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No. ICC-01/14-01/18

Date: 22 March 2019

PRE-TRIAL CHAMBER II

**Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR V. ALFRED YEKATOM
AND PATRICE-EDOUARD NGAÏSSONA***

**Public
with Public Annex A**

Decision on a Protocol on the Handling of
Confidential Information and Contacts with Witnesses

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

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for Alfred Yekatom
Stéphane Bourgon

Counsel for Patrice-Edouard Ngaissona
Geert-Jan Alexander Knoops

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
for Victims**

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Peter Lewis, Registrar

Counsel Support Section

Victims and Witnesses Unit
Nigel Verrill

Detention Section

**Victims Participation and
Reparations Section**

Other

PRE-TRIAL CHAMBER II of the International Criminal Court issues this decision on a protocol on the handling of confidential information and contacts with witnesses (the ‘Protocol’).

I. Procedural history

1. On 11 November 2018 and 7 December 2018, the Chamber issued warrants of arrest for Yekatom and Ngaiissona for their alleged criminal responsibility for crimes against humanity and war crimes committed in various locations in the Central African Republic respectively.¹
2. On 17 December 2018, the Single Judge received the ‘Prosecution’s submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses’ (the ‘Prosecutor’s Protocol Submission’).²
3. On 21 December 2018, the Single Judge received the ‘Expedited request on behalf of M. Yekatom seeking a limited extension of the delay to respond to “Prosecution’s submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses”’ (the ‘Defence Request’).³
4. On 21 December 2018, the Single Judge issued the ‘Decision granting an extension of time’ thereby extending the time limit for the Yekatom Defence to respond to the Prosecutor’s Protocol Submission until 2 January 2019.⁴
5. On 2 January 2019, the Single Judge received the ‘Expedited request on behalf of Mr. Yekatom seeking a limited extension of time to respond to “Prosecution’s submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses” and “Prosecution’s Request for a Protocol on Redactions”’ (the ‘Additional Defence Request’).⁵

¹ ICC-01/14-01/18-1-US-Exp - a public redacted version is also available, *see* [ICC-01/14-01/18-1-Red](#); ICC-01/14-01/18-89-US-Exp - a public redacted version is also available, *see* [ICC-01/14-01/18-89-Red](#).

² [ICC-01/14-01/18-35](#), together with two public annexes.

³ [ICC-01/14-01/18-41](#).

⁴ [ICC-01/14-01/18-43](#).

⁵ [ICC-01/14-01/18-46](#).

6. On 2 January 2019, the Single Judge granted the Additional Defence Request thereby extending the time limit for the Yekatom Defence to respond to the Prosecutor's Protocol Submission until 7 January 2019.⁶
7. On 7 January 2019, the Yekatom Defence filed the 'Response to the Prosecution's submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses' (the 'Yekatom Defence Response').⁷
8. On 10 January 2019, the Single Judge received the 'Prosecution's Request for Leave to Reply to the Defence's Response to the Prosecution's submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses (ICC-01/14-01/18-51)' (the 'Prosecutor's Request').⁸
9. On 11 January 2019, the Single Judge issued the 'Decision on Prosecutor's Requests to Reply' thereby granting the Prosecutor's Request to reply to the Yekatom Defence Response.⁹
10. On 16 January 2019, the Single Judge received the 'Prosecution's Reply to the Defence's Response to the Prosecution's submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses (ICC-01/14-01/18-51)' (the 'Prosecutor's Reply').¹⁰
11. On 21 January 2019, the Yekatom Defence submitted the 'Request on behalf of Alfred Rombhot Yekatom seeking either leave to present additional submissions following the "Prosecution's Reply to the Defence's Response to the Prosecution's submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses" or the scheduling of *inter partes* consultations chaired by a representative of Pre-Trial Chamber II' (the 'Yekatom Defence Request for Additional Submissions or Consultations').¹¹

⁶ Email from the Pre-Trial Division's Senior Legal Advisor on behalf of the Single Judge of 11 January 2019 at 12:12 hours.

⁷ [ICC-01/14-01/18-51](#), together with two public annexes.

⁸ [ICC-01/14-01/18-54](#).

⁹ [ICC-01/14-01/18-55](#), p. 4.

¹⁰ [ICC-01/14-01/18-58](#).

¹¹ [ICC-01/14-01/18-60](#).

12. On 20 February 2019, the Chamber issued the ‘Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters’ joining the cases against Yekatom and Ngaïssona.¹² In this decision, the Chamber, *inter alia*, deemed it appropriate to receive observations from the Ngaïssona Defence on the Prosecutor’s Protocol Submission, if any, by no later than 11 March 2019.¹³

13. On 11 March 2019, the Chamber received the ‘Ngaïssona Defence Observations on the Protocol on the Handling of Confidential Information during Investigations and Contacts with Witnesses’ (the ‘Ngaïssona Defence Observations’).¹⁴

14. On 15 March 2019, the Chamber received the ‘Prosecution’s Request for Leave to Reply to the “Ngaïssona Defence Observations on the Protocol on the Handling of Confidential Information during Investigations and Contacts with Witnesses” (ICC-01/14-01/18-144)’ (the ‘Prosecutor’s Request for Leave to Reply to Ngaïssona’s Observations’).¹⁵

15. On 18 March 2019, the Chamber received the ‘Ngaïssona Defence Response to the “Prosecution’s Request for Leave to Reply to the ‘Ngaïssona Defence Observations on the Protocol on the Handling of Confidential Information during Investigations and Contacts with Witnesses’ (ICC-01/14-01/18-144)” (ICC-01/14-01/18-150)’ (the ‘Ngaïssona Defence Response’).¹⁶

II. Preliminary matters

16. In the Yekatom Defence Request for Additional Submissions or Consultations, the Yekatom Defence argues that, ‘taking into consideration the significant consequences of the adoption of the proposed protocol on the fair and expeditious conduct of the proceedings, additional submissions are required for the purpose of better assisting the Pre-Trial Chamber and ensuring that all issues are clarified before

¹² [ICC-01/14-01/18-121](#). See also [ICC-01/14-01/18-87](#).

¹³ [ICC-01/14-01/18-121](#), para. 23. See also [ICC-01/14-01/18-87](#), para. 23.

¹⁴ [ICC-01/14-01/18-144](#), together with two public annexes.

¹⁵ [ICC-01/14-01/18-150](#).

¹⁶ [ICC-01/14-01/18-152](#).

adoption of the protocol'.¹⁷ In this regard, the Yekatom Defence requests the Chamber to 'order and schedule *inter partes* consultations' chaired by a representative of the Chamber.¹⁸ The Ngaïssona Defence adds that it 'would agree to the scheduling of further *inter partes* discussions on this matter'.¹⁹ In the alternative, the Yekatom Defence requests leave to present additional submissions to address the arguments contained in the Prosecutor's Reply.²⁰

17. The Chamber considers that, pursuant to regulation 24(4) of the Regulations of the Court, '[a] response [...] may not be filed to any document which is itself a [...] reply'. Allowing the Defence to present additional submissions would, in contravention of the aforementioned regulation, amount to a response to the Prosecutor's Reply. In addition, the Defence omits to provide a legal basis for its request to hold *inter partes* consultations chaired by a representative of the Chamber. In any event, the Chamber is of the view that, in the light of the detailed submissions contained in the Prosecutor's Submission, the Yekatom Defence Response, the Prosecutor's Reply and the Ngaïssona Defence Observations, it has the information required to rule on the matter *sub judice*. Accordingly, the Yekatom Defence Request for Additional Submissions or Consultations is rejected.

18. In the Prosecutor's Request for Leave to Reply to Ngaïssona's Observations, the Prosecutor argues that 'a limited and focused reply addressing two discrete issues in the [Ngaïssona Defence] Observations would assist the Chamber in the proper determination of the relevant issues and is otherwise in the interests of justice, namely: (1) the propriety of informing the Victims and Witnesses Unit [...] of the disclosure of the identity of a Prosecution witness only afterwards; and (2) the reasonableness of restricting disclosure to only those witnesses whose identities have been revealed to the Parties'.²¹ In the Ngaïssona Defence Response, the Ngaïssona Defence opposes the Prosecutor's Request for Leave to Reply to Ngaïssona's Observations.²² The Ngaïssona Defence argues that allowing further submissions

¹⁷ [ICC-01/14-01/18-60](#), para. 10.

¹⁸ [ICC-01/14-01/18-60](#), para. 11.

¹⁹ [ICC-01/14-01/18-144](#), para. 25.

²⁰ [ICC-01/14-01/18-60](#), para. 12.

²¹ [ICC-01/14-01/18-150](#), para. 2. *See also* [ICC-01/14-01/18-150](#), para. 4.

²² [ICC-01/14-01/18-152](#), para. 1.

‘would be inconsistent with principles of judicial economy, since the Chamber is already well placed to decide on the terms of such Protocol’.²³ It also avers that, in relation to the second issue, the Prosecutor is attempting ‘to get a second chance to enter into substantive discussions by requesting to make submissions on an issue which should have been raised in its original request for leave to reply to’ the Yekatom Defence Response.²⁴

19. In the view of the Chamber, besides stating, in general, that a reply would assist the Chamber, the Prosecutor does not specifically justify why the two aforementioned issues arising from the Ngaïssona Defence Observations merit a reply. Furthermore, the Chamber considers that it has the information required to take its decision on these issues since, as mentioned in relation to the Yekatom Defence Request for Additional Submissions or Consultations, it has received detailed submissions from the parties. Accordingly, the Prosecutor’s Request for Leave to Reply to Ngaïssona’s Observations is rejected.

III. Analysis

20. The Chamber notes articles 54, 67 and 68 of the Rome Statute (the ‘Statute’), rules 76, 77, 81, 86, 87 and 88 of the Rules of Procedure and Evidence (the ‘Rules’), regulations 92 to 96 of the Regulations of the Registry, articles 5 to 8 and 29 of the Code of Professional Conduct for counsel and articles 66 to 68 of the Code of Conduct of the Office of the Prosecutor.

21. The Prosecutor, the Yekatom Defence and the Ngaïssona Defence propose a number of modifications to 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’ annexed to the Chambers Practice Manual (the ‘Practice Manual Protocol’).²⁵ The Chamber addresses each proposed modification separately below.

²³ [ICC-01/14-01/18-152](#), para. 1.

²⁴ [ICC-01/14-01/18-152](#), para. 1.

²⁵ [Chambers Practice Manual](#), pp. 32-38.

A. The Prosecutor's proposed modifications

22. The Prosecutor proposes that the definition of 'confidential document' in paragraph 4(d) of the Practice Manual Protocol 'should include "any other type of material" (such as, audio or video materials)' in order to ensure 'that information contained therein is also protected'.²⁶ The Yekatom Defence does not oppose this proposal.²⁷ The Ngaissona Defence also does not object to it.²⁸ The Chamber considers that this proposal adds to the clarity of the Practice Manual Protocol. It also notes that neither the Yekatom Defence nor the Ngaissona Defence disagrees with it. Accordingly, this proposal is accepted.

23. For the same reason, the Prosecutor proposes that the definition of 'confidential information' in paragraph 4(e) of the Practice Manual Protocol 'should encompass information contained in confidential documents and "obtained during a confidential discussion" (for example, during a discussion with a source)'.²⁹ The Yekatom Defence objects to this proposal arguing that it is 'vague and ambiguous'.³⁰ The Prosecutor replies that '[t]he Proposed Protocol should protect all types of confidential information' and that the proposed modification 'is fully consonant with the express purpose of the Proposed Protocol'.³¹ The Ngaissona Defence concurs with the Yekatom Defence.³² The Chamber notes that, although the Prosecutor's Protocol Submission is based on the Practice Manual Protocol as amended in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (the 'Al Hassan Case'),³³ such a modification to paragraph 4(e) of the Practice Manual Protocol was not proposed in that case.³⁴ In any event, the Chamber finds that the Prosecutor has not suitably demonstrated the need for the proposed modification in the current case as, except for one example, the Prosecutor fails to specify in which

²⁶ [ICC-01/14-01/18-35](#), para. 12; [ICC-01/14-01/18-35-AnxA](#), para. 4(d).

²⁷ [ICC-01/14-01/18-51](#), para. 24.

²⁸ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), para. 4(d).

²⁹ [ICC-01/14-01/18-35](#), para. 12; [ICC-01/14-01/18-35-AnxA](#), para. 4(e).

³⁰ [ICC-01/14-01/18-51](#), para. 26.

³¹ [ICC-01/14-01/18-58](#), para. 9.

³² [ICC-01/14-01/18-144](#), para. 10.

³³ [ICC-01/14-01/18-35](#), para. 2.

³⁴ Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Annex to Decision on the Adoption of a 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](#), 31 May 2018, ICC-01/12-01/18-40-Anx-tENG, para. 4(e) (the 'Al Hassan Protocol').

circumstances it would apply and it, thus, lacks precision. Accordingly, this proposal is rejected.

24. The Prosecutor also proposes to include ‘the need to clearly convey a Party or participant’s intention to rely on a given individual as a witness for the Protocol to apply’ in paragraph 4(f) of the Practice Manual Protocol.³⁵ The Yekatom Defence responds that, if this modification were adopted, it ‘would effectively have to choose between allowing its prospective witnesses not to be covered by the protection of the Protocol on one hand, and prematurely disclosing its investigative plan on the other’.³⁶ Therefore, the Yekatom Defence proposes an alternative definition for witnesses.³⁷ The Prosecutor opposes this definition arguing that it ‘is unworkable and undermines the purpose of the Proposed Protocol’.³⁸ The Ngaïssona Defence agrees with the Yekatom Defence and supports the alternative definition proposed by the Yekatom Defence.³⁹ The Chamber notes that the Prosecutor’s proposal has been adopted in the Al Hassan Case.⁴⁰ Furthermore, in the view of the Chamber, the definition of ‘witness’ in paragraph 4(f) of the Practice Manual Protocol must be read together with the chapeau of this paragraph, which specifies that this definition has been adopted for the purposes of this Protocol only. It does not, therefore, affect any disclosure obligations arising from the Statute and the Rules, contrary to the arguments of the Yekatom Defence and the Ngaïssona Defence. In addition, the Chamber agrees with the Prosecutor that restricting the definition of witnesses of participants to victims as proposed by the Yekatom Defence would unduly exclude other individuals in need of protection. Accordingly, the modification proposed by the Prosecutor is accepted and the proposal by the Yekatom Defence, as supported by the Ngaïssona Defence, is rejected.

³⁵ [ICC-01/14-01/18-35](#), para. 8; [ICC-01/14-01/18-35-AnxA](#), para. 4(f).

³⁶ [ICC-01/14-01/18-51](#), para. 29.

³⁷ [ICC-01/14-01/18-51-AnxA](#), para. 4(f). The paragraph proposed by the Yekatom Defence reads as follows: “[w]itness” shall mean (i) For the Prosecution: a person whom the Prosecution intends to call to testify, when such intention has been formally communicated to the Defence pursuant to the Statute, Rules and Regulations of the Court; (ii) For the Defence: a person whom the Defence intends to call to testify, when such intention has been communicated *ex parte* to the VWU and (iii) For Participants: a participating victim who has been authorized by the Chamber to provide views or testify in the proceedings’.

³⁸ [ICC-01/14-01/18-58](#), para. 10. *See also* [ICC-01/14-01/18-58](#), paras 11-14.

³⁹ [ICC-01/14-01/18-144](#), paras 11-15; [ICC-01/14-01/18-144-AnxA](#), para. 4(f).

⁴⁰ [Al Hassan Protocol](#), ICC-01/12-01/18-40-Anx-tENG, para. 4(f).

25. The next modification proposed by the Prosecutor concerns the insertion of a new paragraph following paragraph 4 of the Practice Manual Protocol.⁴¹ The new paragraph would read as follows: ‘[a]ll of the obligations set out in the present Protocol, and which are imposed upon parties and participants, are also applicable to members of their teams, the intermediaries on whom they call and any other person who performs tasks at their request’.⁴² The Yekatom Defence agrees with the Prosecutor’s proposal.⁴³ The Ngaïssona Defence does not specifically object to this proposal.⁴⁴ The Chamber notes that this modification has been adopted in the Al Hassan Case⁴⁵ and that neither the Yekatom Defence nor the Ngaïssona Defence opposes it. Accordingly, this proposal is accepted.

26. The Prosecutor also proposes to correct ‘of’ to ‘or’ in paragraph 7 of the Practice Manual Protocol.⁴⁶ The Yekatom Defence agrees with this proposal.⁴⁷ The Ngaïssona Defence does not object to it.⁴⁸ Considering that the proposal concerns the correction of a minor typographical error, the Chamber accepts it. The Prosecutor also proposes to add the words ‘or information’ after the reference to ‘document’ in the same paragraph ‘to be consistent with other references in that section to “confidential document or information”’,⁴⁹ although this proposal has not been marked in the annex appended to the Prosecutor’s filing.⁵⁰ Neither the Yekatom Defence nor the Ngaïssona Defence respond to this proposal. The Chamber considers that the proposed modification specifies the wording of paragraph 7 of the Practice Manual Protocol in a way that is consistent with the context of this paragraph and that does not affect its substance. Accordingly, this proposal is accepted.

27. Furthermore, the Prosecutor proposes ‘to add a reference to rule 112(1)(e) and (3) of the rules [in paragraph 8 of the Practice Manual Protocol] to ensure the requirement does not infringe a suspect’s right of to [sic] have a copy of his or her

⁴¹ [ICC-01/14-01/18-35](#), para. 8; [ICC-01/14-01/18-35-AnxA](#), para. 5.

⁴² [ICC-01/14-01/18-35](#), para. 8; [ICC-01/14-01/18-35-AnxA](#), para. 5.

⁴³ [ICC-01/14-01/18-51](#), para. 32; [ICC-01/14-01/18-51-AnxA](#), para. 5.

⁴⁴ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), para. 5.

⁴⁵ [Al Hassan Protocol](#), ICC-01/12-01/18-40-Anx-tENG, para. 5.

⁴⁶ [ICC-01/14-01/18-35](#), para. 13; [ICC-01/14-01/18-35-AnxA](#), para. 8.

⁴⁷ [ICC-01/14-01/18-51](#), para. 35.

⁴⁸ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), para. 8.

⁴⁹ [ICC-01/14-01/18-35](#), para. 13.

⁵⁰ [ICC-01/14-01/18-35-AnxA](#), para. 8.

recorded interview or statement pursuant to article 55(2) of the Statute’.⁵¹ The Yekatom Defence agrees with this proposal.⁵² The Ngaïssona Defence does not oppose it.⁵³ The Chamber observes that this modification has already been adopted in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (the ‘Bemba et al. Case’).⁵⁴ In addition, neither the Yekatom Defence nor the Ngaïssona Defence objects to it. Accordingly, this proposal is accepted.

28. The Prosecutor further proposes to retain the modification to paragraph 9 of the Practice Manual Protocol as adopted in the Al Hassan Case and the Bemba et al. Case,⁵⁵ namely to add the following words after the current wording of this paragraph: ‘or who are subject to other protection measures, including those applicable in other cases before the Court’.⁵⁶ The Yekatom Defence opposes this proposal. It argues that the Prosecutor omits the qualifier adopted in the Bemba et al. Case, namely that the protective measures must be known to the investigating party.⁵⁷ It also submits that the amendment ‘places unreasonable and unnecessary restrictions on the parties’ and participant’s [sic] ability to conduct its investigations’ as it ‘is so broad that would [sic] inevitably lead to the application of the Protocol to those are [sic] only remotely linked to the Court and/or are unlikely to be called to testify’.⁵⁸ Finally, the Yekatom Defence is of the view that ‘the scope of individuals within the meaning of the Prosecution’s proposed addition is vastly broader for the Defence than that for the Prosecution’, which would amount to ‘a gross breach of equality of arms’.⁵⁹ The Ngaïssona Defence also disagrees with this proposal arguing that ‘[t]he Prosecution fails to explain why this additional reference to other “protection” measures, which

⁵¹ [ICC-01/14-01/18-35](#), para. 10; [ICC-01/14-01/18-35-AnxA](#), para. 9.

⁵² [ICC-01/14-01/18-51](#), para. 37.

⁵³ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), para. 9.

⁵⁴ Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, [Annex to Decision adopting a Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party and Witnesses of the Other Parties](#), 20 July 2015, ICC-01/05-01/13-1093-Anx, para. 9 (the ‘Bemba et al. Protocol’).

⁵⁵ [Bemba et al. Protocol](#), ICC-01/05-01/13-1093-Anx, para. 19; [Al Hassan Protocol](#), ICC-01/12-01/18-40-Anx-tENG, para. 10.

⁵⁶ [ICC-01/14-01/18-35](#), paras 8, 11; [ICC-01/14-01/18-35-AnxA](#), para. 10.

⁵⁷ [ICC-01/14-01/18-51](#), para. 39.

⁵⁸ [ICC-01/14-01/18-51](#), para. 41.

⁵⁹ [ICC-01/14-01/18-51](#), para. 42.

term is extremely vague, would be required'.⁶⁰ The Chamber considers that the Prosecutor's proposal, which is a combination of modifications adopted in other cases, strikes an appropriate balance between the interests of the parties and the protection of persons affected by the activities of the Court. Ignoring protective measures merely because they were adopted in another case would contravene the duty of the Court to protect persons pursuant to article 68(1) of the Statute. However, the Chamber agrees with the Yekatom Defence that the aforementioned qualifier must be added to the Prosecutor's proposal. To do otherwise may result in unintentional violations of the Protocol since the investigating party may not always be aware of the protection measures in place including those applicable in other cases before the Court. Accordingly, the Chamber accepts the Prosecutor's proposal in combination with the addition suggested by the Yekatom Defence.

29. In addition, the Prosecutor proposes to add the word 'a' between the words 'with' and 'form' in paragraph 18 of the Practice Manual Protocol to correct a typographical error.⁶¹ The Yekatom Defence agrees with this proposal.⁶² The Ngaïssona Defence does not oppose it.⁶³ Considering that the proposal concerns the correction of a minor typographical error, the Chamber accepts it.

30. The next proposal by the Prosecutor concerns the insertion of the following sentence after the sentence currently contained in paragraph 20 of the Practice Manual Protocol: 'The receiving party or participant must also inform any person who has read or has had access to the confidential material inadvertently disclosed that they must cease all use of the said document and ensure, as far as possible, that any copies are returned to the disclosing party or participant and that any electronic versions are destroyed'.⁶⁴ The Yekatom Defence opposes this proposal as it is 'redundant'.⁶⁵ The Ngaïssona Defence does not agree with it either.⁶⁶ The Chamber considers that this

⁶⁰ [ICC-01/14-01/18-144](#), para. 16.

⁶¹ [ICC-01/14-01/18-35](#), para. 13; [ICC-01/14-01/18-35-AnxA](#), para. 19.

⁶² [ICC-01/14-01/18-51](#), para. 49.

⁶³ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), para. 19.

⁶⁴ [ICC-01/14-01/18-35](#), para. 8; [ICC-01/14-01/18-35-AnxA](#), para. 21.

⁶⁵ [ICC-01/14-01/18-51](#), para. 52.

⁶⁶ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), para. 21.

modification clarifies the terms of the Protocol and that it has already been adopted in the Al Hassan Case⁶⁷. Accordingly, this proposal is accepted.

31. Moreover, the Prosecutor proposes to replace the text of paragraph 21 of the Practice Manual Protocol with the following text: ‘The parties or participants must seek to reach agreement in the event of any dispute as to whether or not the material should have been disclosed or should have been disclosed in redacted form. If they are unable to do so, they must apply to the Chamber by filing observations on the matter’.⁶⁸ The Yekatom Defence objects to the deletion of the existing text of paragraph 21 of the Practice Manual Protocol but agrees with the addition in general although it suggests a different formulation.⁶⁹ The Ngaïssona Defence agrees with the Yekatom Defence.⁷⁰ The Chamber observes that the Prosecutor’s proposed modification has been adopted in the Al Hassan Case.⁷¹ The Yekatom Defence and Ngaïssona do not object to this proposal as such. However, neither the Yekatom Defence nor the Ngaïssona Defence attempts to explain why the original text should be retained or justifies why the Prosecutor’s proposal should be worded differently. Accordingly, the proposal by the Prosecutor is accepted and the proposal by the Yekatom Defence, as supported by the Ngaïssona Defence, is rejected.

32. The Prosecutor subsequently proposes to delete heading VI and paragraph 25 of the Practice Manual Protocol, which reads as follows: ‘[w]hen interviewing a witness, a party or participant shall inform the witness of its disclosure obligations and shall seek to obtain consent of the witness to the disclosure of his or her statement and any visual and/or non-textual material obtained from the witness. A party or participant shall give particular regard to the needs of vulnerable witnesses’. According to the Prosecutor, ‘[a] Party’s obtaining of their witness’s consent prior to disclosure falls beyond the scope of the Proposed Protocol, as it concerns dealings with one’s “own” witness – and not the practical modalities for handling confidential information during

⁶⁷ [Al Hassan Protocol](#), ICC-01/12-01/18-40-Anx-tENG, para. 21.

⁶⁸ [ICC-01/14-01/18-35](#), para. 8; [ICC-01/14-01/18-35-AnxA](#), para. 22.

⁶⁹ [ICC-01/14-01/18-51](#), para. 55. The Yekatom Defence proposes that the following sentence be added to paragraph 20 of the Practice Manual Protocol: ‘In case of disagreement, the receiving parties undertake to immediately raise the matter with the Chamber, in which case the document at issue can only be use [sic] for this purpose’. See [ICC-01/14-01/18-51-AnxA](#), para. 21.

⁷⁰ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), para. 21.

⁷¹ [Al Hassan Protocol](#), ICC-01/12-01/18-40-Anx-tENG, para. 22.

investigations, nor the contacts between a party or a participant and a witness of *another* party or of a participant'.⁷² The Prosecutor also asserts that this deletion is 'consistent with the *Al Hassan* Protocol whereby the Single Judge excluded similar provisions'.⁷³ The Yekatom Defence opposes this modification arguing that 'it is essential for all parties to know pursuant to what norms witness interviews are conducted'.⁷⁴ The Ngaissona Defence agrees with the Yekatom Defence.⁷⁵ The Chamber notes that a similar provision dealing with a party's 'own' witnesses has not been rejected in a previous case.⁷⁶ The Chamber finds, more generally, that it is desirable to ensure that a witness is properly informed of the disclosure obligations arising from an interview regardless of the party or participant calling the witness. In addition, paragraph 25 of the Practice Manual Protocol has been retained in the *Al Hassan* Case.⁷⁷ Accordingly, this proposal by the Prosecutor is rejected.

33. The Prosecutor also proposes to insert a new paragraph following paragraph 29 of the Practice Manual Protocol regarding the inadvertent contact with witnesses, as adopted in the *Al Hassan* Protocol.⁷⁸ However, the Prosecutor proposes to delete the reference to courtesy meetings organised by the Victims and Witnesses Unit (the 'VWU')⁷⁹ from the paragraph as adopted in the *Al Hassan* Protocol in order to 'avoid the erroneous impression that inappropriate contacts occurring during VWU-organised courtesy meetings are sanctioned'.⁸⁰ The proposed paragraph, as modified, would read as follows: 'If a party or participant contacts a witness of an opposing party or participant inadvertently, 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. A witness's consent to be interviewed may be obtained only

⁷² [ICC-01/14-01/18-35](#), para. 14 (emphasis in original).

⁷³ [ICC-01/14-01/18-35](#), para. 15.

⁷⁴ [ICC-01/14-01/18-51](#), para. 61.

⁷⁵ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), para. 26.

⁷⁶ Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision adopting the Protocol on disclosure of the identity of witnesses of other parties and of the LRV in the course of investigations, use of confidential information by the parties and the LRV in the course of investigations, inadvertent disclosure and contacts between a party and witnesses not being called by that party](#), 31 August 2015, ICC-02/11-01/15-200, paras 29-30 (the 'Gbagbo and Blé Goudé Protocol Decision').

⁷⁷ [Al Hassan Protocol](#), ICC-01/12-01/18-40-Anx-tENG, para. 26.

⁷⁸ [ICC-01/14-01/18-35](#), para. 9; [ICC-01/14-01/18-35-AnxA](#), para. 32.

⁷⁹ While 'Victims and Witnesses Section' or 'VWS' has also been used, the Chamber consistently uses 'VWU' in the present decision in accordance with article 43(6) of the Statute.

⁸⁰ [ICC-01/14-01/18-35](#), para. 9; [ICC-01/14-01/18-35-AnxA](#), para. 32.

through the calling party or participant'. Furthermore, in order to clarify the issue of contact with witnesses during VWU-organised meetings, the Prosecutor proposes the insertion of an additional paragraph following paragraph 27 of the Practice Manual Protocol.⁸¹ This paragraph would read as follows: 'While the purpose of VWU-organized meetings is to meet the witness of another party or participant, this meeting can under no circumstances be used to seek the witness's consent to be interviewed. During such meetings, the provisions of the present Protocol continue to apply'. The Yekatom Defence agrees with the addition proposed by the Prosecutor but suggests a differently worded paragraph.⁸² The Ngaïssona Defence concurs with the Yekatom Defence although it proposes some changes to the paragraph put forward by the Yekatom Defence.⁸³ The Chamber observes that the Prosecutor's proposal has in essence already been adopted in the Al Hassan Case.⁸⁴ In addition, the modification proposed by the Prosecutor further clarifies the position of the Al Hassan Protocol in that it provides the necessary certainty regarding the purpose of VWU-organized courtesy meetings. Neither the Yekatom Defence nor the Ngaïssona Defence objects to this proposal as such. In the absence of an explanation on the part of the Yekatom Defence and the Ngaïssona Defence, the Chamber does not see the need for the alternative wording proposed. Accordingly, the Prosecutor's proposals are accepted and the proposals by the Yekatom Defence and the Ngaïssona Defence are rejected.⁸⁵

34. Moreover, with regard to paragraph 37 of the Practice Manual Protocol, the Prosecutor proposes to retain the deadline of five days in relation to the obligation to

⁸¹ [ICC-01/14-01/18-35](#), para. 9; [ICC-01/14-01/18-35-AnxA](#), para. 29.

⁸² [ICC-01/14-01/18-51](#), para. 74; [ICC-01/14-01/18-51-AnxA](#), para. 29. The paragraph proposed by the Yekatom Defence reads as follows: 'If a party or participant contacts a witness of an opposing party or participant inadvertently, 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. A witness's consent to be interviewed may be obtained only through the calling party. VWU-organized courtesy meetings cannot be used for this purpose'.

⁸³ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), para. 29. The paragraph proposed by the Ngaïssona Defence reads as follows: 'If a party or participant contacts a witness of an opposing party or participant inadvertently, 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. A witness's consent to be interviewed may be obtained only under the conditions specified above and only through the calling party or participant. VWU-organized courtesy meetings cannot be used for this purpose'.

⁸⁴ [Al Hassan Protocol](#), ICC-01/12-01/18-40-Anx-tENG, para. 31.

⁸⁵ The Chamber also notes that the Prosecutor proposes to delete the references to 'in accordance with the provisions of paragraphs 30 and 32 below' in paragraph 29 of the Al Hassan Protocol and to 'in accordance with the provisions of paragraphs 30 and 32' in paragraph 31 of the Al Hassan Protocol. See [ICC-01/14-01/18-35-AnxA](#), paras 30, 32. The Chamber also accepts these proposals as it is sufficiently clear that the requirements in the relevant paragraphs must be complied with.

provide a video or audio recording to the calling party or participant as accepted in the Al Hassan Protocol.⁸⁶ In addition, the Prosecutor proposes to add the words ‘or as soon as practicable thereafter’ in order to take into consideration possible delays in processing the records.⁸⁷ The Yekatom Defence opposes the five days deadline ‘as it may well be logistically impractical despite the party’s best effort.’⁸⁸ The Ngaïssona Defence agrees with the Yekatom Defence.⁸⁹ Given that the Yekatom Defence does not adequately substantiate its argument that a five day deadline could be impractical, the Chamber accepts the addition of the deadline as it has already been accepted in the Al Hassan Case.⁹⁰ However, the Chamber rejects the additional insertion proposed by the Prosecutor (i.e. ‘or as soon as practicable thereafter’) as the Protocol adopted in the Al Hassan Case already stipulates that the five days deadline is subject to the proviso of ‘to the extent possible’.⁹¹

35. Finally, the Prosecutor proposes to add a new section containing two new paragraphs following paragraph 37 of the Practice Manual Protocol dealing with the ‘[o]bjection of a party or participant to the interview of a witness whom the opposing party intends to call to testify’. The proposed paragraphs read as follows:

If, after having obtained the consent of the witness they intend to call, a party or a participant wishes to object, on an exceptional basis and in the event of a serious problem, for reasons related to the safety or physical or psychological well-being or dignity of the witness, to the request to interview the witness with the opposing party or a participant, the opposing party or participant shall be informed in writing. If, despite their efforts, they cannot reach agreement, the calling party must apply to the Chamber and inform the VWS in writing within two days of the disagreement having been notified by one of the parties or participants to the other.

Without prejudice to articles 56 and 57(3)(b) of the Statute and rule 114 of the Rules of Procedure and Evidence, the party or participant seeking the interview with the witness must refrain from holding the interview until the matter has been decided by the Chamber.⁹²

⁸⁶ [ICC-01/14-01/18-35-AnxA](#), para. 40.

⁸⁷ [ICC-01/14-01/18-35](#), para. 12.

⁸⁸ [ICC-01/14-01/18-51](#), para. 71; [ICC-01/14-01/18-51-AnxA](#), para. 36.

⁸⁹ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), para. 36.

⁹⁰ [Al Hassan Protocol](#), ICC-01/12-01/18-40-Anx-tENG, para. 39.

⁹¹ [Al Hassan Protocol](#), ICC-01/12-01/18-40-Anx-tENG, para. 39.

⁹² [ICC-01/14-01/18-35](#), para. 8; [ICC-01/14-01/18-35-AnxA](#), paras 41-42.

The Yekatom Defence objects to these paragraphs on the basis that they ‘are drafted in a vague manner’ and ‘[a]mbiguity as such can easily be abused and may, in practice, create obstacles to the course of investigation by the parties due to potential conflicted [sic] interpretation’.⁹³ It is also the view of the Yekatom Defence that these paragraphs ‘would create an unjustified discretion to prevent an interview despite the witness’ consent given in accordance with the Protocol’.⁹⁴ The Ngaissona Defence agrees with the Yekatom Defence.⁹⁵ The Chamber notes that the proposed paragraphs have also been included in the Protocol adopted in the Al Hassan Case.⁹⁶ The objections raised by the Yekatom Defence do not withstand scrutiny as the proposed paragraphs are worded sufficiently precisely and, as opposed to providing discretion to prevent an interview, merely specify the narrowly defined circumstances under which such an interview should not take place. In any event, the Chamber retains the ultimate authority to decide on any dispute arising from the application of these paragraphs. Accordingly, this proposal is accepted.

B. The Yekatom Defence’s proposed modifications

36. The Yekatom Defence suggests an amendment to paragraph 3 of the Practice Manual Protocol ‘whereby the Prosecution and the Defence can mutually agree to an *ad hoc* deviation without seizing the Chamber for authorization’, which is ‘in the interest of judicial economy and will contribute to the expeditiousness of the trial’.⁹⁷ The Prosecutor does not specifically respond to this proposal. The Ngaissona Defence agrees with the Yekatom Defence.⁹⁸ The Chamber agrees that this proposal may expedite the proceedings and, accordingly, accepts it with adjustments to the wording proposed by the Yekatom Defence as specified in the annex appended to the present decision.

⁹³ [ICC-01/14-01/18-51](#), para. 76.

⁹⁴ [ICC-01/14-01/18-51](#), para. 77.

⁹⁵ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), section VII.

⁹⁶ [Al Hassan Protocol](#), ICC-01/12-01/18-40-Anx-tENG, paras 40-41.

⁹⁷ [ICC-01/14-01/18-51](#), para. 14. The paragraph proposed by the Yekatom Defence reads as follows: ‘In principle, any deviation from this Protocol requires the prior authorization of the Chamber. However, the parties can mutually agree to deviate from this Protocol without requiring prior authorization of the Chamber’. See [ICC-01/14-01/18-51-AnxA](#), para. 3.

⁹⁸ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), para. 3.

37. With regard to the definition of ‘party’ in paragraph 4(a) of the Practice Manual Protocol, the Yekatom Defence ‘proposes a clarification of the scope of the authorised personnel within the Prosecution to those who are properly assigned to the present case’.⁹⁹ In this regard, the Yekatom Defence asserts that ‘[t]he Office of the Prosecutor as a whole is a vast organ comprising a large number of staff members where conflict of interest may arise in certain circumstances’.¹⁰⁰ The Prosecutor objects to this proposal arguing that ‘the Prosecution is a singular entity’ and asserting that ‘the fewer people are bound by [...] [the Protocol], the greater the risks’.¹⁰¹ The Ngaïssona Defence agrees with the Yekatom Defence.¹⁰² The Chamber considers that the Yekatom Defence fails to substantiate how a conflict of interest could arise in this context. Its proposal is, in addition, contrary to the designation of the Office of the Prosecutor as a single organ of the Court under article 42(1) of the Statute. Accordingly, this proposal is rejected.

38. The Yekatom Defence next proposes to remove the term ‘any other entity’ from the definition of participant in paragraph 4(b) of the Practice Manual Protocol ‘as it is too vague’ and to state instead that participant ‘shall mean the Principal Counsel of the Office of the Public Counsel for Victims, Legal Representatives duly assigned to represent participating victims and States in the present case, and any other persons properly designated as members of their teams’.¹⁰³ The Prosecutor objects to this proposal as it would reduce the ‘scope and protection’ of the Protocol.¹⁰⁴ The Ngaïssona Defence agrees with the Yekatom Defence that the term ‘any other entity is too vague’ and suggests an amendment to the proposal put forward by the Yekatom Defence that reads: ‘to ascertain that only such entities as entitled to participate in the proceedings and having rightfully gained access to confidential information are hereby referenced while ensuring that all such entities are bound by the Protocol’s obligations’.¹⁰⁵ In the view of the Chamber, neither the Yekatom Defence nor the

⁹⁹ [ICC-01/14-01/18-51](#), para. 16 (emphasis in original); [ICC-01/14-01/18-51-AnxA](#), para. 4(a).

¹⁰⁰ [ICC-01/14-01/18-51](#), para. 17.

¹⁰¹ [ICC-01/14-01/18-58](#), paras 6-7.

¹⁰² [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), para. 4(a).

¹⁰³ [ICC-01/14-01/18-51](#), para. 20; [ICC-01/14-01/18-51-AnxA](#), para. 4(b).

¹⁰⁴ [ICC-01/14-01/18-58](#), para. 8.

¹⁰⁵ [ICC-01/14-01/18-144](#), para. 9; [ICC-01/14-01/18-144-AnxA](#), para. 4(b). The paragraph proposed by the Ngaïssona Defence reads as follows: “‘Participant’ shall mean any entity, other than a party, judges or authorized Court staff, authorized by the Court to participate in the proceedings and gain access, in

Ngaïssona Defence sufficiently explains why the existing language is too vague. It also agrees with the Prosecutor that such a limitation is contrary to the object and purpose of the Protocol ‘to protect the safety of witnesses, victims and other individuals at risk’.¹⁰⁶ Accordingly, this proposal is rejected.

39. Furthermore, the Yekatom Defence proposes to replace ‘preparation and presentation’ with ‘preparation or presentation’ in paragraphs 7 and 10 of the Practice Manual Protocol since ‘preparation of a case does not necessarily equal to [sic] presentation’.¹⁰⁷ The Prosecutor does not respond to these proposals. The Ngaïssona Defence agrees with the Yekatom Defence.¹⁰⁸ The Chamber considers that these proposals specify the language used in the Practice Manual Protocol and, accordingly, accepts them.

40. As regards paragraph 24 of the Practice Manual Protocol, which concerns the obligation of a party or participant to immediately inform the VWU of a breach of confidentiality, the Yekatom Defence proposes ‘to clarify that the VWU’s involvement is only necessary when the leak or breach of confidentiality pertains to a protected witness’.¹⁰⁹ The Prosecutor objects to this proposal for three reasons: (i) the VWU is privy to all the witnesses and their security concerns in the case, including those unknown to other parties or participants; (ii) without any reporting obligations, the nature and frequency of those breaches cannot be evaluated, nor additional remedies imposed; and (iii) maintaining a reporting obligation will help ensure that the parties and participants take seriously their obligations to secure and appropriately manage confidential information.¹¹⁰ The Ngaïssona Defence agrees with the Yekatom Defence.¹¹¹ The Chamber notes that the mandate of the VWU does not only extend to witnesses and victims appearing before the Court but also to ‘others who are at risk on

accordance with the legal framework of the Court, to confidential information, including the Principal Counsel of the Office of the Public Counsel for Victims, the Legal Representative(s) duly assigned to represent participating of victims and States in the present case, and any other persons properly designated as members of their teams’.

¹⁰⁶ [Practice Manual Protocol](#), para. 1.

¹⁰⁷ [ICC-01/14-01/18-51](#), paras 36, 45; [ICC-01/14-01/18-51-AnxA](#), paras 8, 11.

¹⁰⁸ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), paras 8, 11.

¹⁰⁹ [ICC-01/14-01/18-51](#), para. 57; [ICC-01/14-01/18-51-AnxA](#), para. 25.

¹¹⁰ [ICC-01/14-01/18-58](#), paras 17-19.

¹¹¹ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), para. 25.

account of testimony given by such witnesses' pursuant to article 43(6) of the Statute. Therefore, this proposal is incompatible with the Statute and must be rejected.

41. The Yekatom Defence also proposes to delete the second half of paragraph 26 of the Practice Manual Protocol, which pertains to the prohibition of contacting another party or participant's witness where that party or participant has clearly communicated its intention to call the witness to testify or rely on the witness' statement, in order to bring it in line with its proposed adjustment to the definition of witnesses in paragraph 4(f) of the Practice Manual Protocol.¹¹² The Prosecutor does not specifically respond to this proposal. The Ngaïssona Defence agrees with the Yekatom Defence.¹¹³ The Yekatom Defence further proposes to insert, into paragraph 26 of the Practice Manual Protocol, the content of paragraph 28 which stipulates that a witness of another party or participant may only be contacted or interviewed by a party or participant if that witness consents.¹¹⁴ The Prosecutor does not specifically respond to this proposal either. The Ngaïssona Defence does not appear to take a position on this proposal.¹¹⁵ The Chamber notes that it has rejected the definition of witnesses proposed by the Yekatom Defence in paragraph 24 of the present decision. In addition, it does not see the need to combine the content of paragraphs 26 and 28 of the Practice Manual Protocol as, in the interests of consistency and predictability, the Practice Manual Protocol should not be modified unless there are compelling and adequate reasons to do so. Accordingly, these proposals are rejected.

42. In addition, the Yekatom Defence proposes to move paragraph 27 of the Practice Manual Protocol to the end 'as it considered it more logical'.¹¹⁶ The Prosecutor does not specifically respond to this proposal. The Ngaïssona Defence agrees with the Yekatom Defence.¹¹⁷ The Chamber does not see the need to move this paragraph for the reasons expressed in relation to the preceding proposal put forward by the Yekatom Defence. Accordingly, this proposal is rejected.

¹¹² [ICC-01/14-01/18-51](#), para. 65; [ICC-01/14-01/18-51-AnxA](#), para. 27.

¹¹³ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), para. 27.

¹¹⁴ [ICC-01/14-01/18-51](#), para. 65; [ICC-01/14-01/18-51-AnxA](#), para. 27.

¹¹⁵ [ICC-01/14-01/18-144-AnxA](#), para. 27.

¹¹⁶ [ICC-01/14-01/18-51](#), para. 66; [ICC-01/14-01/18-51-AnxA](#), para. 39.

¹¹⁷ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), para. 39.

43. The Yekatom Defence next proposes to add a new paragraph following paragraph 26 of the Practice Manual Protocol ‘providing for an obligation of the representative of the investigating party or participant to adequately identify him/herself as well as his/her role and function when interviewing a person’ in order to ‘avoid the interviewee misunderstanding the nature of the interview due to a deliberate or inadvertent omission of information by the interviewer’.¹¹⁸ The Prosecutor does not specifically respond to this proposal. The Ngaïssona Defence agrees with the Yekatom Defence.¹¹⁹ The Chamber considers that a deliberate or inadvertent omission to clearly identify oneself and one’s role or function when conducting an interview is incompatible with the professional duties and qualifications of the representatives of the parties as reflected in, for instance, articles 11, 20, 25 to 28 and 66 to 68 of the Code of Conduct for the Office of the Prosecutor and articles 5 to 8 and 29 of the Code of Professional Conduct for counsel. Therefore, this proposal is superfluous and must be rejected.

44. With regard to paragraph 29 of the Practice Manual Protocol, the Yekatom Defence proposes to add the words ‘as soon as practicably possible and in any event’ as well as to reduce the time limit from five days to three days.¹²⁰ The Yekatom Defence also proposes to reduce the time limit from five days to three days in respect of paragraph 30 of the Practice Manual Protocol.¹²¹ The Prosecutor does not specifically respond to these proposals. The Ngaïssona Defence agrees with the Yekatom Defence.¹²² The Chamber notes that the five day deadline is based on the established practice of the Court and that, besides providing general considerations,

¹¹⁸ [ICC-01/14-01/18-51](#), para. 73; [ICC-01/14-01/18-51-AnxA](#), para. 28. The paragraph proposed by the Yekatom Defence reads as follows: ‘To this end, every time an investigating party or participant interviews a person, it shall: (i) clearly identify itself as a representative of the Prosecution, a representative of the Defence, or a representative of participating victims; (ii) explain its role before the Court and in the current proceedings being investigated and (iii) confirm the identity of the witness, whenever possible, through a document. Unless the person is identified as a witness of the other party or participant pursuant to paragraph 4(f), the investigating party can proceed with the interview’.

¹¹⁹ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), para. 28.

¹²⁰ [ICC-01/14-01/18-51](#), para. 67; [ICC-01/14-01/18-51-AnxA](#), para. 30. The paragraph proposed by the Yekatom Defence reads as follows: ‘The party or participant seeking to interview a witness of another party or participant shall notify the latter of its intent to do so. The calling party or participant shall ask the witness as soon as practically possible and in any event within three days whether he or she agrees to be interviewed. 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’.

¹²¹ [ICC-01/14-01/18-51](#), para. 67; [ICC-01/14-01/18-51-AnxA](#), para. 31.

¹²² [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), paras 30-31.

the Yekatom Defence fails to adequately demonstrate the need to deviate from this practice. Accordingly, this proposal is rejected.

45. Furthermore, the Yekatom Defence proposes to add the word ‘immediately’ to paragraph 31 of the Practice Manual Protocol, which ‘would contribute to both the expeditiousness and the transparency of the proceedings’.¹²³ The Prosecutor does not specifically respond to this proposal. The Ngaïssona Defence agrees with the Yekatom Defence.¹²⁴ The Chamber considers that this proposal reduces any ambiguity that could arise from the interpretation of this provision and that it could expedite the proceedings. Accordingly, this proposal is accepted.

46. Finally, the Yekatom Defence asserts that it agrees with the ‘gist’ of paragraph 37 of the Practice Manual Protocol, which requires a video or audio recording of the interview to be provided to the calling party or participant.¹²⁵ However, it ‘proposes to limit the applicable scenario to where the interview was taking [sic] place without the presence of a representative of the calling party in order to avoid unnecessary addition to the disclosure burden’.¹²⁶ The Prosecutor does not specifically respond to this proposal. The Ngaïssona Defence agrees with the Yekatom Defence.¹²⁷ The Chamber considers that, even with the presence of a representative of the calling party or participant, disagreements between the parties and/or participants could arise and a recording of the interview could assist in resolving such disputes. This proposal is, therefore, rejected.

C. The Ngaïssona Defence’s proposed modifications

47. The Chamber observes that the Ngaïssona Defence proposes to modify the first sentence of paragraph 5 of the Practice Manual Protocol by adding the following words after the reference to ‘confidential document or information’: ‘they may have had the right to access to in the context of the proceedings’.¹²⁸ However, the

¹²³ [ICC-01/14-01/18-51](#), para. 68; [ICC-01/14-01/18-51-AnxA](#), paras 32.

¹²⁴ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), para. 32.

¹²⁵ [ICC-01/14-01/18-58](#), para. 70.

¹²⁶ [ICC-01/14-01/18-51](#), para. 70; [ICC-01/14-01/18-51-AnxA](#), paras 36.

¹²⁷ [ICC-01/14-01/18-144](#), para. 8; [ICC-01/14-01/18-144-AnxA](#), para. 36.

¹²⁸ [ICC-01/14-01/18-144-AnxA](#), para. 6. The paragraph proposed by the Ngaïssona Defence reads as follows: ‘Parties and participants are under a general obligation not to disclose to third parties any confidential document or information they may have had the right to access to in the context of the

Ngaïssona Defence has not provided reasons in support of this proposal. In any event, the Chamber is of the view that this addition is not necessary as the existing wording already stipulates that parties may not disclose ‘any confidential document or information’ (emphasis added). Therefore, this proposal is rejected.

48. Furthermore, the Ngaïssona Defence is concerned ‘that informing the VWU, in advance, of the disclosure of the identity of any protected witnesses, i.e., those not in the ICCPP, but who are protected, for example by use of a pseudonym, will be impossible to implement, because all of the important Prosecution witnesses are likely to have a pseudonym’.¹²⁹ It, therefore, proposes to delete the reference to ‘but in any event before disclosure’ in paragraph 10 of the Practice Manual Protocol in order to reflect that ‘it should not be obliged to notify the VWU of such a disclosure prior to the interview as long as it notifies it as soon as possible afterwards’.¹³⁰ The Chamber notes that a provision similar to the one proposed by the Ngaïssona Defence has been adopted in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* (the ‘Gbagbo and Blé Goudé Case’).¹³¹ However, the Chamber observes that recent decisions have retained the requirement under consideration.¹³² More generally, the Chamber considers that the need to inform VWU prior to disclosure is an important safeguard in order to determine if specific measures are necessary before disclosure. The Ngaïssona Defence may consult VWU to resolve any practical impediments that may arise in implementing this safeguard. Accordingly, this proposal is rejected.

49. The Ngaïssona Defence further argues in relation to paragraph 10 of the Practice Manual Protocol that ‘the parties and participants will not necessarily have the means of knowing that the identity of a witness has been protected if that witness’ identity is for instance protected by the VWU in a case other than the present case’.¹³³ It, therefore, ‘suggests to restrict the disclosure obligations of the parties and participants only in relation to witnesses the protection of identity of whom the parties

proceedings. This Protocol sets out the conditions and procedures in which the disclosure of confidential documents or information to third parties as part of investigative activities by a party or participant is exceptionally permissible’.

¹²⁹ [ICC-01/14-01/18-144](#), para. 17.

¹³⁰ [ICC-01/14-01/18-144](#), para. 17; [ICC-01/14-01/18-144-AnxA](#), para. 11.

¹³¹ [Gbagbo and Blé Goudé Protocol Decision](#), ICC-02/11-01/15-200, para. 24.

¹³² See for example [Al Hassan Protocol](#), ICC-01/12-01/18-40-Anx-tENG, para. 11.

¹³³ [ICC-01/14-01/18-144](#), para. 18.

and participants have been made aware [sic]'.¹³⁴ The Chamber recalls that, in adopting the modification to paragraph 9 of the Practice Manual Protocol proposed by the Prosecutor in paragraph 28 of the present decision, the Chamber accepted the proposal of the Yekatom Defence to add the requirement that the protective measures applicable in other cases before the Court must be known to the investigating party. Accordingly, the proposal by the Ngaïssona Defence is superfluous and must be rejected.¹³⁵

50. The Ngaïssona Defence next avers that 'participants should not have the right to request to have contacts with the witnesses of the parties'.¹³⁶ In this regard, it argues that it would be 'illogical and unfair to suspects or accused to allow participants to have an automatic right to contact the parties' witnesses in the field, including before the parties have even had the chance to present their own evidence, and without limiting in any way the topics to be covered with that witness, while the legal texts and jurisprudence of the Court do not grant them the right, on their own motion, to call witnesses or question the other parties' witnesses in court, and when such an authorisation is granted, the conditions in which to do so are extremely circumscribed'.¹³⁷ It, therefore, proposes to delete 'all references to the possibility for "participants" to contact the other parties and participants' witnesses' in section VII of the Practice Manual Protocol.¹³⁸ The Chamber notes that it has rejected the restrictive definition of the term 'participants' proposed by the Yekatom Defence and the Ngaïssona Defence in paragraph 38 above. Furthermore, while a provision similar to the one proposed by the Ngaïssona Defence has been adopted in the Gbagbo and Blé Goudé Case,¹³⁹ the Chamber observes that reference to 'participants' in section VII has been retained in more recent decisions in other cases.¹⁴⁰ In any event, the Chamber considers, more generally, that section VII has been adopted for the

¹³⁴ [ICC-01/14-01/18-144](#), para. 18; [ICC-01/14-01/18-144-AnxA](#), para. 11.

¹³⁵ In connection with its proposals regarding paragraph 10 of the Practice Manual Protocol, the Ngaïssona Defence further proposes to add the following words to paragraph 18 of the Practice Manual Protocol: 'in accordance with paragraphs 10 and 11 above'. See [ICC-01/14-01/18-144-AnxA](#), para. 19. As the Chamber has rejected the proposals of the Ngaïssona Defence in relation to paragraph 10 of the Practice Manual Protocol, the corresponding modification to paragraph 18 of the Practice Manual Protocol must also be rejected.

¹³⁶ [ICC-01/14-01/18-144](#), para. 19.

¹³⁷ [ICC-01/14-01/18-144](#), para. 23. See also [ICC-01/14-01/18-144](#), paras 19-22.

¹³⁸ [ICC-01/14-01/18-144](#), para. 24; [ICC-01/14-01/18-144-AnxA](#), paras 30, 32, 34, 40, 41.

¹³⁹ [Gbagbo and Blé Goudé Protocol Decision](#), ICC-02/11-01/15-200, para. 42.

¹⁴⁰ See for example [Al Hassan Protocol](#), ICC-01/12-01/18-40-Anx-tENG, section VII.

purposes of this Protocol only and it, therefore, does not purport to extend any rights to participants which are inconsistent with those arising from the Statute, the Rules and jurisprudence of the Court, contrary to the arguments of the Ngaïssona Defence. Accordingly, this proposal is rejected.

51. Finally, the Chamber notes that, in addition to proposing the deletion of references to ‘participant’ in section VII of the Practice Manual Protocol, the Ngaïssona Defence proposes to add ‘or participant’ to a number of references to the ‘calling party’ in several paragraphs contained in this section.¹⁴¹ The Chamber notes that it has rejected some of the paragraphs referred to by the Ngaïssona Defence in relation to this proposal and that, in any event, the Ngaïssona Defence has not provided reasons in support of this proposal. Accordingly, this proposal is rejected.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Yekatom Defence Request for Additional Submissions or Consultations;

REJECTS the Prosecutor’s Request for Leave to Reply to Ngaïssona’s Observations;

ADOPTS the Protocol in the annex appended to the present decision; and

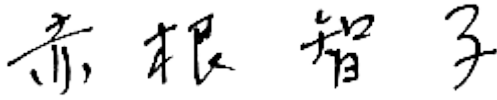
ORDERS the parties to comply with the Protocol in the annex appended to the present decision.

¹⁴¹ See [ICC-01/14-01/18-144-AnxA](#), paras 29, 31, 35, 36.

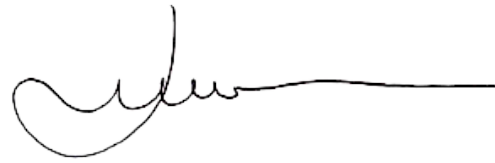
Done in both English and French, the English version being authoritative.



**Judge Antoine Kesia-Mbe Mindua,
Presiding Judge**



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Friday, 22 March 2019

At The Hague, Netherlands