

# **ANNEX A**

# **PUBLIC**

**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**

**I. Introduction**

1. The 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 the opposing party can be effectuated, as well as the conditions under which the investigating party or participant is authorised to contact witnesses of the opposing party or of a participant. The purpose of the Protocol is to protect 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 accused.
2. The parties and participants shall adhere to the high standards set out in, *inter alia*, the Code of Professional Conduct for counsel, the Code of Conduct for Investigators and the Code of Conduct of the Office of the Prosecutor.

**II. Definitions**

3. In this Protocol, the terms below shall have the following meaning:
  - a. 'party' shall mean the Prosecutor or Mr Ntaganda, as the case may be, and their respective teams, including counsel, resource persons, and investigators;
  - b. 'participant' shall mean the legal representatives of victims and their teams;
  - c. 'public' shall include all persons, governments, organisations, entities, associations and groups but shall not include a 'party' or 'participant' as defined above, a judge or legal officer of the International Criminal Court ('Court') or a member of the Registry of the Court;<sup>1</sup>

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<sup>1</sup> See Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Protocol on the handling of confidential information and contact between a party and witnesses of the opposing party; 18 February 2013, ICC-02/05-03/09-451-Anx, para. 2.

- d. 'others at risk' are persons at risk on account of the activities of the Court;<sup>2</sup>
  - e. 'confidential information' shall mean 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', only known to the parties and, if appropriate, participants, and not to be disclosed to the public;<sup>3</sup>
  - f. 'witness' shall refer to a person whom a party or participant intends to call to testify or whose statement the party or participant intends to rely upon, provided that such intention has been conveyed to the non-calling party or participant by means that establish a clear intention on behalf of the calling party or participant to rely upon the individual as a witness.<sup>4</sup>
4. All obligations listed in the current protocol that apply to the parties and participants also apply to the intermediaries they use, any other individuals who perform tasks on their behalf and the suspects or accused.

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

- 5. The provision of confidential information between parties and participants and its subsequent use and disclosure is governed by the legal instruments of this Court, including without limitation the Rome Statute ('Statute') the Rules of Procedure and Evidence ('Rules') and the relevant jurisprudence of the Court.<sup>5</sup>
- 6. Every party or participant shall apply best practices throughout the investigation. An integral part of these best practices is to minimise the risk of exposing confidential information to the greatest extent possible.<sup>6</sup>

<sup>2</sup> See Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 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, para. 2; Trial Chamber V, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, 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, para. 2.

<sup>3</sup> ICC-02/05-03/09-451-Anx, para. 2.

<sup>4</sup> ICC-02/05-03/09-451-Anx, para. 2.

<sup>5</sup> See ICC-02/05-03/09-451-Anx, para. 4.

<sup>6</sup> ICC-02/05-03/09-451-Anx, para. 5; Pre-Trial Chamber III, *The Prosecutor v. Laurent 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, 6 March 2012, ICC-02/11-01/11-49-Anx, page 1.

7. Confidential information disclosed to a party or participant by the opposing party or by a participant may only be disclosed to the public where such disclosure is directly and specifically necessary for the preparation and presentation of their case.<sup>7</sup>
8. When confidential information is made known to a member of the public by a party or participant, that party or participant will 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.<sup>8</sup> Unless otherwise authorised by the Chamber, members of the public should not retain a hard copy of the information.
9. Visual and/or non-textual material such as photographs depicting witnesses should be used only when no satisfactory alternative investigative avenue is available.<sup>9</sup> To reduce the risk of disclosing the involvement in the activities of the Court of the persons depicted or otherwise reflected, the parties and participants shall only use such visual and/or non-textual material which do not contain elements which tend to reveal such involvement, and are in compliance with paragraph 21 of this Protocol.<sup>10</sup> Additionally, when photographs depicting witnesses or victims are used, these shall only be shown together with other photographs of the same kind. Unless otherwise authorised by the Chamber, members of the public should not retain a hard copy of photographs depicting witnesses or other individuals involved with the Court.
10. The party or participant 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,<sup>11</sup> including: (i)

<sup>7</sup> ICC-02/05-03/09-451-Anx, para. ('directly and specifically necessary'); ICC-02/11-01/11-49-Anx, page 3 ('necessary and inevitable'); 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, para. 12 ('truly necessary').

<sup>8</sup> ICC-02/05-03/09-451-Anx, para. 7.

<sup>9</sup> ICC-02/11-01/11-49-Anx, page 4; ICC-02/05-03/09-451-Anx, para. 8; Trial Chamber III, *The Prosecutor v. Jean-Pierre 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.

<sup>10</sup> ICC-02/05-03/09-451-Anx, para. 8; ICC-01/05-01/08-813-Red, para. 87.

<sup>11</sup> ICC-02/05-03/09-451-Anx, para. 9; ICC-02/11-01/11-49-Anx, page 4; ICC-01/04-01/06-1372, para. 12; ICC-01/05-01/08-813-Red, para. 87.

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; and (iv) the location where the information was communicated.<sup>12</sup>

11. The party or participant shall keep a record of all the members of the party's or participant's team having access to this material and the period during which they had such access.<sup>13</sup> Any member of the legal teams of the parties and participants shall, upon separation from those teams, return all confidential material in their possession to the relevant person within the team.<sup>14</sup> The head of such legal teams shall take reasonable measures to ensure that such confidential material is returned.

#### IV. Inadvertent Disclosure

12. In the event that a disclosing party or participant discovers that it has disclosed material that should not have been disclosed or should have been disclosed in redacted form, it shall immediately inform the receiving party or participant.<sup>15</sup> The Victims and Witnesses Unit ('VWU') shall also be informed if the witness concerned is in the ICCPP or is otherwise provided with any form of protective measures.
13. In the event that the receiving party or participant discovers that it has received material that it believes should not have been disclosed or should have been disclosed in redacted form, the receiving party or participant shall bring that fact immediately upon discovery to the attention of the disclosing party or participant. Pending confirmation by the disclosing party or participant that the material should not have been disclosed or should have been disclosed in redacted form, the member of the team having received the said material shall act in good faith and refrain from sharing the material in any manner, including with the accused and, to the extent possible, with other members of the team.

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<sup>12</sup> See ICC-02/05-03/09-451-Anx, para. 9; ICC-01/09-01/11-449-Anx, para. 22.

<sup>13</sup> ICC-02/05-03/09-451-Anx, para. 10.

<sup>14</sup> ICC-02/05-03/09-451-Anx, para. 10; ICC-02/11-01/11-49-Anx, page 4; ICC-01/04-01/06-1372, para. 13.

<sup>15</sup> Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap 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.

14. As soon as the disclosing party or participant informs the receiving party or participant or confirms that the material should not have been disclosed or should have been disclosed in redacted form, the receiving party or participant shall return to the disclosing party the material as well as any copies that it may have made. The receiving party or participant shall delete any electronic copies in its possession.<sup>16</sup>
15. Should a dispute arise as to whether or not the material should have been disclosed or should have been disclosed in redacted form, the parties and participants shall first seek to resolve the dispute on between themselves. If they are unable to do so, the matter may be brought to the attention of the Chamber by way of written application.<sup>17</sup>
16. Moreover, the receiving party or participant will instruct any individuals who have read or have had access to the inadvertently disclosed material to refrain from using the material any further and will ensure that all remaining copies of the inadvertently disclosed material are returned to the disclosing party and any electronic copies destroyed.<sup>18</sup>

#### **V. Disclosure of the Identity of Witnesses of Other Parties and Participants In the Course of Investigations**

17. This section of the Protocol applies to witnesses whose identity or relationship with the Court has not yet been made public by a party, participant or by the Chamber or who have other protective measures known to the investigating party or participant.<sup>19</sup>
18. The VWU remains available to provide training on best practices and advice to the Court staff, parties and participants who are in direct contact with potential witnesses and with victims.<sup>20</sup>
19. It is essential that the investigating party or participant avoid whenever possible the security risk of disclosing to a member of the public the identity of witnesses.<sup>21</sup> The provisions of this Protocol concern situations

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<sup>16</sup> ICC-01/09-01/11-458-AnxA-Corr, para. 23.

<sup>17</sup> ICC-01/09-01/11-458-AnxA-Corr, para. 24.

<sup>18</sup> ICC-01/09-01/11-458-AnxA-Corr, para. 25.

<sup>19</sup> ICC-02/05-03/09-451-Anx, para. 11.

<sup>20</sup> ICC-02/05-03/09-451-Anx, para. 12; ICC-01/09-01/11-449-Anx1, para. 17.

<sup>21</sup> ICC-02/11-01/11-49-Anx, page 1.

where such disclosure is considered directly and specifically necessary for the purpose of investigation and/or preparation of its case.

*Use of Names or Other Identifying Information*

20. The investigating party or participant shall use the names of witnesses of the opposing party or a participant only when directly and specifically necessary for the purposes of its investigation or and/or preparation of its case.<sup>22</sup>
21. If the investigating party or participant 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 or participant 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.<sup>23</sup> In case of doubt as to the necessity of the disclosure, the Chamber shall decide.
22. Should the investigating party or participant 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 or participant shall liaise with the VWU prior to the mission in which such disclosure may take place and shall communicate the details of the place, time and, to the extent possible, the person(s) that the party or participant intends to contact and to whom 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 or participant with its best practices and advice in relation to the specific information communicated by that party or participant.
23. Should the investigating party or participant need to disclose the identity of a witness who is otherwise protected by the VWU, the investigating party or participant shall inform the VWU as soon as possible.
24. The investigating party or participant shall not make inquiries relating to the current location of protected witnesses or other persons who have

<sup>22</sup> ICC-02/05-03/09-451-Anx, para. 13.

<sup>23</sup> ICC-02/05-03/09-451-Anx, para. 14; ICC-02/11-01/11-49-Anx, page 1; ICC-01/05-01/08-813-Red, para. 84.

been 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 apparent to the investigating party or participant, it shall inform the VWU as soon as possible.<sup>24</sup>

### *Investigation of Information of Sexual Violence*

25. Where a witness has stated that she or he has suffered sexual and/or gender based crimes and it is apparent that the witness has not discussed the violence with members of his or her family, the investigating party or participant must exercise real caution in investigating the allegations to protect the privacy, dignity and well-being of the witness. It shall not reveal this information to these family members or to persons who will communicate the information to family members and any inquiries it undertakes must be done so as to ensure the confidentiality of the information. Where there are no suitable alternative investigative avenues available, the investigating party or participant may communicate the information that the witness suffered sexual or gender based crimes to those individuals that the witness has stated she or he has informed or has confirmed are aware of the sexual and gender based crimes suffered, provided that in doing so the investigating party or participant does not reveal that she or he is a Court witness.

### *Breaches of confidentiality*

26. If the investigating party or participant 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 or participant must also inform the VWU of such an occurrence as soon as possible.
27. All investigating parties and participants shall bring to the attention of the VWU any reasonable suspicion that a witness, members of his or her

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<sup>24</sup> ICC-02/05-03/09-451-Anx, para. 18; ICC-02/11-01/11-49-Anx, page 2; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Annex 1 to Victims and Witnesses' Unit Observations on the "Protocol on investigations in relation to witnesses benefiting from protective measures", 10 March 2010, ICC-01/04-01/07-1956-Anx1, para. (e).



family, or others at 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) as soon as possible.<sup>25</sup>

28. Likewise, if a party or participant has revealed confidential information, or has become aware of any other breach of the confidentiality of information under the present 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.<sup>26</sup> In addition, it shall immediately inform the VWU,<sup>27</sup> 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 or participant*

29. The parties or participants carry the responsibility of ensuring that witnesses they intend to call provide, whenever possible, their informed consent in writing to their involvement with the Court. This consent should be provided before the provision of any witness statement. The parties and participants bear a higher responsibility in this regard when their activities may involve vulnerable witnesses.
30. If the party or participant collects visual and/or non-textual material from the witness, it shall clarify explicitly how these materials may be disclosed.

**VI. Regulation of Contacts Between a Party or Participant and a Witness of the Opposing Party or participants**

31. This section of the Protocol governs the conditions under which the investigating party or participant is authorised to contact witnesses of the opposing party or a participant.
32. This section applies only to a 'witness' as defined under paragraph 1(f) of the Protocol.

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<sup>25</sup> ICC-01/04-01/07-1956-Anx1, para. (f); ICC-02/05-03/09-451-Anx, para. 18; ICC-02/11-01/11-49-Anx, page 2.

<sup>26</sup> ICC-02/05-03/09-451-Anx, para. 19.

<sup>27</sup> ICC-01/09-01/11-449-Anx, para. 35.

### *Consent*

33. A party or participant who seeks to interview a witness of the opposing party or of a participant can only do so if the witness consents to the interview.<sup>28</sup>

### *Notification to the Opposing Party or Participant*

34. The party or participant seeking to contact a witness of the opposing party or participant will provide the latter with notice of its intent to do so. Such a procedure will allow the opposing party or participant to ask the witness whether he/she agrees to be contacted or interviewed. After being notified, the party or participant calling the witness shall seek the consent of the witness within five business days of receiving notification.<sup>29</sup>
35. The decision whether to be interviewed is up to the witness. The calling party or participant shall not attempt to influence the witness's decision whether to agree to be interviewed by the other party or participant.<sup>30</sup>

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

36. When the party or participant wishing to interview a witness is aware that the witness is a participant in the ICCPP, or has been otherwise relocated with the assistance of the Court, the party or participant shall, in addition to notifying the calling party or participant, also inform the VWU.<sup>31</sup>
37. All contact with individuals who are part of the ICCPP shall be facilitated exclusively by the VWU.<sup>32</sup>

### *Objections to the Interview*

38. If the party or participant who intends to call or rely upon a witness objects to the interview of that witness, it shall inform the investigating

<sup>28</sup> ICC-02/05-03/09-451-Anx, para. 21; ICC-01/04-01/06-1372, para. 11.

<sup>29</sup> ICC-01/09-01/11-449-Anx, para. 7; ICC-02/05-03/09-451-Anx, para. 22.

<sup>30</sup> ICC-01/09-01/11-449-Anx, para. 7.

<sup>31</sup> ICC-01/09-01/11-449-Anx, para. 14; ICC-02/05-03/09-451-Anx, para. 30.

<sup>32</sup> ICC-01/09-02/11-449-Anx, para. 15; ICC-02/05-03/09-451-Anx, para. 30.

party or participant. If they cannot reach an agreement, despite genuine efforts to do so, they may raise the matter with the Chamber.<sup>33</sup>

39. Without prejudice to Articles 56 and 57(3)(b) of the Statute and Rule 114 of the Rules, the party or participant seeking the interview shall not proceed with said interview until the Chamber rules on the matter.<sup>34</sup>

#### *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 or participant 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 or participant 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 interview in order to arrange for an assessment of the need for assistance by a VWU representative during the interview.<sup>35</sup>

#### *Arranging the interview*

42. Once the witness has given his or her consent to be interviewed, the party or participant calling the witness or relying on his or her statement shall inform the investigating party or participant and contact shall be facilitated as appropriate.<sup>36</sup> If the calling party or participant attends the interview, it shall bear its own travel and other costs associated with the interview.<sup>37</sup>
43. In principle, the parties and participants shall make all the necessary logistical arrangements in accordance with best practices.<sup>38</sup> However,

<sup>33</sup> ICC-01/09-01/11-449-Anx, para. 8; ICC-02/05-03/09-451-Anx, para. 23.

<sup>34</sup> ICC-01/09-01/11-449-Anx, para. 9; ICC-02/05-03/09-451-Anx, para. 24.

<sup>35</sup> ICC-01/09-01/11-449-Anx, para. 13; ICC-02/05-03/09-451-Anx, para. 29.

<sup>36</sup> ICC-01/09-01/11-449-Anx, para. 7; ICC-02/05-03/09-451-Anx, para. 25.

<sup>37</sup> See 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, 15 October 2012, ICC-01/05-01/08-2293, para. 31.

<sup>38</sup> ICC-01/09-01/11-449-Anx, para. 12.

should there be any remaining security concerns, the calling party or participant shall inform the VWU for the latter to assess the situation and, if necessary, take relevant steps in order to assist the parties and participants in organising the meeting in a safe manner.<sup>39</sup>

44. In the event that the investigating party or participant wishes to meet a witness who is a participant in the ICCPP, the VWU will inform the investigating party or participant 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 or participant.<sup>40</sup>

#### *Recording of the Interview*

45. A video or audio record of the entire interview will be provided to the party or participant calling the witness or relying on his or her statement as soon as practicable after the conclusion of the interview.<sup>41</sup>

#### **VII. Derogation**

46. Any deviation from this Protocol requires the prior authorisation of the Chamber.<sup>42</sup>

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<sup>39</sup> ICC-01/09-01/11-449-Anx, para. 12.

<sup>40</sup> ICC-01/09-01/11-449-Anx, para. 15; ICC-02/05-03/09-451-Anx, para. 30.

<sup>41</sup> ICC-02/05-03/09-451-Anx, para. 31.

<sup>42</sup> ICC-02/05-03/09-451-Anx, para. 32.