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**No. ICC-01/12-01/18
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TRIAL CHAMBER X

**Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Kimberly Prost**

SITUATION IN THE REPUBLIC OF MALI

**IN THE CASE OF
*THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD***

Public

Decision on the ‘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’, the ‘Dual Status Witness Protocol’, and related matters

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Articles 64(2), 64(3)(a) and 68 of the Rome Statute (the ‘Statute’) and Rule 140 of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Decision on the “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”, the “Dual Status Witness Protocol”, and related matters’.

I. Procedural history

1. On 31 May 2018, the Single Judge of Pre-Trial Chamber I (hereinafter: ‘PTC I’) adopted the ‘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’ (the ‘Contact Protocol’) for the purpose of the *Al Hassan* case.¹
2. On 26 November 2019, the Chamber sought the views of the parties and participants on the need for additional protocols or amendment to the existing protocols, in preparation of the first status conference.²
3. On 6 December 2019, the Office of the Prosecutor (the ‘Prosecution’) and the Defence submitted their observations on amendments to the Contact Protocol.³ In addition, the Legal Representatives of Victims (the ‘LRVs’) proposed that the Chamber adopt an additional protocol on contact between the parties and represented victims, as adopted in the *Katanga and Ngudjolo* case.⁴
4. During the status conference on 12 December 2019, the Chamber encouraged the parties and participants to engage in *inter partes* consultations with a view to

¹ Contact Protocol, ICC-01/12-01/18-40-Anx-tENG.

² Order scheduling a first status conference, ICC-01/12-01/18-507, para. 3(H).

³ See Version publique expurgée des « Observations de l’Accusation suite à l’Ordonnance de la Chambre de Première Instance X relative à la conférence de mise en état du 12 décembre 2019 », 6 décembre 2019, ICC-01/12-01/18-518-Conf-Exp, ICC-01/12-01/18-518-Red, para. 41; Public Redacted Version of “Submissions pursuant to ‘Order Scheduling First Status Conference’”, ICC-01/12-01/18-519-Red, paras 43-49.

⁴ Observations des Représentants légaux suite à l’« Order Scheduling First Status Conference » (ICC-01/12-01/18-507), ICC-01/12-01/18-516, paras 4-8.

making a joint proposal on the Protocol on the handling of confidential information and contact with witnesses of the opposing party or of a participant.⁵

5. On 24 January 2020, the Chamber issued its ‘Decision on outstanding protocols’ where it indicated, *inter alia*, that it was minded to adopt the most recent version of the Dual Status Witness Protocol, as adopted in the *Ongwen* case (the ‘*Ongwen* Dual Status Witness Protocol’).⁶ The Chamber therefore instructed the Registry to put the *Ongwen* Dual Status Witness Protocol into the record of the case, subject to terminology amendments where needed, unless the parties and participants submit objections or propose amendments thereto by 13 February 2020.
6. By email sent to the Chamber on 24 January 2020, the Victims and Witness Unit (the ‘VWU’) informed the Chamber that it was satisfied with the Contact Protocol adopted by PTC I and that it had no comments on the LRVs’ proposal for an additional protocol.⁷
7. On 13 February 2020, the Defence filed submissions on the *Ongwen* Dual Status Witness Protocol in which it proposed, *inter alia*, to merge the Protocol with the Contact Protocol, and requested that the Chamber postpone adopting the Dual Status Witness Protocol.⁸ Further specific amendments to the Contact Protocol were proposed in an annex.⁹
8. On 17 February 2020, the Prosecution filed its response, opposing the various requests formulated in the Defence submissions of 13 February 2020, and informing the Chamber that further *inter partes* discussions would be taking place in the following days.¹⁰

⁵ Transcript of hearing, 12 December 2019, ICC-01/12-01/18-T-008-ENG, p.53, line 21, to p. 55, line 15.

⁶ Decision on outstanding protocols, ICC-01/12-01/18-562, para. 6.

⁷ Email from the VWU to the Chamber, 24 January 2020, at 15:17.

⁸ Defence Submissions on Protocol on Dual Status Witnesses, ICC-01/12-01/18-590.

⁹ Annex A to the Defence Submissions on Protocol on Dual Status Witnesses, ICC-01/12-01/18-590-AnxA.

¹⁰ Prosecution position on amendments proposed by the Defence to the Confidentiality Protocol, ICC-01/12-01/18-596 (with confidential Annex A).

9. On 18 February 2020, the Chamber held a status conference with the parties and participants during which the Single Judge reiterated the Chamber's strong preference to see the parties and participants propose a single document identifying points of agreement and disagreement among themselves.¹¹ During the hearing, the LRVs restated their position that an additional protocol governing contact between the parties and represented victims should be adopted.¹²
10. On 19 February 2020, the Chamber was informed of the progress of the *inter partes* consultations and of the fact that the parties and participants intended to make a joint filing setting out the points of agreement and any outstanding areas of disagreement on the Contact Protocol and the proposal from the LRVs.¹³
11. On 28 February 2020, the parties filed a single document containing points of agreement and disagreement with respect to the Contact Protocol and related matters (the 'Joint Agreement').¹⁴ Further relevant submissions were also made in the parties' respective observations on the conduct of proceedings filed on the same day.¹⁵

II. Submissions and analysis

12. The Chamber expresses its appreciation for the parties and participants engaging in *inter partes* consultations on multiple occasions and attempting to make a joint proposal on the Contact Protocol.
13. At the outset, the Chamber notes that, in addition to the joint proposal by the Prosecution and the Defence, the Chamber also received a joint submission

¹¹ Transcript of hearing, 18 February 2020, ICC-01/12-01/18-T-011-CONF-ENG, p. 33, line 24 to p. 34, line 12 and p. 36, lines 13-16.

¹² Transcript of hearing, 18 February 2020, ICC-01/12-01/18-T-011-CONF-ENG, p. 34, line 22 to p. 35, line 25.

¹³ Email from the Defence to the Chamber, 19 February 2020, at 16:08.

¹⁴ Prosecution and Defence joint submission of proposed amendments to the Confidentiality and Contact Protocol, ICC-01/12-01/18-616 (with confidential annexes A and B).

¹⁵ Prosecution observations on conduct of proceedings, ICC-01/12-01/18-615, paras 104-16; Public redacted version of Defence observations on the conduct of proceedings, ICC-01/12-01/18-618-Red, paras 94-124; Observations des victimes sur la conduite du procès et sur des questions connexes, ICC-01/12-01/18-619, paras 20-28.

from the LRVs and the Defence.¹⁶ Having satisfied itself that the joint filing by the Defence and the LRVs does not contain any substantial submissions which are not already contained in the Joint Agreement,¹⁷ the Chamber will only refer to the Joint Agreement in its discussion from this point onward, unless additional references are necessary. Pursuant to Regulation 23bis(3) of the Regulations of the Court (the ‘Regulations’), the Chamber also finds it appropriate to re-classify the Joint Agreement as ‘public’.

A. Dual Status Witness Protocol

14. The Defence submits that, instead of adopting a Dual Status Witness Protocol, the Chamber should amend the Contact Protocol so that the provisions of the Dual Status Witness Protocol are incorporated into the Contact Protocol.¹⁸
15. Dual status witnesses are witnesses who are participating victims in the case and are therefore represented by a legal representative. Special considerations apply to dual status witnesses. The Chambers Practice Manual, which this Chamber endeavours to adhere to, recommends that a protocol specifically governing dual status witnesses be adopted.¹⁹
16. The Chamber further recalls that, as stipulated in the Chambers Practice Manual, the general rule is that the protocols from the confirmation of charges

¹⁶ Annex A to the *Soumissions conjointes des Représentants légaux des victimes et de la Défense quant aux propositions d’amendements au Protocole régissant le traitement d’informations confidentielles lors d’enquêtes et de contacts entre une partie ou un participant et les témoins de la partie adverse ou d’un participant* (ICC-01/12-01/18-40-Anx), 28 February 2020, ICC-01/12-01/18-617-AnxA.

¹⁷ The Chamber notes that among the minor discrepancies between the two documents is that Section I, subsection A of the Defence-LRVs submissions starts with ‘[I]es parties *et les Représentants légaux*’ (emphasis added), while the Joint Agreement does not speak of ‘the legal representatives’ in the corresponding sentence. However, as the heading of Section I of the Defence-LRVs submissions reads ‘Points d’accord *entre les parties*’ (emphasis added), the Chamber was unable to determine if the LRVs agree with the parties on the proposals contained in Section I, subsection A. Nonetheless, this has not affected the Chamber’s determination on the merits in the present decision.

¹⁸ Defence Submissions on Protocol on Dual Status Witnesses, ICC-01/12-01/18-590, paras 2-6; Public redacted version of Defence observations on the conduct of proceedings, ICC-01/12-01/18-618-Red, para. 95.

¹⁹ Chambers Practice Manual, fourth edition, 29 November 2019, <https://www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf>, para. 79. See also Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Protocols to be Adopted at Trial, 22 July 2016, ICC-02/04-01/15-504, para. 31.

stage continue to apply at trial.²⁰ As the Prosecution rightly points out, a distinction should be made between protocols which are newly adopted for the purpose of trial proceedings and protocols which have already been adopted at the confirmation of charges stage.²¹ The parties and participants should not be re-litigating the latter at the trial stage. With a view to ensuring continuity, the Chamber considers that amendments to protocols which have been adopted at the confirmation of charges stage should be confined to minor adjustments or those that are strictly necessary.

17. The Chamber appreciates the effort made by the Defence ‘to minimise the number of protocols and, ensure a comprehensive and clear regime’.²² However, as the Defence itself admits, this proposal is a matter of format and not of content.²³ Given that there is no substantive reason to modify the Contact Protocol, the Chamber finds it unnecessary to amend it to incorporate provisions of the Dual Status Witness Protocol for the purposes of the trial proceedings.
18. The Defence objects to paragraphs 6 and 9 of the *Ongwen* Dual Status Witness Protocol, provisions which regulate contacts between dual status witnesses and the LRVs, as well as their attendance at interviews.²⁴ The Defence submits that ‘it would be inconsistent with the security of dual status witnesses to engage in multiple communications with various persons on matters which are of concern to this case particularly with regard to the fact that the Contact Protocol already provides for a framework to protect witnesses of a calling party to minimise any risk(s) which arise from contact with the non-calling party’.²⁵ The Prosecution and LRVs are silent on this matter.

²⁰ Chambers Practice Manual, para. 77; Prosecution observations on conduct of proceedings, ICC-01/12-01/18-615, para. 114. *See also* Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Order Scheduling First Status Conference and Other Matters, 4 May 2016, ICC-02/04-01/15-432, para. 4.

²¹ Prosecution observations on conduct of proceedings, ICC-01/12-01/18-615, para. 106. *See also* generally paras 114-115.

²² Public redacted version of Defence observations on the conduct of proceedings, ICC-01/12-01/18-618-Red, para. 95.

²³ Public redacted version of Defence observations on the conduct of proceedings, ICC-01/12-01/18-618-Red, para. 95.

²⁴ Defence Submissions on Protocol on Dual Status Witnesses, ICC-01/12-01/18-590, para. 7.

²⁵ Defence Submissions on Protocol on Dual Status Witnesses, ICC-01/12-01/18-590, para. 7.

19. Paragraph 6 of the *Ongwen* Dual Status Witness Protocol is a general provision which stipulates that the LRVs may contact their clients. The relationship between a client and his or her counsel inherently implies that a client must be able to freely contact his or her legal representative and *vice versa*.²⁶ The Chamber considers that the Defence submission is not sufficiently substantiated to warrant a deviation from this rule and therefore rejects the objection to paragraph 6 of the *Ongwen* Dual Status Witness Protocol.
20. With respect to paragraph 9 of the *Ongwen* Dual Status Witness Protocol which regulates the attendance of the LRVs at interviews of dual status witnesses, the Chamber recalls that pursuant to Articles 8, 15(3), 24 and 29 of the Code of Professional Conduct for counsel, all legal representatives are under an obligation to respect secrecy and confidentiality and to refrain from performing acts which may in any way jeopardise the proceedings before the Court. It follows that, contrary to the Defence submissions, the presence of legal representatives or contact with them does not add any risks in conducting interviews with dual status witnesses. As such, the Chamber is of the view that dual status witnesses are entitled to have their legal representatives attend interviews, should they so decide.
21. The Chamber nonetheless accepts that there may be exceptional situations where a party may need to conduct an interview without the presence of the LRVs. Such an exception was regulated in a similar protocol adopted by Trial Chamber VI in *Ntaganda*.²⁷ Therefore, the Chamber decides to add the following language to paragraph 9 of the *Ongwen* Dual Status Witness Protocol:

Should a party consider that the presence of the legal representative is inappropriate or impracticable, it shall, as soon as practicable, inform the legal representative of the objection. The party seeking to interview the individual without the legal representative should promptly raise the matter with the Chamber with a view to obtaining its authorisation. The burden is

²⁶ On contacts between the LRVs and dual status witnesses prior to and during the course of their testimony, *see also* Decision on witness preparation and familiarisation, 17 March 2020, ICC-01/12-01/18-666, para. 39.

²⁷ *See* Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Annex 1 to the Victims and Witnesses Unit's submission of the proposed mechanisms for exchange of information on individuals enjoying dual status pursuant to Order n° ICC-01/04-02/06-416, 23 January 2015, ICC-01/04-02/06-430-Anx1, para. 10(c).

on the party seeking authorisation to establish that such an exceptional remedy is necessary in the particular circumstances.

22. Finally, the Chamber considers it appropriate to correct a typographical error in paragraph 8 of the *Ongwen* Dual Status Witness Protocol. This paragraph is amended to stipulate that ‘[t]he presence of the legal representative must **not** in any way obstruct a proper medical examination’.

B. The Contact Protocol

1. Interpretation of ‘witness’ in the Contact Protocol

23. The parties disagree on the interpretation of the term ‘witness’ in the Contact Protocol. Noting its decision of 24 December 2019 in which it decided to postpone any determination regarding the interpretation and application of the Contact Protocol,²⁸ the Chamber finds it appropriate to deal with this issue in the present decision.
24. The Prosecution submits that the Contact Protocol covers not only individuals who appear on its provisional list of witnesses, but also any individual whom the Prosecution clearly communicates to the Defence it intends to use as a witness.²⁹ The Prosecution views this interpretation as being in line with the text of paragraph 4(f) of the Contact Protocol and states that the identities of witnesses will be communicated on a rolling basis, until the final list of witnesses is filed.³⁰
25. The Defence argues that if an individual is not on the Prosecution’s provisional list of witnesses, then they fall outside the definition of a ‘witness’ for the purposes of the Contact Protocol and the Defence therefore has the right to initiate contact with them.³¹
26. First, the Chamber observes that, as reflected *inter alia* in section VII of the Contact Protocol, the consequence of classifying an individual as a witness

²⁸ Decision on the Defence request for clarification and disclosure, ICC-01/12-01/18-542-Red2, para. 19.

²⁹ Transcript of hearing, 18 February 2020, ICC-01/12-01/18-T-011-ENG, p. 38, lines 1-16.

³⁰ Transcript of hearing, 18 February 2020, ICC-01/12-01/18-T-011-ENG, p. 38, lines 17-19.

³¹ Transcript of hearing, 18 February 2020, ICC-01/12-01/18-T-011-ENG, p. 36, line 23 to p. 37, line 4.

under the Contact Protocol is to limit and regulate contacts by the other party or participants with him/her, which consequently limits the scope of their investigations. It follows that, whenever a party or participant decides that they will rely or decide that they will no longer rely upon a particular individual, such an intention must be communicated to the other party or participants in a timely manner.

27. The Chamber notes that the term ‘witness’ can have different meanings depending on the context and purpose of the provisions in which it appears.³² Under paragraph 4(f) of the Contact Protocol, a ‘witness’ is a person whom a party or participant intends to call to testify or on whose statement a party or participant intends to rely. The only qualification under this paragraph is that ‘the intention of the party or participant to call the witness or to use his or her statement’ should have been ‘clearly communicated to the opposing party’. In this respect, the Chamber observes that the Contact Protocol does not specify a particular way in which this intention must be conveyed to the other party, as long as it is done in a ‘clear’ manner.
28. In the present circumstances, noting that the Prosecution has filed a provisional list of witnesses at the end of January 2020³³ and that its final list of witnesses is due in a month’s time,³⁴ the Chamber considers that the term ‘witness’ used in the Contact Protocol may include individuals beyond those appearing in the most recent list where the Prosecution has clearly communicated its intention to call them.³⁵ This is currently the case for 4 individuals who do not appear on the

³² Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Judgment pursuant to Article 74 of the Statute’, 8 March 2018, ICC-01/05-01/13-2275-Red, paras 719-23.

³³ Prosecution submission of Provisional list of Prosecution witnesses, 31 January 2020, ICC-01/12-01/18-572.

³⁴ Decision Setting the Commencement Date of the Trial, 6 January 2020, ICC-01/12-01/18-548, para. 10.

³⁵ On 16 March 2020, the Prosecution filed a request seeking, *inter alia*, the extension of the deadline for the submission of its final list of witnesses. Irrespective of the Chamber’s determination on the request for extension, the guidance contained in this paragraph stands. See Prosecution provisional request for extension of judicial deadlines, ICC-01/12-01/18-665-Conf.

provisional list on the record.³⁶ After the filing of the Prosecution's final list of witnesses, only those individuals appearing on the list shall qualify as Prosecution 'witnesses' for the purpose of this protocol.

29. The Chamber considers that no further guidance on this point is required at this stage.

2. *Points of agreement*

30. In the Joint Agreement, the parties communicate their agreement to amend the Contact Protocol with respect to the provision on costs incurred by the attendance at interviews of witnesses by the other parties or participants.³⁷ Noting that this is an unsubstantial amendment, modifying the language of the provision and moving it from paragraph 35 to 37, the Chamber grants this joint request.
31. Furthermore, noting that the parties withdrew their previous requests for two amendments,³⁸ the Chamber does not address them any further.

3. *Prosecution proposed amendment*

32. The Prosecution proposes that paragraph 39 of the Contact Protocol be amended as follows:

'A video or audio recording and any type of notes and record of an accidental contact with a witness of an opposing party or of a participant shall be disclosed to the calling party or participant, to the extent possible, within five days of the said contact'.³⁹

33. The Defence opposes this proposal and submits that such an amendment is both unnecessary and inconsistent with the Court's legal framework. The Defence argues that it does not always maintain a record of the entire interview with

³⁶ Transcript of hearing, 18 February 2020, ICC-01/12-01/18-T-011-CONF-ENG, p. 38, line 24 to p. 39, line 3.

³⁷ Joint Agreement, ICC-01/12-01/18-616-Conf-AnxA, p. 1.

³⁸ These are requests to insert a paragraph on the Prosecution's disclosure obligations and expand Section III of the Contact Protocol to include provisions related to victims have been withdrawn. *See* Joint Agreement, ICC-01/12-01/18-616-Conf-AnxA, pp. 1-3.

³⁹ Prosecution observations on conduct of proceedings, ICC-01/12-01/18-615, para. 107; Joint Agreement, ICC-01/12-01/18-616-Conf-AnxA, p. 6. *See also* ICC-01/12-01/18-518-Red, para. 41.

potential witnesses and that the Prosecution amendment risks negatively affecting Defence investigations.⁴⁰

34. The Chamber first notes that paragraph 31 of the Contact Protocol provides that, in case of an inadvertent contact, ‘the party or participant shall refrain from any discussion of the case and shall under no circumstances seek the witness’s consent to be interviewed directly’. It follows that the party who has an inadvertent contact with a witness is under an obligation to discontinue its interview when realising that the individual it is interviewing is actually the witness of another party or participant.
35. The Chamber further observes that, when an interview with a witness of the other party is authorised under the protocol, relevant safeguards include both the recording of the interview as well as, should the witness choose so, the presence of representatives of the calling party.⁴¹ In the view of the Chamber, and as currently phrased, the mandatory disclosure obligation under paragraph 39 of the Contact Protocol applies to situations where the interviewing party is aware that the contents of the interview will be made available to the calling party or participant.
36. Because one cannot foresee or plan the occurrence of an inadvertent contact,⁴² a distinction should be made between authorised interviews by the other party, which are planned for and regulated, and situations where individuals are inadvertently contacted by a party during its investigations.
37. In light of the above, and particularly having considered that the statutory framework does not provide for a reciprocal disclosure regime and that the

⁴⁰ Public redacted version of Defence observations on the conduct of proceedings, ICC-01/12-01/18-618-Red, paras 100-12.

⁴¹ See paragraphs 35 and 39 of Annex 2 to the present decision.

⁴² In this regard, the Defence has informed the Chamber that it is standard practice of the Defence to ask individuals if they have spoken to the Prosecution at the very beginning of interview, and that it has instructed their resource person to absolutely refrain from contacting an individual without seeking the counsel’s permission as intermediaries get information on a strictly need to know basis. The Chamber finds these measures satisfactory and adequate to try to prevent inadvertent contacts with Prosecution witnesses. See Public redacted version of Defence observations on the conduct of proceedings, ICC-01/12-01/18-618-Red, para. 102; Transcript of hearing, 18 February 2020, ICC-01/12-01/18-T-011-ENG, p. 43, lines 11-17.

disclosure obligations of the Defence are different than those of the Prosecution,⁴³ the Chamber is of the view that the Prosecution is not entitled to obtain any and all material emanating from an inadvertent contact between the Defence and a Prosecution witness. Judicial oversight is warranted in these exceptional circumstances and whether a particular material should be disclosed to the calling party or participant will be decided on a case-by-case basis by the Chamber, involving the VWU where necessary. The Chamber thus rejects the Prosecution's request to include a mandatory disclosure obligation of materials related to inadvertent contacts in paragraph 39 of the Contact Protocol.

4. *Defence Proposed Amendments*

i. Amendments to the existing definitions (paragraph 4 of the Contact Protocol)

38. In its observations on the conduct of proceedings, the Defence proposes three amendments to the definitions contained in the Contact Protocol.⁴⁴ Firstly, the Defence proposes to amend the definition of 'confidential information' so that it reads:

"Confidential information" shall mean any information which is directly the subject of protective measures under Article 68 of the Statute, or which identifies documents or information directly subject to confidentiality agreements or protective measures, including any information ordered not to be disclosed to third parties by any Chamber of the Court or which is otherwise subject to Rule 81(3) or (4) of the Rules of Procedure and Evidence.

39. The Defence submits that the current definition of 'confidential information' in the Contact Protocol is overly vague and the focus on the label of the document: (i) unnecessarily extends confidentiality protections to public (or non-confidential) information which happens to be included, or referred to, in a confidential document; and (ii) fails to provide adequate protection in case

⁴³ Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Prosecution Request to Order the Disclosure of Material in Possession of the Defence, 20 April 2016, ICC-01/05-01/13-1820, para. 6; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)", 14 September 2010, ICC-01/04-01/07-2388, para. 36.

⁴⁴ Public redacted version of Defence observations on the conduct of proceedings, ICC-01/12-01/18-618-Red, paras 122-24; Joint Agreement, ICC-01/12-01/18-616-Conf-AnxA, p. 3.

confidential information has incorrectly or inadvertently been included in a public document.⁴⁵

40. The Prosecution opposes the requested amendment and submits that the definition, which corresponds to the definition in the Chambers Practice Manual, should be retained in its current form.⁴⁶ The Prosecution also submits that it favours the current definition as it covers certain information transmitted through *inter partes* disclosure.⁴⁷
41. Concerning the first part of the Defence contention, the Chamber observes that the current definition of ‘confidential information’ includes a caveat for information ‘which has not otherwise legitimately been made public’. It follows that, contrary to the argument of the Defence, public information which appears in a confidential document does not fall under the current definition.
42. With respect to information incorrectly or inadvertently included in a public document, the Chamber fails to see how the amendments proposed by the Defence would provide additional protection in case of an inadvertent disclosure of confidential information. The Chamber is of the view that the procedure set out at paragraph 20 of the protocol sufficiently regulates this matter. The party or participant who noticed that inadvertent disclosure may have occurred is required to raise this issue directly with the disclosing party and, where disagreement arises regarding the use of the material, seize the Chamber. Accordingly, the Chamber is satisfied that no amendment to the definition of ‘confidential information’ is required. The request is therefore rejected.
43. Secondly, the Defence proposes to delete paragraph 5 of the Contact Protocol which extends the obligations set out in the protocol to intermediaries and other persons and, instead, include resource persons and intermediaries in the

⁴⁵ Public redacted version of Defence observations on the conduct of proceedings, ICC-01/12-01/18-618-Red, paras 121-23.

⁴⁶ Prosecution observations on conduct of proceedings, ICC-01/12-01/18-615, para. 109.

⁴⁷ Prosecution observations on conduct of proceedings, ICC-01/12-01/18-615, para. 109.

definition of a ‘party’.⁴⁸ The Prosecution submits that the original provision should be retained as it is necessary and appropriate to extend the obligations in the Contact Protocol to the persons addressed in that paragraph.⁴⁹

44. The Chamber recalls that the parties are responsible for the conduct of their intermediaries *by virtue of the control and oversight exercised by a party*.⁵⁰ However, as submitted by the Defence, the parties should not be held responsible for ensuring that ‘any other persons performing tasks on their behalf’ comply with the Contact Protocol, as such a broad wording might indeed include Registry sections and personnel who clearly do not work under the control or oversight of the parties.
45. Accordingly, paragraph 5 of the Contact Protocol shall be amended so that it reads: ‘All of the obligations set out in the present Protocol, and which are imposed upon the parties and participants, are also applicable to resource persons and intermediaries acting on instruction of or on behalf of a party or participant’.
46. Thirdly, the Defence submits that a reference to the need for regular review of the classification of documents should be included in the protocol together with the definition of ‘confidential document’.⁵¹
47. The Chamber recalls that materials disclosed should be classified as ‘public’, unless there is a valid reason for the information they contain not to be disclosed to the public. It is indeed the disclosing party’s obligation to justify any exception to this rule,⁵² as well as the ongoing validity of the justifications provided. The Defence seeks to explicitly include a reference to the need for regular review pursuant to Articles 64(7) and 67(1) of the Statute. As these provisions of the Statute apply regardless, the Chamber sees no specific need for this obligation to be repeated in the Contact Protocol. The Chamber however

⁴⁸ Public redacted version of Defence observations on the conduct of proceedings, ICC-01/12-01/18-618-Red, paras 124; Joint Agreement, ICC-01/12-01/18-616-Conf-AnxA, pp. 3-4.

⁴⁹ Prosecution observations on conduct of proceedings, ICC-01/12-01/18-615, para. 110.

⁵⁰ See for example Article 7(4) of the Code of Professional Conduct for counsel.

⁵¹ Joint Agreement, ICC-01/12-01/18-616-Conf-AnxA, p. 4.

⁵² See Pre-trial Chamber I, *Décision relative au système de divulgation et à d’autres questions connexes*, 6 May 2018, ICC-01/12-01/18-31, para. 42.

reiterates that, as submitted by the Defence, the parties are under a statutory obligation to review the classification of materials disclosed regardless of whether they rely on it during trial or not.

ii. Amendments on the obligations of the calling party or participant

48. The Defence requests that the Contact Protocol be amended to provide additional obligations on the calling party or participant to: (i) clearly inform all persons it has met with and/or obtained statements from, as to whether or not it intends to rely on that individual as a witness; and (ii) direct all persons who have consented to being called as a witness to identify themselves as such when approached by the other party or participants.⁵³
49. The Prosecution opposes these requests and asserts that it would be impractical to grant the first part of the request as the parties and participants will not always be in a position to determine that they intend to rely on an individual as a witness at the time of contact or obtaining of the statement.⁵⁴ Regarding the second part of the request, the Prosecution argues that instructing individuals to disclose their witness status to other parties and participants would potentially endanger witnesses, as this would create a risk of the witnesses disclosing their status as a witness to persons who might not actually be representatives of the other party or participants.⁵⁵ The Prosecution maintains that, contrary to the Defence request, the practice is to brief the witnesses on the importance of maintaining confidentiality regarding their interaction with the Court, in order to mitigate any security risks.⁵⁶
50. The Chamber observes that, with respect to the proposed insertion of an obligation to inform persons of the intention to call them as witnesses, the Prosecution has rightly pointed out that the parties and participants may not be in a position to make a determination on whether to call an individual as a witness at the time of contact or taking of a statement. Moreover, even if a party

⁵³ Joint Agreement, ICC-01/12-01/18-616-Conf-AnxA, p. 4.

⁵⁴ Prosecution observations on conduct of proceedings, ICC-01/12-01/18-615, para. 111.

⁵⁵ Prosecution observations on conduct of proceedings, ICC-01/12-01/18-615, para. 111.

⁵⁶ Prosecution observations on conduct of proceedings, ICC-01/12-01/18-615, para. 111.

or participant were to make a preliminary assessment on whether to rely on a particular individual as a witness, the assessment may change over time due to various circumstances.

51. Further, as testifying before the Court could have a significant impact on an individual's personal life, the parties should not be put in a situation where they are forced to rush this decision, only for it to be altered at a later point. This is particularly important in light of the security situation as well as the need to manage the expectations of witnesses.
52. For the aforementioned reasons, the Chamber finds that the calling party is in the best position to balance all the relevant factors and decide on the appropriate time when it will communicate to individuals previously interviewed its clear intention to rely on them as witnesses.⁵⁷ Therefore, the Chamber declines to include a specific obligation on the timing of such decision in the Contact Protocol.
53. Turning to the Defence request on the obligation to direct witnesses to reveal their status as a witness, the Chamber observes, keeping in mind its obligations under Article 68 of the Statute, that whether a witness risks revealing their status as a witness to third parties by virtue of the Defence proposed amendments, as argued by the Prosecution, can only be determined on a case-by-case basis. However, it cannot be ruled out that by instructing a witness to communicate their witness status to the other party or participant upon their first encounter, a witness may inadvertently reveal their interaction with the Court to third parties, which may place them at risk. Accordingly, the Defence request on this point is rejected.

⁵⁷ The Chamber emphasises that the notification of this intent to the opposing party is a distinct issue, discussed above at paragraphs 23 to 29.

iii. Amendment on the prohibition to contact witnesses of the other party or participants (paragraph 27 of the Contact Protocol)

54. The Defence requests an amendment to paragraph 27 so that the prohibition to contact witnesses of the other party or participants is limited to instances where such contact is done ‘knowingly’.⁵⁸
55. The Prosecution opposes the request, arguing that such an amendment would unduly restrict the prohibition contained in paragraph 27, and points to paragraph 31 of the protocol which governs inadvertent contact with witnesses.⁵⁹
56. Paragraph 27, which incorporates certain elements of the definition of ‘witness’ in paragraph 4(f), clearly sets out the parameters of prohibited contact under the Contact Protocol. In the Chamber’s view, the caveat ‘if the intention to call [...] has been communicated to the party or participants, or if this intention is otherwise clearly apparent’ provides sufficient clarity on the scope of this prohibition. When such contact occurs unknowingly, paragraph 31 of the Contact Protocol is triggered and the framework regulating inadvertent contact applies. The Chamber further notes that the procedure set out in other relevant parts of the protocol, regulating the witness’s prior consent,⁶⁰ the modalities of the interview,⁶¹ as well as any objection,⁶² are premised on the existence of a general rule setting out the prohibition of any ‘other’ contacts with witnesses of the other party or participant. Accordingly, this requested amendment is rejected.

iv. Amendment imposing an additional obligation to audio-record (paragraph 35 of the Contact Protocol)

57. The Defence requests that an additional sentence be added to paragraph 35 of the Contact Protocol which would read: ‘Communication by which the witness

⁵⁸ Joint Agreement, ICC-01/12-01/18-616-Conf-AnxA, p. 6.

⁵⁹ Prosecution observations on conduct of proceedings, ICC-01/12-01/18-615, para. 112.

⁶⁰ See paragraphs 29-32 of Annex 2 to the present decision.

⁶¹ See paragraphs 33-39 of Annex 2 to the present decision.

⁶² See paragraphs 40-41 of Annex 2 to the present decision.

is informed of this right shall be audio recorded by the calling party'.⁶³ The Prosecution submits that such an amendment is unnecessary as it is the practice to make notes and keep track of such contacts.⁶⁴

58. The Chamber considers that the obligation under paragraph 35 of the protocol is straightforward and can easily be implemented by the calling party or participant. As such, in the Chamber's view it is appropriate for them to be entrusted with this task which, it must be assumed, will be effected with due diligence. Having had further regard to the Prosecution's clarification set out above, the Chamber finds it unnecessary to impose a specific obligation to audio-record this simple communication. Accordingly, this request is rejected.

C. The protocol proposed by the LRVs

59. The LRVs request that the Chamber adopt an additional protocol on the contact between victims participating in the case and parties, as adopted by Trial Chamber II (the '*Katanga and Ngudjolo* protocol').⁶⁵ The Chamber observes that the *Katanga and Ngudjolo* protocol sets out certain procedural requirements for the parties to contact victims, such as prior notification to the LRVs.⁶⁶
60. The Defence advances several arguments against the adoption of such a protocol.⁶⁷ First, it highlights the differences between the *Katanga and Ngudjolo* case and the *Al Hassan* case, and contends that the particularities of the present case make it difficult to transpose the *Katanga and Ngudjolo*

⁶³ Joint Agreement, ICC-01/12-01/18-616-Conf-AnxA, p. 6.

⁶⁴ Prosecution observations on conduct of proceedings, ICC-01/12-01/18-615, para. 113.

⁶⁵ Observations des Représentants légaux suite à l'« Order Scheduling First Status Conference » (ICC-01/12-01/18-507), ICC-01/12-01/18-516, paras 4-8; Transcript of hearing, ICC-01/12-01/18-T-011-ENG, p.35, lines 2-25.

⁶⁶ Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the arrangements for contact between represented victims and the parties, 23 November 2010, ICC-01/04-01/07-2571-tENG, paras 29-39.

⁶⁷ Public redacted version of Defence observations on the conduct of proceedings, ICC-01/12-01/18-618-Red, paras 113-20. On 12 March 2020, the LRVs filed its response to the Defence submissions on the conduct of proceedings where it makes further arguments for the adoption of a protocol regulating contact between parties and victims. See Réponse des victimes aux observations de la Défense sur la conduite des débats (ICC-01/12-01/18-618-Red), ICC-01/12-01/18-653. The Chamber had already received sufficient submissions from the parties and participants on the issue of protocols, and observes that the request to adopt the *Katanga and Ngudjolo* protocol was raised by the LRVs to which the Defence responded in its submission on the conduct of proceedings. Noting Regulation 24(5) of the Regulations, the Chamber dismisses the LRVs' response.

protocol. Additionally, the Defence raises concerns with respect to the fact that the LRVs' proposal, which would restrict its investigations, is proposed at this point, whereas the Prosecution was, in its view, given an unfettered ability to speak to potential witnesses during its investigation.

61. The Chamber first notes that, as a prerequisite to the implementation of such a protocol, the parties would need to be made aware of the identities of the participating victims, which the LRVs accept.⁶⁸ Pursuant to the victims' participation procedure recently adopted by the Chamber, the parties are in possession of only a limited number of the victims' applications to participate in the proceedings.⁶⁹ The Chamber therefore finds that the LRVs' proposal is not suited to the present circumstances and considers it unnecessary to adopt a separate protocol regulating contacts between represented victims and the parties. The Chamber also sees no need to explore other alternatives, as suggested by the LRVs.⁷⁰

⁶⁸ Observations des victimes sur la conduite du procès et sur des questions connexes, ICC-02/12-01/18-619, paras 23-26.

⁶⁹ Decision on the procedure for the admission of victims to participate in proceedings for the purposes of trial, XX March 2020, ICC-01/12-01/18-661. *See also* Decision on the Prosecution request for access to the identity and applications of participating victims and inviting report and submissions on victim application procedure, 20 December 2019, ICC-01/12-01/18-536 whereby the Chamber ordered that the unredacted versions of the victim applications of dual status witnesses be transferred to the Prosecution, and that the Prosecution, in consultation with the LRVs, apply necessary redactions and transmit those applications to the Defence at the earliest opportunity.

⁷⁰ Observations des victimes sur la conduite du procès et sur des questions connexes, ICC-02/12-01/18-619, para. 27.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ADOPTS the Dual Status Witness Protocol as contained in Annex 1 to the present decision;

ADOPTS the Protocol on the handling of confidential information and contact with witnesses of the party as contained in Annex 2 to the present decision;

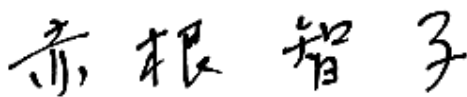
REJECTS the request by the LRVs to adopt an additional protocol; and

INSTRUCTS the Registry to reclassify the Joint Agreement, filing ICC-01/12-01/18-616-Conf-AnxA, as 'public'.

Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Kimberly Prost

Dated this Thursday, 19 March 2020

At The Hague, The Netherlands