that such confidential material is returned.¹⁹

IV. Inadvertent Disclosure

14. In the event that a party discovers that it has disclosed material in error, whether in whole or in part, it shall immediately inform the party to whom disclosure was made ("the receiving party").²⁰ The Victims and Witnesses Unit ("VWU") shall also be informed if any witness concerned is in the ICCPP or is otherwise provided with any form of protective measures.²¹
15. In the event that any member of the receiving party discovers that (s)he has received material that (s)he believes should not have been disclosed in whole or in part, (s)he shall bring that fact immediately upon discovery to the attention of the disclosing party. Pending confirmation by the disclosing party that such material should not have been disclosed, members of the receiving party shall act in good faith and refrain from sharing the material in any manner including with the accused²² and, to the extent possible, with other members of the team.²³
16. As soon as the disclosing party informs the receiving party or confirms that the material or a part thereof should not have been disclosed, the receiving party shall return to the disclosing party the material as well as any copies that it may have made. The receiving party shall delete any electronic copies in its possession.²⁴
17. Should a dispute arise as to whether or not the material should have been disclosed in whole or in part, the parties shall first seek to resolve the dispute on an *inter partes* basis. If they are unable to do so, the matter may be brought to the attention of the Chamber by way of application.²⁵

¹⁷ ICC-01/04-02/06-412-AnxA, para. 11; ICC-02/05-03/09-451-Anx, para. 10.

¹⁸ ICC-01/04-02/06-412-AnxA, para. 11; ICC-02/05-03/09-451-Anx, para. 10.

¹⁹ ICC-01/04-02/06-412-AnxA, para. 11; ICC-02/05-03/09-451-Anx, para. 10; ICC-02/11-01/11-49-Anx, p. 4; ICC-01/04-01/06-1372, para. 13.

²⁰ ICC-01/04-02/06-412-AnxA, para. 12; Trial Chamber V, *Ruto and Sang*, Protocol establishing a redaction regime in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-458-AnxA-Corr, 5 October 2012, para. 21.

²¹ ICC-01/04-02/06-412-AnxA, para. 12.

²² ICC-01/04-02/06-412-AnxA, para. 13; see also ICC-01/09-01/11-458-AnxA-Corr, para. 22.

²³ ICC-01/04-02/06-412-AnxA, para. 13.

²⁴ ICC-01/04-02/06-412-AnxA, para. 14; ICC-01/09-01/11-458-AnxA-Corr, para. 23.

²⁵ See ICC-01/04-02/06-412-AnxA, para. 15; ICC-01/09-01/11-458-AnxA-Corr, para. 24.

18. Moreover, the receiving party will instruct any individuals who have read or have had access to the inadvertently disclosed material to refrain from using the material any further²⁶ and will ensure that all remaining copies of the inadvertently disclosed material are returned to the disclosing party and any electronic copies destroyed.²⁷

V. Disclosure of the Identity of Witnesses of Other Parties in the Course of Investigations

19. This section of the Protocol applies to witnesses 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,²⁸ including those applicable in other cases before the Court.
20. The VWU remains available to provide training on best practices and advice to the Court staff, and the parties.²⁹ If a party is in any doubt as to whether a proposed investigative activity may lead to the disclosure of the identity of a protected witness, it shall seek the advice of the VWU.
21. It is essential that the investigating party avoid whenever possible the security risk of disclosing to a member of the public the identity of witnesses.³⁰ The provisions of this Protocol concern situations where such disclosure is considered directly and specifically necessary for the purpose of investigation and/or preparation of the case.³¹

Use of Names or Other Identifying Information

22. The investigating party shall use the names of witnesses of the other parties with caution and only when directly and specifically necessary for the purposes of its investigation and/or preparation of its case.³²
23. If the investigating party finds it directly and specifically necessary for the preparation and presentation of its case to disclose to a member of the public the name or identifying information of a witness, the party shall under no circumstances reveal (i) that the person is involved, directly or indirectly, with the

²⁶ ICC-01/04-02/06-412-AnxA, para. 16; ICC-01/09-01/11-458-AnxA-Corr, para. 25.

²⁷ ICC-01/04-02/06-412-AnxA, para. 16.

²⁸ ICC-01/04-02/06-412-AnxA, para. 17; ICC-02/05-03/09-451-Anx, para. 11.

²⁹ ICC-02/05-03/09-451-Anx, para. 12; ICC-01/09-01/11-449-Anx1, para. 17.

³⁰ ICC-01/04-02/06-412-AnxA, para. 19; ICC-02/11-01/11-49-Anx, p. 1.

³¹ ICC-01/04-02/06-412-AnxA, para. 19.

³² ICC-01/04-02/06-412-AnxA, para. 20; ICC-02/05-03/09-451-Anx, para. 13; ICC-02/11-01/11-49-Anx, p.

1.

activities of the Court; or (ii) the nature of such involvement.³³ In case of any doubt as to the necessity of the disclosure, the Chamber shall decide.³⁴

24. Should the investigating party need to disclose the identity of a witness who is in the ICCPP or who has otherwise been relocated with the assistance of the Court, during the course of specific investigations related to that witness, the investigating party shall liaise with the VWU prior to the mission in which such disclosure may take place. The investigating party shall communicate to the VWU the details of the place, time and, to the extent possible, the types of organisations, institutions and, if available, the persons that the party intends to contact and to which it intends to disclose the identity in question. Additionally, the way disclosure will take place will be discussed with the VWU, which shall provide the investigating party with its best practices and advice in relation to the specific information communicated by that party.³⁵
25. Should the investigating party need to disclose the identity of a witness who is otherwise protected by the VWU, the investigating party shall inform the VWU as soon as possible, but in any event prior to disclosure.³⁶
26. The investigating party shall not make inquiries relating to the current location of protected witnesses or other persons admitted to the ICCPP, who have been assisted by the Court to move away from their initial place of residence, or whose location has been protected by the Chamber. Should the location of such protected witnesses or persons become known or apparent to the investigating party, it shall inform the VWU as soon as possible.³⁷

Breaches of confidentiality

27. If the investigating party finds that the recipient of the information knows or understands that a witness, including a witness admitted in the ICCPP, is involved with the Court, it must expressly inform the recipient of the confidential nature of this information and instruct him or her not to disclose this information any further. The investigating party must also inform the VWU of such an occurrence as soon as possible.³⁸
28. An investigating party shall bring to the attention of the VWU as soon as possible any reasonable suspicion that a witness, members of his or her family, or others at

³³ ICC-01/04-02/06-412-AnxA, para. 21; ICC-02/05-03/09-451-Anx, para. 14; ICC-02/11-01/11-49-Anx, p. 1; ICC-01/05-01/08-813-Red, para. 84.

³⁴ ICC-01/04-02/06-412-AnxA, para. 21.

³⁵ ICC-01/04-02/06-412-AnxA, para. 22; ICC-01/04-02/06-185, para. 15.

³⁶ ICC-01/04-02/06-412-AnxA, para. 23.

³⁷ See ICC-01/04-02/06-412-AnxA, para. 24; ICC-02/05-03/09-451-Anx, para. 18; ICC-02/11-01/11-49-Anx, p. 2(e-f); ICC-01/04-01/07-1956-Anx1, para. (e).

³⁸ ICC-01/04-02/06-412-AnxA, para. 26.

risk, may have been placed at risk for any reason (for example, if his or her participation as a witness is known, or his/ her protected location has become known).³⁹

29. Likewise, if a party has revealed confidential information, or has become aware of any other breach of the confidentiality of information under this Protocol, or realises that a third party has become aware of confidential information, it shall inform the recipient of the information about the confidential nature of such information and instruct him not to disclose it any further.⁴⁰ In addition, it shall immediately inform the VWU,⁴¹ who will keep confidential any information that could impact ongoing investigations into such a breach.

*Prior consent to disclosure secured from witnesses by the calling party*⁴²

30. The parties carry the responsibility of ensuring that the witnesses they intend to call provide, whenever possible, their informed consent to their involvement with the Court. This consent should be provided before the provision of any witness statement.⁴³
31. If the party collects visual and/or non-textual material from the witness, it shall clarify explicitly how these materials may be disclosed.⁴⁴

VI. Regulation of Contacts Between a Party and a Witness of the Other Party

32. This section of the Protocol governs the conditions under which the investigating party is allowed to contact witnesses of the other party.
33. This section applies only to a “witness”, as defined under paragraph 4(e) of the Protocol.

Consent

34. A party who seeks to interview a witness of the other party can only do so if the witness consents to the interview.⁴⁵

³⁹ ICC-01/04-02/06-412-AnxA, para. 27; ICC-02/05-03/09-451-Anx, para. 18; ICC-02/11-01/11-49-Anx, p. 2(f); ICC-01/04-01/07-1956-Anx1, para. (f).

⁴⁰ See ICC-01/04-02/06-412-AnxA, para. 28; ICC-02/05-03/09-451-Anx, para. 19.

⁴¹ ICC-01/04-02/06-412-AnxA, para. 28; ICC-01/09-01/11-449-Anx, para. 35.

⁴² ICC-01/09-01/11-449-Anx, paras. 26-32.

⁴³ ICC-01/04-02/06-412-AnxA, para. 29.

⁴⁴ ICC-01/04-02/06-412-AnxA, para. 30.

⁴⁵ ICC-01/04-02/06-412-AnxA, para. 33; ICC-02/05-03/09-451-Anx, para. 21; ICC-01/04-01/06-1372, para. 11; Trial Chamber II, *Katanga and Ngudjolo*, Decision on a number of procedural issues raised by the Registry, ICC-01/04-01/07-1134, 14 May 2009, para. 28.

Notification to the Other Party

35. The party seeking to contact a witness of the other party will provide the calling party with notice within reasonable timeframe of its intent to do so.⁴⁶ Such a procedure will allow the calling party to ask the witness whether he/she agrees to be contacted or interviewed.⁴⁷ After being notified, the party calling the witness shall seek the consent of the witness within five business days of receiving notification.⁴⁸
36. The decision whether to be interviewed is up to the witness. The calling party shall not attempt to influence the witness's decision whether to agree to be interviewed by the other party.⁴⁹
37. If the calling party is unable to contact the witness in question within 5 business days, the investigating party may apply to the Chamber and request it instructs the VWU to attempt to contact the witness for the purpose of an interview.

Contact with Individuals Participating in the ICCPP and those subject to an assisted move

38. When the party wishing to interview a witness is aware that the witness is a participant in the ICCPP, or has otherwise been relocated with the assistance of the Court, the party shall notify the calling party and also inform the VWU.⁵⁰
39. All contact with individuals who are part of the ICCPP shall be facilitated exclusively by the VWU.⁵¹

Presence during the Interview

40. The witness is entitled to have a representative attend the interview. This is the choice of the witness; the calling party shall not influence the witness's decision on whether to have a representative present during the interview.
41. In addition, independent of the wishes of the witness, it is the responsibility of the calling party to ensure that, if the witness is particularly vulnerable or otherwise in need of assistance during the interview, the appropriate assistance is provided and that, where necessary, it contacts the VWU well in advance of the scheduled

⁴⁶ ICC-01/04-01/06-1372, para. 14; ICC-02/05-03/09-451-Anx, para. 22. See ICC-01/04-02/06-412-AnxA , para. 34;

⁴⁷ ICC-01/04-02/06-412-AnxA , para. 34; ICC-02/05-03/09-451-Anx, para. 22.

⁴⁸ ICC-01/04-02/06-412-AnxA , para. 34; ICC-01/09-02/11-469-Anx, para. 7.

⁴⁹ ICC-01/04-02/06-412-AnxA, 35; ICC-01/04-01/07-1134, para. 28.

⁵⁰ See ICC-01/04-02/06-412-AnxA, para. 36; ICC-01/09-02/11-469-Anx, para. 14.

⁵¹ ICC-01/04-02/06-412-AnxA, para. 37; ICC-01/09-02/11-469-Anx, para. 15; ICC-02/05-03/09-451-Anx, para. 30.

interview in order to arrange for an assessment of the need for assistance by a VWU representative during the interview.⁵²

42. The representative of the calling party present at the interview shall not, in any manner, prevent or dissuade the witness from answering questions freely. In the event that the calling party disagrees with or objects to any part of the procedure followed or any particular line or manner of questioning of the witness, it shall raise the issue with the investigating party, outside of the presence of the witness. The disagreement shall be recorded and shall not impede or unduly disrupt the interview.⁵³ The investigating party may, in the event of repeated interference by the representative of the calling party, adjourn the interview and apply to the Chamber for leave to conduct it without the presence of the calling party representative.

Arranging the interview

43. Once the witness has given his or her consent to be interviewed, the party calling the witness or relying on his or her statement shall inform the investigating party and contact shall be facilitated, as appropriate.⁵⁴ If a representative of the calling party attends the interview, the calling party shall bear its own travel and other costs associated with the interview.⁵⁵
44. If the calling party is unable to travel to the particular location where the witness is resident, the parties shall endeavour to reach agreement concerning alternative arrangements for the participation of the calling party, including facilitating the participation of the calling party by video link, or holding the interview with the witness at the seat of the Court.
45. In principle, the parties shall make all the necessary logistical arrangements in accordance with best practices.⁵⁶ However, should there be any remaining security concerns, the calling party shall inform the VWU for the latter to assess the situation and, if necessary, take relevant steps to assist the parties in organising the meeting in a safe manner.⁵⁷
46. In the event that the investigating party wishes to interview a witness who is a participant in 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

⁵² See ICC-01/04-02/06-412-AnxA, para. 41; ICC-01/04-01/07-1134, para. 27; ICC-01/09-02/11-469-Anx, para. 13; ICC-02/05-03/09-451-Anx, para. 29.

⁵³ See ICC-01/09-02/11-469-Anx, para. 11; see also Trial Chamber III, *Bemba Gombo*, ICC-01/05-01/08-2293, 15 October 2012, para. 32.

⁵⁴ ICC-01/04-02/06-412-AnxA, para. 42; ICC-01/09-02/11-469-Anx, para. 7.

⁵⁵ ICC-01/04-02/06-412-AnxA, para. 42; ICC-01/05-01/08-2293, para. 31.

⁵⁶ ICC-01/04-02/06-412-AnxA, para. 43; ICC-01/09-02/11-469-Anx, para. 12.

⁵⁷ ICC-01/04-02/06-412-AnxA, para. 43; ICC-01/09-02/11-469-Anx, para. 12.

necessary logistical arrangements for the witness to be present in the location specified on the date previously agreed with the investigating party.⁵⁸

Recording of the Interview

47. A video or audio record of the entire interview shall be provided to the party calling the witness or relying on his or her statement as soon as practicable after the conclusion of the interview.⁵⁹

VII. Derogation

48. Any deviation from this Protocol requires the prior authorisation of the Chamber.⁶⁰

⁵⁸ ICC-01/04-02/06-412-AnxA , para. 44; ICC-01/09-02/11-469-Anx, para. 15; ICC-02/05-03/09-451-Anx, para. 30.

⁵⁹ ICC-01/04-02/06-412-AnxA , para. 45; ICC-02/05-03/09-451-Anx, para. 31.

⁶⁰ ICC-01/04-02/06-412-AnxA, para. 46; ICC-02/05-03/09-451-Anx, para. 32.