

Pursuant to Pre Trial Chamber I's instruction dated 07 November 2023, this document is reclassified as Public.

Annex 2

Confidential

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Annex 1

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PROPOSED PROTOCOL ON THE HANDLING OF CONFIDENTIAL INFORMATION DURING INVESTIGATIONS AND CONTACT WITH WITNESSES OF OPPOSING PARTIES OR PARTICIPANTS, OR WITH REPRESENTED VICTIMS

A. Introduction

1. The purpose of this Protocol is to protect the safety of witnesses, victims and other individuals at risk, as well as the integrity of investigations, in a manner consistent with the rights of suspects and accused.
2. This Protocol shall be interpreted restrictively and no provision shall be interpreted to derogate any general rule of confidentiality or other protection accorded to witnesses, victims or other persons at risk on account of the activities of the Court, or any obligations of the parties and participants under the Code of Conduct of the Office of the Prosecutor, the Code of Professional Conduct for counsel, the Code of Conduct for Investigators, the Code of Conduct for Intermediaries and any binding national codes of conduct.
3. Any deviation from this Protocol requires the prior authorisation of the Chamber.

B. Definitions

4. For the purposes of this Protocol:
 - (a) 'Party' shall mean the Prosecutor and any member of the Office of the Prosecutor authorised to have access to the information in question, and the suspect or the accused and his or her counsel, assistants to counsel and any other persons properly designated as members of the Defence team;
 - (b) 'Participant' shall mean any other entity participating in the proceedings, including but not limited to the legal representatives of victims and States, and any other persons properly designated as members of their teams;
 - (c) 'Third party' shall include any person except a party or participant as defined above, or a Judge or staff of the Court authorised to have access to the information in question;
 - (d) 'Confidential document' shall mean any document, or any other type of material, not

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classified as 'public' in accordance with Regulation 14(b) of the Regulations of the Registry;

- (e) 'Confidential information' shall mean any information contained in a confidential document which has not otherwise legitimately been made public, and any information ordered not to be disclosed to third parties by any Chamber of the Court;
 - (f) 'Witness' shall mean a person whom a party or participant may call to testify or on whose statement a party or participant may rely. The term 'witness' includes expert witnesses;
 - (g) "Victim" means a person, organization or institution who appears, based on the information available, to fall within Rule 85 of the Rules of Procedure and Evidence, including where the person, organization or institution has not yet been the subject of a judicial determination on victim status, unless that person has applied had an individual application for victim participation rejected by the Chamber;
 - (h) 'Represented victim' shall mean a victim who is legally represented for the purpose of ICC proceedings by a lawyer on the ICC's list of counsel, as demonstrated by a power of attorney submitted to the Victims Participation and Reparations Section ('VPRS').
5. All 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, resource persons and intermediaries acting on instruction of or on behalf of a party or participant.

C. Use of confidential documents and information in investigations

1. General provisions

6. Where the Registry becomes aware that persons are holding themselves out to be counsel before the ICC, including in their interactions with victims or witnesses, filings to the Court, or public statements it shall take all reasonable steps to verify that the persons are included on the ICC List of Counsel. If such persons are not included on the ICC List of Counsel, the Registry shall provide them with the necessary information and assistance to apply for inclusion on the ICC List of Counsel or, if they are not suitably qualified, inform them of this.

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7. Parties and participants are under a general obligation not to disclose to third parties any confidential document or information. 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.
8. Throughout the investigation and proceedings, parties and participants shall undertake to minimise the risk of exposing confidential information to the greatest extent possible.
9. Confidential documents or information which have been made available to a party or participant may only be revealed by that party or participant to a third party where such disclosure is directly and specifically necessary for the preparation or presentation of their case. A party or participant shall only disclose to third parties those portions of a confidential document or information of which the disclosure is directly and specifically necessary for the preparation or presentation of its case.
10. When a confidential document or confidential information is revealed to a third party under the preceding paragraph, the party or participant shall explain to the third party the confidential nature of the document or information and warn the third party that the document or information shall not be reproduced or disclosed to anyone else in whole or in part. Unless specifically authorised by the Chamber, and without prejudice to rule 112(1)(e) and (3) of the rules, the third party shall not retain a copy of any confidential document shown to them.

2. Information about victims and witnesses whose identity has not been made public

11. This section of the Protocol applies to victims (including represented victims) and witnesses whose identity or relationship with the Court has not been made public or who are subject to other protection measures known to the investigating party, including those applicable in other cases before the Court. The identities of represented victims and of witnesses, and the fact of a particular person's interaction with the Court as a victim or witness, shall be confidential information unless otherwise ordered by a Chamber, or unless a represented victim waives confidentiality through his or her legal representative.
12. A party or participant may disclose the identity of such a victim or witness to a third party if

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such disclosure is directly and specifically necessary for the preparation or presentation of its case. If a party or participant is aware that the victim or witness is in the International Criminal Court Protection Programme ('ICCPP') or has otherwise been relocated with the assistance of the Court, the party or participant shall inform the Victims and Witnesses Unit ('VWU') in advance of the details of the place, time and, to the extent possible, the types of organisations, institutions, and, if available, the person(s) to whom it intends to disclose the identity of the victim or witness, and shall consult with the VWU as to specific measures that may be necessary. If the victim or witness is otherwise protected by the VWU, the party or participant shall inform the VWU of the disclosure of the victim or witness's identity as soon as possible, but in any event prior to disclosure.

13. Notwithstanding the previous paragraph, parties and participants shall not reveal to third parties that the victim or witness is involved with the activities of the Court or the nature of such involvement.
14. Visual and/or non-textual material depicting or otherwise identifying victims or witnesses shall only be shown to a third party when no satisfactory alternative investigative avenue is available. To reduce the risk of disclosing the involvement in the activities of the Court of the person depicted or otherwise reflected, a party or participant shall only use such visual material and/or non-textual material which does not contain elements which tend to reveal the involvement of the person depicted in the activities of the Court. When a photograph of a victim or witness is used, it shall only be shown together with other photographs of the same kind. Unless specifically authorised by the Chamber, the third party shall not retain copies of the visual material subject to this provision.
15. If a party or participant is in doubt as to whether a proposed investigative activity may lead to the disclosure of the identity of a protected victim or witness to third parties, it shall seek the advice of the VWU.

3. Investigation of allegations of sexual or gender based crimes

16. Where a victim or witness has stated that he or she has suffered sexual or gender based crimes and it is apparent that the victim or witness has not discussed the violence with members of his or her family, parties and participants must exercise particular caution in

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investigating the allegations, in order to protect the privacy, dignity and well-being of the victim or witness. Parties and participants shall not reveal information about the victim or witness's alleged victimisation to the family members of the victim or witness or to persons who can reasonably be expected to communicate it to family members. Where there are no suitable alternative investigative avenues, the investigating party or participant may communicate the information to such individuals that the victim or witness has stated he or she has informed or has confirmed are aware of the sexual or gender based crimes suffered, provided that in doing so the investigating party or participant does not reveal that the victim or witness has a relationship with the Court.

4. Records of the handling of confidential documents or information

17. Parties and participants shall keep a record of any disclosure of confidential documents or information to third parties, which shall include: (i) the name and particulars of the person(s) to whom the confidential documents or information was disclosed; (ii) the name of the person who disclosed the document or information; (iii) the date of disclosure; and (iv) the location of disclosure.
18. Parties and participants shall keep a record of all members of their team having access to confidential documents and information, which shall include: (i) the name and particulars of the member of the team; and (ii) the period during which they had access to confidential documents and information. Any such member of the team shall, upon separation from the team, return all confidential documents in their possession and return or destroy any copies. The head of the team shall take all reasonable measures to ensure that all confidential documents have been returned, and any copies returned or destroyed.
19. Where there are reasonable grounds to believe that confidential documents or information have been disclosed in violation of this Protocol, the Chamber may instruct the party or participant to disclose to it, and, if appropriate, to other parties and participants, in whole or in part, the records mentioned above.

D. Inadvertent disclosure

20. If a party or participant discovers that it has disclosed material which should not have been disclosed or should have been disclosed in redacted form, it shall immediately inform the

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receiving party or participant and the Registry. The Registry shall immediately restrict access to the material in the eCourt database. If the information inadvertently disclosed pertains to a witness in the ICCPP or who has been otherwise provided with a form of protective measures, the party or participant shall also directly inform the VWU.

21. If a party or participant discovers that it has received material which it believes should not have been disclosed or should have been disclosed in redacted form, it shall immediately inform the party or participant who disclosed the material. Pending confirmation by the disclosing party or participant that the material should not have been disclosed or should have been disclosed in redacted form, the party or participant having received the material shall act in good faith and shall ensure that the material is not distributed within the team including, in the case of the Defence, to the accused.
22. As soon as the disclosing party or participant informs the receiving party or participant or confirms that the material should not have been disclosed or should have been disclosed in redacted form, the receiving party or participant shall return the material to the disclosing party or participant and shall return or destroy any copies. This includes electronic copies, including those stored in the party's or participant's own Ringtail or other database. This also includes any copies that may have been provided to the suspect/accused/convicted person. 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 copies are destroyed.
23. After having implemented the Protocol, the receiving party or participant must immediately report to the disclosing party or participant as well as to the Chamber and must: (a) provide the identity of every person who has accessed the document or its content; and (b) confirm that all copies have been returned, deleted or destroyed. The receiving party or participant also has an obligation to provide full cooperation to the VWU in the exercise of its protection mandate.
24. The procedure for exceptions to disclosure under rule 81 of the Rules of Procedure and Evidence shall apply to any dispute as to whether or not the material should have been

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disclosed or should have been disclosed in redacted form.

25. Where an inadvertent disclosure covered by this Protocol involves information which concerns a represented victim, the disclosing party shall immediately inform the legal representative.

E. Breaches of confidentiality

26. If a party or participant discovers that a third party knows or understands that a victim or witness whose identity has not been made public is involved with the Court, it shall inform the third party of the confidential nature of this information and instruct the third party not to disclose this information any further. The party or participant shall also inform the VWU of such occurrence as soon as possible.
27. A party or participant shall bring to the attention of the VWU as soon as possible any reasonable suspicion that a victim or witness, a member of a victim or witness's family, or another person at risk as a result of the activities of the Court may have been placed at risk for any reason, including reasonable suspicion that a victim or witness's involvement with the Court or protected location has become known to third parties.
28. If a party or participant has revealed confidential information, or has become aware of any other breach of the confidentiality of documents or information, or discovers that a third party has become aware of confidential information, it shall inform the recipient of the confidential nature of such information and instruct him or her not to disclose it any further. In addition, the party or participant shall immediately inform the VWU.
29. Where the circumstances described in paragraphs 26, 27 and/or 28 arise in relation to information which concerns a represented victim, the VWU shall immediately inform the legal representative.

F. Consent to disclosure by victims or witnesses

30. When interviewing a victim or witness, a party or participant shall inform the victim or witness of its disclosure obligations and shall seek to obtain consent of the victim or witness to the disclosure of his or her statement and any visual and/or non-textual material obtained from the victim or witness. A party or participant shall give particular regard to the needs

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of vulnerable victims or witnesses.

G. Contacts with witnesses of other parties or participants

31. Except under the conditions specified in this section, a party or participant shall not contact or interview a witness of another party or participant (the 'calling party or participant') if the intention to call the witness to testify or to rely on his or her statement has been communicated to the party or participant, or if this intention is otherwise clearly apparent. Where a comprehensive (final) list of witnesses has been filed by a party or a participant for its presentation of evidence at trial, the obligations set out in the present section shall apply only in respect of individuals included in such list, and not in respect of any other individuals appearing in earlier (provisional) lists or relied upon or otherwise interviewed at earlier stages of the proceedings.k
32. A party or participant shall not make inquiries relating to the current location of protected witnesses or other persons who have been admitted to the ICCPP, who have been assisted by the Court to move away from their initial place of residence, or whose location has been protected by the Chamber. Should the location of such protected witnesses or persons become known or apparent to a party or participant, it shall inform the VWU immediately.
33. While the purpose of VWU-organized courtesy 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.

1. Consent of the witness

34. A party or participant shall only contact or interview a witness of another party or participant if the witness consents.
35. 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 within five days whether he or she agrees to be contacted or 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.

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36. If a party or participant comes into contact with a person during investigation and it becomes clear that he or she is a witness of an opposing party or participant, 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 or participant, in accordance with this protocol.
37. If the calling party or participant is unable to contact the witness within five days, the party or participant seeking to interview the witness may apply to the Chamber and request that the VWU be instructed to attempt to contact the witness.

2. Interview

38. If the witness consents to be interviewed, the calling party or participant shall immediately inform the investigating party or participant and contact shall be facilitated as appropriate.
39. The calling party or participant shall ensure that, if the witness is particularly vulnerable or otherwise in need of assistance during the interview, such appropriate assistance is provided and that, where necessary, the VWU is informed sufficiently in advance of the scheduled interview in order to arrange for an assessment of the need for assistance by a VWU representative during the interview.
40. The witness may choose to have a representative of the calling party or participant attend the interview. The calling party or participant shall inform the witness of this right but shall not attempt to influence the witness's decision.
41. If the calling party or participant is unable to travel to the particular location where the interview is to be conducted, the parties and participants shall endeavour to reach an agreement concerning alternative arrangements for the participation of a representative of the calling party, such as participation by video link or holding the interview with the witness at another location.
42. The parties and participants shall make all necessary logistical arrangements in accordance with best practices. The parties and participants shall bear their own costs for attendance at the interview. In case of security concerns, the calling party or participant shall inform the

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VWU for it to assess the situation and if necessary, to assist the parties and participants in organising the meeting in a safe manner.

43. The representative of the calling party or participant present at the interview shall not prevent or dissuade the witness from answering questions freely. In the event that the calling party or participant objects to any part of the procedure followed or any particular line or manner of questioning of the witness, it shall raise the issue with the party or participant conducting the interview outside of the presence of the witness. The disagreement shall be recorded and shall not impede or unduly disrupt the interview. The party or participant conducting the interview may, in the event of repeated interference by the calling party or participant, adjourn the interview and apply to the Chamber for leave to conduct it without the presence of the representative of the calling party or participant.
44. A video or audio recording of the interview shall be provided to the calling party or participant as soon as practicable after the conclusion of the interview, to the extent possible, within five days of the interview date.

3. Objection of the calling party or participant to the interview with another party or participant

45. If, despite the consent of the witness, the calling party or 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 interview of the witness with another party or participant, it shall inform the party or participant seeking to interview the witness in writing. If agreement cannot be reached, the calling party or participant shall apply to the Chamber for a ruling and inform the VWU in writing within two days of the disagreement having been notified.
46. 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 to interview the witness must refrain from doing so until the matter has been decided by the Chamber.

4. Special provisions for protected witnesses

47. When the party or participant seeking to interview a witness is aware that the witness is a participant in the ICCPP, or has been otherwise assisted by the Court to move away from

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their place of residence, the party or participant shall, in addition to notifying the calling party or participant, inform the VWU. All contact with individuals who are part of the ICCPP shall be facilitated exclusively by the VWU.

48. In the event that the investigating party or participant wishes to interview a witness who is a participant in the ICCPP, the VWU will inform the investigating party or participant of the location at which the meeting will take place, and the VWU will undertake all necessary logistical arrangements for the witness to be present in the location specified on the date previously agreed with the investigating party or participant.

H. Contacts with represented victims

1. Identifying represented victims and making contact

49. Except under the conditions specified in this section, a party or participant shall not contact or interview a represented victim if the party or participant knows or has reason to believe that the victim is represented. Contact regulated by this section is not limited to investigative interviews, but includes any contact, formal or informal, and whether in-person, by phone or video, or via an intermediary.
50. When a party or participant knows or has reason to believe that a victim is represented, the party or participant shall only contact or interview the victim if the victim consents, and that consent shall only be obtained and communicated through the victim's legal representative. When a party or participant wishes to contact a victim whom it knows or has reason to believe has legal representation, it shall provide notice as soon as possible of this to the legal representative of the victim.
51. Whenever a party or participant contacts a victim, the party or participant shall ask from the first contact whether the victim has a lawyer representing him or her at the ICC. If the victim states that he or she has a legal representative, the party or participant shall end the interaction, explain to the victim why the interaction has been ended, and contact the legal representative. If the victim is not able to provide contact information of the lawyer, the party or participant shall inform the VPRS, who shall notify the legal representative. When a victim indicates that he or she is not legally represented, the party or participant may continue with the contact, but only after informing the victim that victims may participate

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in ICC proceedings and are able to have their own lawyers for this purpose, and that the VPRS can assist the victim with further information.

52. Where a party or participant meets with a victim, and only during the course of the meeting or interview, or only afterwards, learns that the victim is legally represented, the party or participant shall immediately inform the legal representative, and where applicable disclose any relevant material, including the records referred to in paragraphs 17, 18, 59 and 60 of this Protocol.
53. When, in unavoidable situations of urgency, in order to preserve or collect evidence, a party or participant contacts a represented victim without first contacting the legal representative, the party or participant who has contacted the represented shall as soon as possible thereafter inform the legal representative, and where applicable disclose any relevant material.
54. If a represented victim participating in ICCPP requests to contact the parties or participants, the VWU will facilitate the contact, but shall first inform the legal representative of the victim.
55. The legal representative of a represented victim may always contact his or her client, including if they are a victim with dual status (that is, a victim who is also an intended witness for another party or participant), and including if they are in the ICCPP. If the represented victim is in the ICCPP, contacts between the legal representative and the victim shall be facilitated by the VWU.

2. Meetings, interviews and examinations

56. When a represented victim meets with a party or participant (including for the purpose of a screening or an interview), the victim is entitled to have his or her legal representative attend. This is the choice of the victim. The presence of the legal representative must not obstruct a proper meeting or interview. The legal representative may be accompanied by his or her own interpreter. Where appropriate, the party or participant shall provide the legal representative with any relevant materials, including the records referred to in paragraphs 17, 18, 59 and 60 of this Protocol.

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57. Paragraphs G.2.41, G.2.39, and G.2.41 above shall apply *mutatis mutandis* to meetings or interviews between a represented victim and a party or participant.
58. Where a medical examination is undertaken of a represented victim, the legal representative may be present, provided that the victim consents. The presence of the legal representative must in no way obstruct a proper medical examination.

3. Statements and other material relating to a represented victim

59. Whenever a party or participant meets with or interviews a represented victim, the victim's legal representative has the right to receive a copy of the statement, transcript or recording, or notes made during the meeting or interview. This applies equally where the victim was unrepresented at the time of the meeting or interview, and subsequently becomes legally represented .
60. Where a legal representative seeks access to materials concerning a represented victim which are held by a party or participant (including materials relating to the represented victim or materials produced with the involvement or assistance of the represented victim), the legal representative shall submit a detailed request to the party or participant outlining the reasons why access should be provided. Unless reasons exist for refusing access, the party or participant shall provide the legal representative with a copy of these materials, under conditions of strict confidentiality. If a party or participant considers that it should not provide particular materials or will only submit them in redacted or summary form, it shall inform the Chamber and the legal representative of the reasons. The Chamber will then consider the matter, if an application is made by the legal representative.