

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

Annex 3

Confidential

Annex 2

Explanatory guide to provisions included in the proposed Protocol (Annex 1)

1. Section 4.3 of the LRVs' submissions provides a broad overview of the sources of the material which is contained in the Protocol. This annex is intended to serve as a more detailed guide to the Chamber (and other parties and participants), identifying the source and/or rationale of each provision contained in the Protocol.

Part A: Introduction

2. This part is identical to Part A of the protocol in the Chambers Practice Manual ("CPM protocol").

Paragraph	Source / rationale
Para. 1	CPM protocol, para. 1
Para. 2	CPM protocol, para. 2
Para. 3	CPM protocol, para. 3

Part B: Definitions

3. This part is based closely on the CPM protocol. The only changes are:
 - (i) New paragraphs 4(f) and 4(g) to define victims and represented victims, which are not terms used in the CPM protocol;
 - (ii) Amendments to paragraphs 4(f) and 5, for reasons explained in the table below.

Paragraph	Source / rationale
Para 4(a)-(e)	CPM protocol, para. 4(a)-(e)
Para 4(f)	Minor modification to the definition of "witness" to address the earlier stage of proceedings, at which there will be less certainty about which individuals will be called.
Para. 4(g)	New definition of victim, to reflect the Rule 85 definition. Anybody appearing to meet this definition would be considered a "victim", unless/until they are determined by a Chamber <i>not</i> to be a victim.

Paragraph	Source / rationale
Para. 4(h)	New definition of represented victim. Some obligations regarding contact would only arise for victims who are represented (or where the other party or participant has reason to believe the victim is represented).
Para. 5	Edit reflects an amendment made in the <i>Al Hassan</i> case. ¹

Part C: Use of confidential documents and information in investigations

4. This part is based closely on the CPM protocol. The only changes are:

- (i) New paragraph 6, intended to ensure that those holding themselves out as ICC counsel are in fact appropriately qualified and subject to the Court's ethical standards as well as this Protocol;
- (ii) Minor amendments to paragraphs 11 to 16, to ensure these apply to victims, and to clarify the position regarding presumptive confidentiality of victim and witness information.

Paragraph	Source / rationale
Para. 6	New provision, adding a requirement for the Registry to verify that persons purporting to be counsel before the ICC, including in their interactions with victims and witnesses, are included on the ICC List of Counsel. This addresses the issue set out in paragraph 27 of the LRVs' submissions. It is intended to ensure that persons who are receiving confidential information from victims, and with whom other parties and participants may need to engage on confidential matters, in fact meet the requirements of Rule 22 of the Rules of Procedure and Evidence and owe professional duties – including duties of confidentiality under the Code of Professional Conduct for counsel.
Para. 7	CPM protocol, para. 6

¹ *Prosecutor v Al Hassan*, [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](#), ICC-02/05-01/20-691, 19 March 2020, paras 44-45.

Paragraph	Source / rationale
Para. 8	CPM protocol, para. 7
Para. 9	CPM protocol, para. 8
Para. 10	CPM protocol, para. 9
Para. 11	CPM protocol, para. 10, amended to include victims (including represented victims) and also to explicitly state the presumption of anonymity which is implicit in the CPM protocol already, but not expressly stated, as well as to allow for the possibility that victims may waive their anonymity through a lawyer. The LRVs consider that this codifies the current position but makes it more clear and transparent.
Para. 12	CPM protocol, para. 11 with minor amendments so that the provision applies to a “victim or witness” rather than only witnesses
Para. 13	CPM protocol, para. 12 with minor amendments so that the provision applies to a “victim or witness” rather than only witnesses
Para. 14	CPM protocol, para. 13 with minor amendments so that the provision applies to a “victim or witness” rather than only witnesses
Para. 15	CPM protocol, para. 14 with minor amendments so that the provision applies to a “victim or witness” rather than only witnesses
Para. 16	CPM protocol, para. 15 with minor amendments so that the provision applies to a “victim or witness” rather than only witnesses; and to protect not only the person’s identity but also the fact of their interaction with the ICC
Para. 17	CPM protocol, para. 16
Para. 18	CPM protocol, para. 17
Para. 19	CPM protocol, para. 18

Part D: Inadvertent disclosure

5. This part is based closely on the CPM protocol. The only changes is a new paragraph 25, as explained below.

Paragraph	Source / rationale
Para. 20	CPM protocol, para. 19
Para. 21	CPM protocol, para. 20
Para. 22	CPM protocol, para. 21
Para. 23	CPM protocol, para. 22
Para. 24	CPM protocol, para. 23
Para. 25	New provision to require that where an inadvertent disclosure relates to a represented victim, the victims' legal representative shall be informed.

Part E: Breaches of confidentiality

6. This part is based closely on the CPM protocol. The only changes are:

- (i) New paragraph 29, as explained below;
- (ii) Minor amendments to paragraphs 11 to 16, to ensure these apply to victims.

Paragraph	Source / rationale
Para. 26	CPM protocol, para. 24 with minor amendments so that the provision applies to a "victim or witness" rather than only witnesses
Para. 27	CPM protocol, para. 25 with minor amendments so that the provision applies to a "victim or witness" rather than only witnesses
Para. 28	CPM protocol, para. 26.
Para. 29	New provision to require that where a breach of confidentiality relates to a represented victim, the victims' legal representative shall be informed.

Part F: Consent to disclosure by victims or witnesses

7. This part (one paragraph only) is based closely on the CPM protocol. The only changes are minor amendments to ensure that the paragraph applies to victims.

Paragraph	Source / rationale
Para. 30	CPM protocol, para. 27 with minor amendments so that the provision applies to a “victim or witness” rather than only witnesses

Part G: Contacts with witnesses of other parties or participants

8. This part is copied exactly from the CPM protocol with no changes other than the renumbering of the paragraphs to take account of new paragraphs inserted in preceding parts.

Paragraph	Source / rationale
Para. 31	CPM protocol, para. 28
Para. 32	CPM protocol, para. 29
Para. 33	CPM protocol, para. 30
Para. 34	CPM protocol, para. 31
Para. 35	CPM protocol, para. 32
Para. 36	CPM protocol, para. 33
Para. 37	CPM protocol, para. 34
Para. 38	CPM protocol, para. 35
Para. 39	CPM protocol, para. 36
Para. 40	CPM protocol, para. 37
Para. 41	CPM protocol, para. 38
Para. 42	CPM protocol, para. 39

Paragraph	Source / rationale
Para. 43	CPM protocol, para. 40
Para. 44	CPM protocol, para. 41
Para. 45	CPM protocol, para. 42
Para. 46	CPM protocol, para. 43
Para. 47	CPM protocol, para. 44
Para. 48	CPM protocol, para. 45

Part H: Contacts with represented victims

9. This is a new part, however it is based closely on material taken from two sources:
- (i) Part G above, adapted to be relevant to represented victims rather than witnesses;
 - (ii) The standard dual status victims protocol, adapted to reflect the different stage of proceedings

Paragraph	Source / rationale
Para. 49	Based on para. 31 above, but simplified and adapted to cover represented victims rather than witnesses
Para. 50	Based on para. 34 above, but adapted to apply to represented victims
Para. 51	New, to ensure that whenever parties and participants meet a victim, they should first make enquiries to ascertain whether or not the person is represented. This is essential for the Protocol's operation in respect of represented victims, so that parties and participants can be made aware when a victim is represented. Making these enquiries also protects parties and participants in the event that they meet a represented victim but the victim does not disclose the representation to them, since they then do not have reason to believe that the victim is represented.

Paragraph	Source / rationale
	The provision also makes clear what steps should be followed in the event that the victim does disclose that he/she is legally represented.
Para. 52	New provision introduced to address the situation where a party or participant asks a victim about legal representation but does not receive clear or correct information that the victim is legally represented until part-way through a meeting, or after a meeting. This is a problem which can occur in practice through miscommunication or where victims are fearful of disclosing their engagement with the court to unknown persons.
Para. 53	Based on the standard dual status victim protocol – eg see most recently the <i>Abd-Al-Rahman</i> Dual Status Witness Protocol, ² paragraph 5(d) – with slight modifications.
Para. 54	Based on the standard dual status victim protocol – eg see most recently the <i>Abd-Al-Rahman</i> Dual Status Witness Protocol, paragraph 5(b) – with slight modifications.
Para. 55	Based on the standard dual status victim protocol – eg see most recently the <i>Abd-Al-Rahman</i> Dual Status Witness Protocol, paragraph 6 – with slight modifications.
Para. 56	Based on the standard dual status victim protocol – eg see most recently the <i>Abd-Al-Rahman</i> Dual Status Witness Protocol, paragraph 9 – with slight modifications.
Para. 57	Applies the approach from paragraphs 38, 39 and 41 from the Protocol (regarding witnesses) to participating victims. (The contents of paragraph 40 are already covered by paragraph 56, which is based on the dual status protocol.)
Para. 58	Based on the standard dual status victim protocol – eg see most recently the <i>Abd-Al-Rahman</i> Dual Status Protocol, paragraph 8.

² *Prosecutor v Abd-Al-Rahman*, [Dual Status Witness Protocol](#), ICC-02/05-01/20-618-Anx, 7 March 2022.

Paragraph	Source / rationale
Para. 59	<p data-bbox="421 331 1350 416">Based on the standard dual status victim protocol – eg see most recently the <i>Abd-Al-Rahman</i> Dual Status Protocol, paragraph 7(a).</p> <p data-bbox="421 452 1299 685">The text has been adapted to make clear that it applies equally in the situation in which an interview happens without the legal representative present (for example, where a party or participant did not have reason to believe that the victim was represented) or where the victim only later obtains legal representation.</p>
Para. 60	<p data-bbox="421 725 1343 810">Based on the standard dual status victim protocol – eg see most recently the <i>Abd-Al-Rahman</i> Dual Status Protocol, paragraph 7(b)-(e).</p>