

# Annex 1

Public Redacted

Version

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/19**  
Date: **25 October 2023**

**PRE-TRIAL CHAMBER I**

**Before:** Judge Péter Kovács, Presiding Judge  
Judge Reine Adélaïde Sophie Alapini-Gansou  
Judge María del Socorro Flores Liera

**SITUATION IN THE PEOPLE'S REPUBLIC OF BANGLADESH / REPUBLIC OF  
THE UNION OF MYANMAR**

**Public redacted version**

**Request for the adoption of a protocol and for access to the confidential record**

**Source:** Legal Representatives of Victims

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

**The Office of the Prosecutor**

Karim A. A. Khan  
Essa Faal  
Melissa Pack

**Legal Representatives of the Victims**

**The Office of Public Counsel for Victims**

Paolina Massida

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**States Representatives**

***Amicus Curiae* Representatives**

**REGISTRY**

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**Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

Nigel Verrill

**Detention Section**

**Victims Participation and Reparations Section**

Philip Ambach

**Other**

## 1 INTRODUCTION

1. This motion is filed pursuant to Article 68(3) of the Rome Statute and Rule 93 of the Rule of Procedure and Evidence (“RPE”) by the Legal Representatives (“LRVs”) of 2 groups of victims who have been actively participating in the *Bangladesh/Myanmar Situation*.<sup>1</sup> They request the Pre-Trial Chamber (“Chamber”) to use its powers under Articles 57(3)(c) and 68(1) of the Rome Statute, and Rule 81(4) of the RPE to issue orders relevant to the interests of the victims at this early stage of the proceedings.

2. In many of the Court’s other situations, the Office of the Prosecutor (“OTP”) alone has been active in the situation country during the investigation phase. However, in the present Situation, several groups of victims have actively engaged with the ICC in various ways, as well as with each other. Other legal proceedings have also been operating concurrently, with overlapping evidence, witnesses and (potentially confidential) information. As explained below, these factors give rise to the need for regulation, including in relation to interactions between parties or participants and represented victims, and concerning the management of confidential information.

3. Well established precedents exist before the Court for protocols regulating the management of confidential information and interactions between parties (or participants) and witnesses during an investigation.<sup>2</sup> Usually, these rules are established and applied once a suspect is before the Court. However, the LRVs submit, establishing relevant protocols at an earlier stage would serve to ensure good practice and protect the integrity of the investigation. Moreover, once appropriate protocols are in place, LRVs should be able to access court records which are relevant to the interests of their clients.

4. This filing addresses two inter-related requests on these matters: (1) for the adoption of a protocol to regulate the handling of confidential information and/or material and contact with witnesses and represented victims; and (2) an order permitting the LRVs to access confidential material on the record of the situation. Sections 4 to 5 of the present filing explain why each of these measures is necessary and appropriate.

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<sup>1</sup> Further details regarding the victims are set out at paragraphs 6-8 below.

<sup>2</sup> See, for example, the protocols referred to in paragraph 13 below.

## 2 CLASSIFICATION

5. This filing is marked as “confidential” pursuant to Regulation 23 *bis* of the Regulations of the Court. It includes some potentially identifying information about victims, and [REDACTED]. A public redacted version of the motion is filed simultaneously.

## 3 THE VICTIMS AND STANDING

6. Details of the LRVs and their clients (collectively “the Victims”) are as follows. The first group of victims (“Victim Group 1”) comprises 10 individuals from the village of Tula Toli in Myanmar. They have been participating in ICC proceedings since the Prosecutor’s request concerning jurisdiction in 2018. On 12 June 2018 they submitted written applications for participation and powers of attorney to the Victims Participation and Reparations Section of the Registry (“VPRS”). The victims were assigned the numbers a/60011/18 to a/60020/18. They are represented by Ms Megan Hirst. Victim Group 1 has filed submissions concerning jurisdiction,<sup>3</sup> and the opening of the investigation and its necessary scope.<sup>4</sup> They have also jointly filed submissions with Victim Groups 2 and 3 regarding hearings outside the seat of the Court.<sup>5</sup> Victim Group 1 has actively engaged with the OTP regarding its investigation.

7. The second group of victims (“Victim Group 2”) comprises 87 individuals from Rakhine State in Myanmar, represented by Ms Kate Gibson and Ms Clare Brown through Victim Advocates International, who deposited powers of attorney with the VPRS in 2020. This group is comprised of some members of [REDACTED] civil society associations in Cox’s Bazar [REDACTED]. Victim Group 2 has enjoyed active engagement with the OTP for several years and has also jointly filed submissions with Victim Groups 1 and 3 regarding hearings outside the seat of the Court.<sup>6</sup>

8. The third group of victims (“Victim Group 3”) comprises 12 Rohingya individuals from Rakhine State in Myanmar, represented by Mr Nicholas Leddy through Legal Action Worldwide (LAW). LAW deposited powers of attorney for these 12 individuals with VPRS in 2020. They are survivors and/or witnesses of murder, rape, deportation, persecution, and other

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<sup>3</sup> *Request Under Regulation 46(3) of the Regulations of the Court*, [Observations on behalf of victims from Tula Toli](#), ICC-RoC46(3)-01/18-26, 18 June 2018.

<sup>4</sup> *Situation in the People’s Republic of Bangladesh / Republic of the Union of Myanmar*, [Representations of victims from Tula Toli](#), ICC-01/19-19, 23 October 2019.

<sup>5</sup> *Situation in the People’s Republic of Bangladesh / Republic of the Union of Myanmar*, [Victims’ joint request concerning hearings outside the host state](#), ICC-01/19-34, 4 August 2020.

<sup>6</sup> *Ibid.*

inhumane acts committed as part of the Myanmar military's 2017 clearance operations.<sup>7</sup> LAW provides legal representation and advice to over 560 Rohingya persons located in the refugee camps in Cox's Bazar, Bangladesh, including: (i) 148 survivors and witnesses sexual and gender-based violence and other international crimes, (ii) [REDACTED], and (iii) and a group of 18 male 'survivor advocates'. Victim Group 3 has enjoyed active engagement with the OTP for several years and has jointly filed submissions with Victim Groups 1 and 2 regarding hearings outside the seat of the Court.<sup>8</sup> It has also filed confidential submissions to the PTC through VPRS,<sup>9</sup> as well as with the OTP under article 15.<sup>10</sup>

9. The standing of the LRVs to seize a Pre-Trial Chamber with a procedural issue during the investigation stage has previously been affirmed by Pre-Trial Chamber III. It ruled that:

“the Court maintains wide powers to consider the interests of victims through their legal representatives, at stages of the proceedings the Court determines are appropriate, provided that this is done in manner that is not prejudicial or inconsistent with the rights of an accused to a fair trial.”<sup>11</sup>

10. Submissions from the victims were also accepted and considered by Pre-Trial Chamber I in the jurisdiction proceedings,<sup>12</sup> and by Pre-Trial Chamber III in the proceedings concerning the OTP's request for authorisation to investigate.<sup>13</sup> This approach has also been explicitly endorsed by the Presidency.<sup>14</sup> In those instances, LRV filings were directly included as part of the record of the situation, as is usual for filings from participants with standing before the

<sup>7</sup> Situation in the People's Republic of Bangladesh / Republic of the Union of Myanmar, [Victims' joint request concerning hearings outside the host state](#), ICC-01/19-34, 4 August 2020, at para. 24, n. 27.

<sup>8</sup> *Ibid.*

<sup>9</sup> See e.g., Confidential Annex to the Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Decision ICC-01/19-6 28 June 2019, ICC-01/19-22, 31 October 2019.

<sup>10</sup> See e.g., Communication to the ICC Prosecutor under Article 15 of the Rome Statute Regarding the Declaration by the National Unity Government of Myanmar Accepting the Court's Jurisdiction under Article 12(3), 13 September 2021; Press Release available at: [LAW: ICC Victim Submission for Rohingya clients following NUG Declaration – Legal Action Worldwide](#).

<sup>11</sup> *Situation in the People's Republic of Bangladesh / Republic of the Union of Myanmar*, [Corrected version of "Decision on Victims' joint request concerning hearings outside the host State" \(26 October 2020, ICC-01/19-38\)](#), ICC-01/19-38-Corr, 27 October 2020, paras 16-19.

<sup>12</sup> *Request Under Regulation 46(3) of the Regulations of the Court*, [Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute"](#), ICC-RoC46(3)-01/18-37, 6 September 2018, especially at para. 21.

<sup>13</sup> *Situation in the People's Republic of Bangladesh / Republic of the Union of Myanmar*, [Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar](#), ICC-01/19-27, 14 November 2019, especially at paras 8, 125, 126, and 133.

<sup>14</sup> *Situation in the Islamic Republic of Afghanistan*, [Decision on 'Motion Seeking Remedies for Repeated Administrative Violations', dated 28 January 2022, \(ICC-02/17-183-Conf-Anx1\) annexed to 'Registry Transmission of a Document submitted before the Presidency', dated 4 March 2022 \(ICC-02/17-183\)](#), ICC-02/17-193, 7 July 2022, para. 27.

Court. Filing by LRVs were also recently permitted in this situation by the Presidency.<sup>15</sup> The LRVs respectfully submit that the Chamber should maintain this practice, rather than the “Registry transmission” approach recently used by Pre-Trial Chamber II.

11. The present submissions fall squarely within the matters on which victims may be heard by the Chamber. They are concerned with the protection of the Victims’ own interests during the investigation, including the protection of their confidential information, and the ability of their LRVs to effectively represent them in respect of their roles during the investigation. Moreover, there is nothing in the present request which would interfere with a fair trial or the rights of the defence. To the contrary, as the LRVs elaborate below, the early adoption of protocols would protect the fairness of any future pre-trial and/or trial proceedings, including as regards suspects and accused persons.

#### **4 REQUEST FOR A PROTOCOL**

12. The LRVs have encountered a number of challenges in their work resulting from the lack of protocols currently in place in this Situation. Examples of these challenges are detailed below in section 4.2 and relate to the sharing of confidential victims’ information with other participants, the presence of LRVs in interviews conducted with their clients, and LRV access to materials concerning their clients. Before turning to these examples, the LRVs consider that it may be useful to set out the broader context of the ICC’s practice on protocols.

##### ***4.1 ICC practice to date***

13. A practice has developed at the ICC for the adoption of “protocols” within each case, which regulate certain aspects of the proceedings. The protocols deal with procedural matters which are not covered in the RPE or Regulations (or which are covered, but in insufficient detail). For example, protocols have been established to cover the process for approving redactions to evidentiary material;<sup>16</sup> to establish procedures for sharing evidence electronically;<sup>17</sup> and to set out procedures for preparation and familiarisation of *viva voce* witnesses.<sup>18</sup> By establishing protocols, the Court’s Chambers have ensured that these matters

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<sup>15</sup> *Situation in the People’s Republic of Bangladesh / Republic of the Union of Myanmar*, [Motion for Review of the Registrar’s Decision on Legal Aid](#), ICC-ROC85-01/23-1-Red, 10 May 2023.

<sup>16</sup> See *e.g. Prosecutor v Yekatom and Ngaïssona*, [Protocol governing the redaction of evidence at trial](#), ICC-01/14-01/18-677-Anx3, 8 October 2020.

<sup>17</sup> See *e.g. Prosecutor v Ongwen*, [Unified Technical protocol \(“E-Court Protocol”\) for the provision of evidence, witness and victims information in electronic form](#), ICC-02/04-01/15-203-Anx1, 27 February 2015.]

<sup>18</sup> See *e.g. Prosecutor v Dominic Ongwen*, [Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial](#), ICC-02/04-01/15-504-Anx1, 22 July 2016; *Prosecutor v Yekatom and*

are properly regulated. Increasingly, efforts are made to ensure consistency between the protocols which are put in place. The Chambers Practice Manual calls for Pre-Trial Chambers to establish protocols, which then continue to operate before the Trial Chamber.<sup>19</sup>

14. In the practice of the Court to date, protocols have only been established during pre-trial proceedings in a case (after the appearance of a suspect before the Court) or later (at trial). This is reflected in the Chambers Practice Manual, which recommends that Pre-Trial Chambers establish protocols “ideally in the first [relevant decision] following the initial appearance”.<sup>20</sup> The establishment of protocols within a *case*, and after the initial appearance of a suspect, makes sense on some questions. For example, this is logical on matters relating to disclosure, given that disclosure is a process which occurs in earnest only after the initiation of pre-trial proceedings.

15. However, protocols also exist to regulate matters which are fundamentally concerned with the conduct of investigations. That is the case for 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* (“*Protocol on Confidential Information and Witness Contact*”).<sup>21</sup> As the OTP has previously explained, this protocol serves an essential role in “protecting all witnesses who cooperate with the Court, while respecting the rights of the parties to investigate.”<sup>22</sup> In this area, the circumstances which justify the creation of protocols do not arise simultaneously with the initial appearance. These circumstances also exist during the period before an arrest warrant, and in some cases the need for regulation is even heightened at this earlier stage. The LRVs submit that the reason such protocols have to date been established only after the initial appearance of a suspect is simply because no request has ever been made for their earlier establishment.

16. While it is sometimes assumed that the OTP alone operates during the investigation stage, in reality this is not always the case. Victims’ counsel often play an active role, and can advise their clients, take statements or gather other evidentiary material from them, and liaise with the OTP, the Registry and each other. States parties also play a role. That is most clearly the case in matters concerning cooperation. However, States parties and their lawyers may also seek to

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*Ngaïssona*, [Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial](#), ICC-01/14-01/18-677-Anx1, 8 October 2020.

<sup>19</sup> [Chambers Practice Manual](#), 6<sup>th</sup> ed., 2022, paras 20, 78-81.

<sup>20</sup> [Chambers Practice Manual](#), 6<sup>th</sup> ed., 2022, paras 103. See also para. 20.

<sup>21</sup> As set out in the [Chambers Practice Manual](#), 6<sup>th</sup> ed., 2022, Annex.

<sup>22</sup> *Prosecutor v Yekatom*, [Prosecution’s submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses](#), ICC-01/14-01/18-35, 17 December 2018, para. 4.



interact with victims and witnesses, the OTP and victims' counsel. It is also conceivable that duty counsel (or the Office for the Public Counsel of the Defence "OPCD") may be appointed to represent the interests of suspects, potentially self-incriminating witnesses or others during this phase.

17. The interactions between these various participants are regulated at the later stages of the proceedings. There are cogent reasons for equivalent regulation during the investigation phase. Indeed, principles of consistency and fairness dictate that the same rules should regulate those who are present during this early stage, as those – most obviously defendants – who join the case later.

18. The LRVs note that the period of investigation preceding an arrest warrant can be lengthy. The issuance of an arrest warrant may take years, and several more years may pass before a suspect appears at the Court. A considerable period can therefore pass during which victims and potential suspects are unprotected by the existence of protocols regulating the investigation. Also relevant is the variation in length as between different situations. In the *Kenya* and *Ukraine* situations for example, summonses to appear or arrest warrants were issued approximately 12 months after these investigations were opened by the OTP.<sup>23</sup> In the present situation, the investigation has been open since 14 November 2019. The adoption of a protocol during the investigation stage would therefore also assist in harmonising the practice as between the different situations, ensuring that victims receive the same protections regardless of the length of the investigation.

19. During this period before protocols are applied, OTP has not adopted or publicized documents regarding its practices or guarantees for victim and witness interaction at this stage, and instead explains its approach as being "case-by-case".<sup>24</sup> This makes it difficult, if not impossible, for victims' counsel to advise clients on how OTP interactions will proceed, and is in stark contrast to how a similar process would operate in domestic criminal investigations, which are highly regulated and predictable in terms of procedural rules. However, even if the OTP were to effectively self-regulate through the establishment and publication of procedures on witness and victim interaction and the handling of confidential information during investigations, this would not entirely resolve the problems which currently exist. That is

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<sup>23</sup> See, ICC, [Kenya](#) (ICC-01/09) and [Ukraine](#) (ICC-01/22) key figures.

<sup>24</sup> See, for example, the OTP position regarding the presence of lawyers in meetings or interviews with represented victims, discussed below at paragraph 28 *et seq.*

because, as discussed above, other actors are also active at the investigation stage – including victims’ representatives and states.

20. These questions are not theoretical. The following section sets out examples of challenges that have arisen as a result of the absence of regulation in the investigation stage.

#### ***4.2 Challenges encountered in the present Situation***

21. The LRVs have encountered challenges in their work that they submit could have been addressed by the adoption of relevant protocols. Three examples are given below. All are situations in which the Victims’ interests or well-being were affected because parties or participants are currently not bound by any protocol requiring them to conduct their activities in precisely the ways that they *will* be bound during pre-trial or trial. In other words, the minimum guarantees which are put in place to regulate investigative activities during pre-trial or trial are not being upheld currently.

22. These examples are not exhaustive. To preserve the confidentiality of activities being undertaken by the LRVs, the OTP, and other participants, the following information is in general form.

##### ***4.2.1 Confidential victims’ information shared with other participants***

23. Since they began engaging with the ICC, the Victims have taken all appropriate steps to maintain their anonymity. This is because of threats which might arise against them from various sources should their engagement with justice processes become public.

24. However, circumstances can arise in which it becomes necessary to share some information about the Victims with the OTP or other participants. This can occur, for example, if an LRV needs to establish whether the OTP or another participant has previously obtained a statement from one of the Victims, and to request a copy of that prior statement. This will necessarily entail identifying the Victim (and the Victim’s legal representation) to the OTP or other participant.

25. If the OTP or other participant were bound by obligations to maintain the confidentiality of this material within clearly defined parameters, this would not be a concern. However, in the absence of an applicable protocol, it is currently insufficiently clear in these proceedings (a) that information relating to Victims is considered confidential; and (b) how such information may be dealt with by the parties and participants.

26. No order currently binds parties and participants engaging with victims (or witnesses) in the situation to ensure that their identities or other personal information is considered confidential or that steps are taken to minimize the risk of inadvertent disclosures.<sup>25</sup> Neither is it currently clear under what limited circumstances this kind of confidential information may be shared onwards, or what steps must be taken in the event of permitted sharing (for example, warning the recipient of the information that it is confidential and must not be disclosed, or maintaining a log of disclosures).<sup>26</sup>

27. Presently, it is not even clear that all of those acting in the investigation owe obligations of confidentiality before the Court. External counsel representing some victims and other actors in the current proceedings do not appear to be included on the ICC's List of Counsel, and therefore may not be aware of or comply with obligations set out in the ICC's Code of Professional Conduct for counsel. This emphasizes the need for regulation from the Chamber in the form of a protocol which would create obligations separate to those arising under the Code of Professional Conduct, as well as a role for the Registry (included in the attached proposed draft protocol) to support those lawyers to apply to the List of Counsel.<sup>27</sup>

#### *4.2.2 LRV presence during OTP interviews with LRV clients*

28. The LRVs have been engaged in discussions with the OTP for some time about the possibility of the OTP interviewing some of the Victims. In the context of these discussions, the question has arisen of LRV presence in OTP interviews, where this is the express wish of the represented victim. The OTP has not published a policy on this question and in communications with the LRVs from Victim Group 1 the OTP has made clear that no internal protocols exist. Rather, the OTP states that in principle it will determine this matter "case-by-case".

29. However, discussions with the OTP have revealed to a consistent practice of excluding victims' counsel from interviews and preliminary meetings with represented victims. The OTP position is that this is necessary to reduce the number of persons present during an interview.

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<sup>25</sup> As exists, for example, under paragraphs 6 and 7 of the [Chambers Practice Manual](#) version of the *Protocol on Confidential Information and Witness Contact*. In the attached proposed Protocol, this is covered by paragraphs 7 and 8.

<sup>26</sup> As exists, for example, under paragraphs 8 and 16 of the [Chambers Practice Manual](#) version of the *Protocol on Confidential Information and Witness Contact*. In the attached proposed Protocol, equivalent obligations are established in paragraphs 9 and 17.

<sup>27</sup> In the attached proposed Protocol, this role for the Registry is established by paragraph 6.

When stating that a different approach might in theory be taken on a case-by-case basis, the OTP has not indicated in which circumstances the LRV could be present.

30. [REDACTED]

31. The OTP approach appears at odds with ICC decisions, and sources which support the view that international best practice is to *enable* represented victims to have a lawyer present in investigative interviews:

- (a) Various ICC Chambers have established protocols which provide that dual status victims *are entitled* to have their lawyer present during meetings or investigative interviews with the OTP or defence.<sup>28</sup> In contrast, to our knowledge, no Chamber has taken the contrary position. When this issue has been litigated, it has never been ruled that it is permissible for a party to refuse a request from a represented victim to have the legal representative present during an interview.
- (b) Rule 111(1) of the RPE foresees the presence of counsel in investigative interviews. It can be inferred that this rule applies to interviews with victims, given that a more specific position is set out for suspect interviews in Rule 112.
- (c) The OTP's Guidelines for Civil Society Organisations, on "Documenting international crimes and human rights violations for accountability purposes", recognises that there may be a need for lawyers or legal guardians to be present during interviews, with no

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<sup>28</sup> In some cases this has been explicitly addressed in decisions. See *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-01/12-01/18-674, 19 March 2020, para. 20; *Prosecutor v Katanga and Ngudjolo*, [Decision on the arrangements for contact between represented victims and the parties](#), ICC-01/04-01/07-2571-tENG, 4 January 2012, para. 25. In others the matter has been addressed in a Dual Status Protocol. See for example: *Prosecutor v Ntaganda*, [Proposed mechanisms for exchange of information on individuals enjoying dual status](#), ICC-01/04-02/06-430-Anx1, 23 January 2015, para. 10(a); *Prosecutor v Gbagbo and Blé Goudé*, [Mechanisms for exchange of information on individuals enjoying dual status \('Protocol'\)](#), ICC-02/11-01/15-199-Anx, 1 September 2015, para. 9(a); *Prosecutor v Ongwen*, [Mechanisms for exchange of information on individuals enjoying dual status \('Protocol'\)](#), ICC-02/04-01/15-504-Anx2, 22 July 2016, para. 9(a); *Prosecutor v Al Hassan*, [Dual Status Witness Protocol](#), ICC-01/12-01/18-674-Anx1, 19 March 2020, para. 9(a); *Prosecutor v Yekatom and Ngaïssona*, [Mechanisms for exchange of information on individuals enjoying dual status \('Protocol'\)](#), ICC-01/14-01/18-677-Anx2, 8 October 2020, para. 9(a); *Prosecutor v Abd-Al-Rahman*, [Dual Status Witness Protocol](#), ICC-02/05-01/20-618-Anx, 7 March 2022, para. 9.

suggestion that this raises risks or compromises the interview process.<sup>29</sup> The emphasis throughout the Guidelines is on the preference of the interviewee.<sup>30</sup>

- (d) The UN's Independent Investigative Mechanism for Myanmar ("IIMM") has an internal protocol, according to which if a victim requests that their legal representative be present for an interview, the request will be granted.<sup>31</sup> In an interview conducted with a Victim from Victim Group 2 by the IIMM, a legal representative was permitted to be present. That is relevant because the IIMM is an international investigative mechanism, led and staffed by professionals with extensive experience in international criminal tribunals who are implementing their interpretation of "best practice". It is also relevant because material collected by the IIMM will almost certainly be used by the OTP. The IIMM has said publicly that it is undertaking its own victim interviews in "close and timely cooperation" with the OTP, and is sharing witness screenings and statements with the OTP.<sup>32</sup>
- (e) Where the question has arisen at other international criminal courts, victims' lawyers have been permitted to be present. The Kosovo Specialist Chambers has held that where a party has contact with a dual status victim or other represented witness, that person is entitled to have a lawyer present.<sup>33</sup> At the Extraordinary Chambers in the Courts of Cambodia and the Special Criminal Court in Central African Republic, where investigating judges conduct(ed) investigative interviews, legal texts explicitly provide for the presence of victims' counsel in such interviews.<sup>34</sup>

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<sup>29</sup> OTP and Eurojust, [Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations](#), p. 15: "Individual questioning: Question each person separately and individually and keep the number of people in the room to a minimum. If there is a need for the presence of persons others than the person(s) doing the questioning, the person being questioned and the interpreter (e.g. a support person, lawyer or legal guardian), then inform those persons in advance that they are not to influence the account of the person being questioned in any way and should not speak during the person's questioning."

<sup>30</sup> *Ibid*, p. 22: "To the extent possible, allow vulnerable persons to decide on the meeting location, time, and presence of a support person."

<sup>31</sup> Email correspondence between LRVs and the IIMM, August -September 2023.

<sup>32</sup> UN Human Rights Council, [Report of Independent Investigative Mechanism for Myanmar](#), A/HRC/54/19, 30 June 2023, paras 2, 18, 20. See also: [IIMM Bulletin](#), Issue 8, June 2023.

<sup>33</sup> *Prosecutor v Thiçi et al.*, [Decision on the Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or Participant](#), KSC-BC-2020-06/F00854, 24 June 2022, paras 203 and 212 (II.b); see also *Prosecutor v Shala*, [Decision on the Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant](#), KSC-BC-2020-04/F00537, 8 June 2023, and its [Annex 1](#), para. II.b.

<sup>34</sup> [ECCC Internal Rules, Rev.9](#), 16 January 2015, Rule 59(2). Minor wording changes were made to this provision during the first set of amendments to the Internal Rules on 1 February 2008, but the rule was not substantively modified from the version which existed in the original rules: [ECCC Internal Rules, 12 July 2007](#). CAR SCC, [Loi](#)

- (f) International instruments support victims having a right to their lawyer’s presence during interviews.<sup>35</sup> For example, the EU’s 2012 Directive on minimum standards on the rights, support and protection of victims of crime requires that during criminal investigations “victims may be accompanied by their legal representative and a person of their choice, unless a reasoned decision has been made to the contrary”.<sup>36</sup> The guidance document accompanying that directive explains that experience from member states shows that this practice “is beneficial for the quality of evidence, the conclusion of the cases and also lightens the burden on police and lawyers.”<sup>37</sup>
- (g) Among the domestic criminal law systems which, like the ICC, allow victims some level of standing criminal proceedings, legal representation during investigative interviews is standard.<sup>38</sup> Even common law jurisdictions which do not permit victims to be heard through a lawyer during criminal proceedings increasingly recognize a right for them to be legally represented in police or prosecution interviews.<sup>39</sup> In other cases, there exists a general right to be accompanied by any person of the interviewee’s choosing, which would include a legal representative.<sup>40</sup>

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[n° 18.010 du 02 juillet 2018, portant règlement des procédure et preuve devant la cour penale speciale de la république centrafricaine](#), art. 88. See also article 75(A) which entitled civil parties to the assistance of their lawyer during all stages of the investigation.

<sup>35</sup> In addition to the EU documents referenced in the following footnotes, see: [Principles on Effective Interviewing for Investigators and Information Gathering \(the “Mendez Principles”\)](#), May 2021, para. 108; Murad Code Project and IICI, [Collated Main Feedback on the Draft Murad Code of June 2020](#), 13 April 2022, p.41. (Citing input from a commentator that: “Interviews by international, state or private investigators [legal interviews] should in principle only be conducted in the presence of legal representation of the survivors”)

<sup>36</sup> [Directive 2012/29/ EU of the European Parliament and of the Council on establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA](#), 25 October 2012, art.20(c).

<sup>37</sup> [DG Justice Guidance Document, related to the transposition and implementation of Directive 2012/29/ EU of the European Parliament and of the Council on establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA](#), December 2013, p.42.

<sup>38</sup> See, for example: France, [Code de procédure pénale, art. 10-2](#), 8°: “*Les officiers et les agents de police judiciaire ou, sous leur contrôle, les assistants d’enquête informent par tout moyen les victimes de leur droit: ... D’être accompagnées chacune, à leur demande, à tous les stades de la procédure, par leur représentant légal et par la personne majeure de leur choix, y compris par un avocat, sauf décision contraire motivée prise par l’autorité judiciaire compétente*”. See also Spain, [Ley 4/2015, de 27 de abril, del Estatuto de la víctima del delito](#), art. 21(c); Netherlands, [Wetboek van Strafvordering, art. 51c](#); Denmark, [Retsplejeloven](#), s741c; Norway, [Lov om rettergangsmåten i straffesaker](#), art 107c; Poland, [Kodeks postępowania karnego](#), art. 315 §2, art. 316 §1, art. 317 §1; Côte d’Ivoire, Loi No. 2018-975 du 27 Decembre 2018 [Code de Procédure pénale](#), arts. 90-91; Senegal, Loi n° 65-61 du 21 juillet 1965 portant [Code de procédure pénale \(tel que modifié\)](#), art. 101; République Islamique de Mauritanie, Ordonnance n° 83.163 du 9 juillet 1983 instituant un [Code de Procédure pénale](#), art.105.

<sup>39</sup> See for example: Ireland, [Criminal Justice \(Victims of Crime\) Act 2017, s14\(2\)](#); Scotland, [Victims and Witnesses \(Scotland\) Act 2014, s9A](#); Northern Ireland, [Victim Charter: A Charter for victims of crime](#) (September 2015), Standard 1.6. In some instances rules have been created to apply specifically in respect of serious crimes, or vulnerable victims. See for example: United States of America, [US Code, Title 10, § 1044e\(b\)\(6\)](#) which applies to victims of sex-related offences in a military service context.

<sup>40</sup> See for example England and Wales, [Code of Practice for Victims of Crime in England and Wales](#), Para. 2.5; UK, [The Criminal Justice \(Armed Forces Code of Practice for Victims of Crime\) Regulations 2015, s65\(1\)](#).

32. The LRVs can see no reasonable justification for a presumptive denial of legal representation in investigative interviews where the victim has requested the presence of their counsel. Regarding confidentiality, Trial Chamber X addressed this issue, noting that legal representatives of victims are bound by the Code of Conduct for counsel, and that therefore “the presence of legal representatives or contact with them does not add any risks in conducting interviews”.<sup>41</sup> This obligation would be even clearer should the Chamber adopt a protocol regarding the handling of confidential information and/or material.

33. The OTP’s concerns about the number of people present during an interview should not justify denying a victim’s explicit request for their lawyer to be present. The practice of limiting the number of people in an interview is one principle which arises in international standards, but it is balanced with the importance of “honour[ing] the survivor’s choices” about who should be present, and informing them of any good reason not to do so.<sup>42</sup> Limiting persons present is presumably intended to make the interviewee feel more comfortable, and thereby create an atmosphere more conducive to the interviewee speaking openly. Having a trusted legal representative present in the room serves the same objective.

34. The LRVs note that the standard protocols applied at pre-trial and trial have the effect of increasing the number of persons present in an investigative interview: for example, where a Defence team wishes to interview an OTP witness, a representative of the OTP is entitled to be present.<sup>43</sup> In its submissions before other Chambers, the OTP has raised no concerns that this increase in persons present might be detrimental to the well-being of their witnesses.<sup>44</sup>

35. In the LRVs’ submission, it is not only unproblematic for victims’ counsel to be present during interviews; the presence of counsel is actively beneficial. The benefits go well beyond the protection of the victim’s own legal rights, but also contribute to a more effective investigation. Having a familiar and trusted legal representative present contributes to the

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<sup>41</sup> *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-01/12-01/18-674, 19 March 2020, para. 20.

<sup>42</sup> See for example [The Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence \(“Murad Code”\)](#) (version as at 13 April 2022), principle 9.5.

<sup>43</sup> See for example paragraph 37 of the *Protocol on Confidential Information and Witness Contact*, as set out in the [Chambers Practice Manual](#), 6<sup>th</sup> ed., 2022, Annex.

<sup>44</sup> See for example: the OTP’s submissions on protocols in the *Al Hassan* and *Yekatom* cases, which raise no concerns the increased number of persons in investigative interviews which may occur as a result of the standard protocols: *Prosecutor v Al Hassan*, [Version publique expurgée des « Observations de l’Accusation suite à l’Ordonnance de la Chambre de Première Instance X relative à la conférence de mise en état du 12 décembre 2019 », 6 décembre 2019, ICC-01/12-01/18-518-Conf-Exp](#), ICC-01/12-01/18-518-Red, 6 December 2019, para. 41; *Prosecutor v Yekatom*, [Prosecution’s submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses](#), ICC-01/14-01/18-35, 17 December 2018.

interviewee's psychological comfort as they recount what will likely be distressing events and incidents. The presence of the lawyer also reduces the risk of miscommunication, given that the lawyer will already be familiar with the victims' ability to understand and participate in the interview process, and will be alert to signs of discomfort, confusion or misunderstanding. It also avoids the need for the interviewee to attempt to recall and recount what was discussed afterwards to their lawyer in the event that a record of the meeting is not shared (on this question, see section 4.2.3 below). This complies with standards which emphasize minimising the number of times a victim is required to provide an account.<sup>45</sup> If a victim's legal representative is excluded from a meeting, the victim will likely wish to share what was said during the meeting with their legal representative, and this will also be necessary for the lawyer to provide effective representation. This places a burden on the victim to recall and re-tell what was discussed with the OTP. Should the represented victim have questions or concerns following the interview, the legal representative is in a far better place to address these and assuage concerns if they were present during the interview. The presence of a lawyer even protects the interviewers from allegations of improper conduct. As summarised in one international best practice document on investigative interviews:

A lawyer present during an interview serves as a legal resource, an eyewitness to the fairness of the process, and a safeguard against misunderstandings, misrepresentations and any attempt to conduct the interview unlawfully. These functions serve to enhance the evidentiary value of the information gathered during the interview.<sup>46</sup>

36. It is likely for these reasons that, at the trial stage, the Court's standard protocols require the OTP to permit a legal representative to be present during interviews.<sup>47</sup> The same approach should be applied equally to represented victims who engage with a party during an earlier stage of proceedings. Indeed equality of arms would require that OTP and Defence counsel are subject to the same rules regarding their interactions with represented victims. By the time Defence counsel are involved in a case and begin carrying out investigations, there will almost certainly be protocols in place regulating contact with victims and witnesses. There is no apparent justification for the OTP investigations to remain unregulated merely because it

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<sup>45</sup> See for example OTP and Eurojust, [Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations](#), pp. 14 and 15.

<sup>46</sup> [Principles on Effective Interviewing for Investigators and Information Gathering \(the "Mendez Principles"\)](#), May 2021, para. 108.

<sup>47</sup> See footnote 28 above.



carries out its investigations first in time, and reaches the victims and witnesses at an earlier point in time.

#### *4.2.3 Provision to LRVs of materials relating to a represented victim*

37. The LRVs have already had reason to request specific materials relating to the Victims from both the OTP and other victims' counsel. Materials requested can include records of meetings or interviews conducted with a Victim, or other information or documents, such as information about the Victim obtained from state authorities, international agencies or other third parties.

38. To date the LRVs have been successful in obtaining relevant materials from other victims' counsel. The only difficulty faced in this respect was that – as set out above at paragraph 24 – this necessitated sharing confidential information about victim identities. However, the OTP has refused to share materials with the LRVs, even those generated by the OTP and directly related to the Victims. For example, [REDACTED]

39. As a consequence, the LRVs are hampered in their representation of the Victims because they do not have accurate records of the Victims' interactions with the OTP. As discussed above (at paragraph 35) a burden is thereby placed on the victims to recall their interactions with the OTP and recount them from memory to their lawyers in order for counsel to provide proper representation. This can be stressful and potentially retraumatizing for victims, depending on the content of the interaction, and is unnecessary given that the OTP will have a record of the interaction.

40. Additionally, where the OTP holds material from third-parties about a Victim, the LRVs must seek out those third parties and disclose to them that the Victim is represented by the LRVs. This has the possibility of exposing the Victim to increased risk, especially where a third party is not a participant in the Court's proceedings and owes no obligations to protect the confidentiality of this information.

41. For these reasons, the LRVs consider that the OTP should be required to share material in its possession about a represented victim with that person's legal representatives when a specific request is made, and unless a reasonable justification for non-disclosure is provided. This complies with the OTP's obligations under Article 68(1), and (for the same reasons set out above at paragraph 32) does not undermine the confidentiality of the proceedings. This is also an obligation which would fall on the OTP and Defence under the standard dual status

protocol which is typically adopted later in the proceedings.<sup>48</sup> For the reasons explained above at paragraph 36, imposing the same obligations on the OTP during investigations which will ultimately fall on the Defence is an important guarantee of equality of arms. The LRVs note that the obligation as set out in paragraph 60 of the proposed Protocol would not create an undue burden for the OTP, as it would only arise in response to a specific request and the opportunity would exist to provide a reasonable justification for non-disclosure in a given instance.

### **4.3 The proposed protocol**

42. A proposed protocol to regulate interactions with witnesses and represented victims, and for the handling of confidential information is Annex 1 to this filing (“Protocol”). The LRVs respectfully adopt the approach of the Chamber’s Single Judge in the *Al Hassan* Case, namely that it is preferable to adopt the structure of the protocol used in the Chambers Practice Manual, so that the evolution of practices in different cases can more easily be followed, while recognizing nonetheless that some adaptations can be made.<sup>49</sup> The Protocol is therefore based on the *Protocol on Confidential Information and Witness Contact* as set out in the Chambers Practice Manual, but with proposed modifications.

43. The Protocol includes Parts A to G which constitute the protocol contained in the Chambers Practice Manual. In these parts, minor modifications have been proposed ensure that the Protocol not only protects witnesses, but also participating victims.

44. The Protocol also includes a new proposed Part H on contact with represented victims. It aims to establish a contact regime equivalent to that contained in Part G (Contacts with witnesses of other parties or participants) but for represented victims. The LRVs considered options for simply amending Part G for this purpose, but found that some principles relevant to represented victims are different, and closer to those found in the well-established dual status protocols, usually imposed at trial. The new Part H is therefore based on a combination of the

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<sup>48</sup> See: *Prosecutor v Ntaganda*, [Proposed mechanisms for exchange of information on individuals enjoying dual status](#), ICC-01/04-02/06-430-Anx1, 23 January 2015, para. 8; *Prosecutor v Gbagbo and Blé Goudé*, [Mechanisms for exchange of information on individuals enjoying dual status \(‘Protocol’\)](#), ICC-02/11-01/15-199-Anx, 1 September 2015, para. 7; *Prosecutor v Ongwen*, [Mechanisms for exchange of information on individuals enjoying dual status \(‘Protocol’\)](#), ICC-02/04-01/15-504-Anx2, 22 July 2016, para. 7; *Prosecutor v Al Hassan*, [Dual Status Witness Protocol](#), ICC-01/12-01/18-674-Anx1, 19 March 2020, para. 7; *Prosecutor v Yekatom and Ngaïssona*, [Mechanisms for exchange of information on individuals enjoying dual status \(‘Protocol’\)](#), ICC-01/14-01/18-677-Anx2, 8 October 2020, para. 7; *Prosecutor v Abd-Al-Rahman*, [Dual Status Witness Protocol](#), ICC-02/05-01/20-618-Anx, 7 March 2022, para. 7.

<sup>49</sup> *Prosecutor v Al Hassan*, [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](#), ICC-01/12-01/18-40-tENG, 31 May 2018, para. 10.

Part G rules, and the rules which would ordinarily be applied later in the proceedings under a dual status protocol. Annex 2 to the present filing provides an overview of the sources and rationale of each provision contained in the Protocol.

45. The LRVs note that, while dual status protocol rules apply to victims who have already had an individual application for participation considered and approved by a Chamber, a broader approach is necessary at the investigation stage because the Chamber is not yet considering individual victim applications. As such, the Protocol adopts the approach of applying the relevant protections to victims who are represented by counsel.

46. The application of the Protocol is appropriate at this stage, even where the parties and participants may not always know in advance or conclusively whether a victim is represented. Protocols routinely adopted by the Court (including the *Protocol on Confidential Information and Witness Contact* as set out in the Chambers Practice Manual) apply to the witnesses of another party where the intention to call the person as a witness has been communicated or is otherwise clearly apparent, even when they have not yet been formally included in a list of witnesses. The same is true of represented victims. The Protocol is able to accommodate scenarios in which a party interacts with a victim in good faith, not knowing that the victim is represented.

47. The Protocol contains a definition of “victim” which is linked to Rule 85 of the RPE, but without requiring a judicial determination of that status. This flexible approach is appropriate at this stage of proceedings, given that judicial decisions on victim application forms are not yet made. It is also appropriate given that the Protocol is primarily directed at protecting victims’ safety and well-being. Those are protections which the Court owes under Article 68(1) of the Statute not only to persons who have submitted an application for victim participation, but to a broad category of person including victims, witnesses and others at risk on account of the activities of the Court.<sup>50</sup> There is therefore no need to limit the protections under the Protocol to persons who have already been subject to a judicial determination on their status as participating victims.

48. The adoption of a protocol of this type may have an impact beyond the parties to the present filing, and may also have larger implications across other situations. For this reason, the LRVs have consulted with colleagues in the Office of Public Counsel for Victims

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<sup>50</sup> *Prosecutor v Katanga*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"](#), ICC-01/04-01/07-475, 13 May 2008.

(“OPCV”), OPCD, the Victims and Witness’ Unit (“VWU”), and VPRS, to exchange with them on the need for regulation, and with a view to addressing and incorporating any feedback and suggestions. The LRVs also contacted relevant Special Advisors to the Office of the Prosecutor. The LRVs would also respectfully invite the Chamber to seek the views of these different actors, should it consider it appropriate to do so, in order to have a broad cross-section of views and input into the utility of the protocol in facilitating the work of the Court.

## 5 LRV ACCESS TO CONFIDENTIAL COURT RECORDS

49. Despite variable early practice, the ICC now consistently provides LRVs with access to confidential records at the pre-trial and trial stages of active cases.<sup>51</sup> Such access is essential to enable victims’ participation in the proceedings: if victims’ lawyers are unaware of what is taking place in the proceedings, they may not effectively represent their clients’ interests.

50. The LRVs submit that the very same considerations apply during earlier stages of proceedings. As with protocols, the position at the investigation stage has not kept up with developments at the pre-trial and trial stages, apparently due to a lack of litigation at the situation level in recent years. When dealing with the very first ever applications for participation in ICC proceedings, in the *DRC Situation* in 2006, this Chamber refused victims’ counsel access to “non-public” records.<sup>52</sup> However, this reflected the approach which at that time was applied even at the trial stage within cases, that victims’ counsel would presumptively be denied access to confidential records.<sup>53</sup> That approach is no longer applied at the pre-trial or trial stages.<sup>54</sup> The LRVs submit that there is no reason in principle for treating access at an earlier stage differently. While significantly fewer judicial activities occur at this stage, and

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<sup>51</sup> *Prosecutor v Gbagbo*, [Decision on the Legal Representative of Victims’ access to certain confidential filings and to the case record](#), ICC-02/11-01/11-749, 19 January 2015, para. 15; *Prosecutor v Ntaganda*, [Decision on victims’ participation in trial proceedings](#), ICC-01/04-02/06-449, 6 February 2015, para. 55; *Prosecutor v Ongwen*, [Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights](#), ICC-02/04-01/15-350, 27 November 2015, para. 29; *Prosecutor v Al Mahdi*, [Public redacted version of ‘Decision on victim Participation at Trial and on Common Legal Representation of Victims’](#), ICC-01/12-01/15-97-Red, 8 June 2016, para. 42;

*Prosecutor v Al Hassan*, [Decision on Principles Applicable to Victims’ Applications for Participation, to Legal Representation of Victims, and to the Manner of Victim Participation in the Proceedings](#), ICC-01/12-01/18-289-Red-tENG, 20 March 2019, para. 45; *Prosecutor v Mokom Gawaka*, [Public redacted version of ‘Decision on victim applications for participation in the proceedings’](#), ICC-01/14-01/22-254-Red, 9 August 2023, para. 26.

<sup>52</sup> *Situation in the Democratic Republic of the Congo*, [Decision on the applications for participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6](#), ICC-01/04-101-tEN-Corr, 17 January 2006, para. 76 and p42.

<sup>53</sup> See for example: *Prosecutor v Lubanga*, [Decision on victims’ participation](#), ICC-01/04-01/06-1119, 18 January 2008, para. 106.

<sup>54</sup> See the decisions cited in footnote 51.

therefore usually fewer confidential filings, important matters can be raised confidentially which impact on the interests of victims.

51. One example relates to the possibility for proceedings under Article 56 of the Statute for the preservation of evidence. The Registry has already considered the possibility that Article 56 proceedings might form part of the present investigation, and took the view that victims' counsel (and duty counsel for the Defence) should be present.<sup>55</sup> However, such proceedings are usually initiated confidentially, and where victims' counsel are not notified they are thereby excluded from these proceedings. An example can be seen from the *Ongwen* case. There, proceedings were held under Article 56 of the Statute, including the examination of (victim) witnesses. However, because victims' counsel had yet to be given access to the confidential record of the case, they were unaware that this was occurring, and were excluded from the process. Victims' counsel were unable to make submissions on the appropriate procedures for the taking of Article 56 evidence. For example, they were unable even to be heard on the question of whether victims examined through this procedure should have representation, as the OTP had itself requested.<sup>56</sup> And although later, at trial, victims' counsel were able to question all *other* witnesses, they were prevented from questioning the witnesses heard under Article 56 of the Statute simply because they were unaware of that process while it was occurring. While the Article 56 proceedings in the *Ongwen* case occurred after the suspect's surrender to the ICC, that was because the OTP substantially reopened its investigation at that time, since original investigation had been completed ten years previously. It seems likely that an Article 56 process would ordinarily occur before a suspect has been surrendered to the Court, and particularly where the long wait for arrests prompts the need to preserve evidence.

52. A second example arises from Rule 99(1) of the RPE, which permits victims to request that a Pre-Trial Chamber take measures under Article 57(3)(e) of the Statute to secure the assets of a suspect for eventual use in reparations proceedings. These measures can only be taken against a person who is subject to an arrest warrant. They are only likely to be effective where taken before, or at the same times as an arrest warrant becomes public. Rule 99(1) therefore in practice presupposes that victims can be made aware of the existence of a confidential request

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<sup>55</sup> *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, [Registry's Observations on the Victims' Joint Request Concerning Hearings outside the host State \(ICC-01/19-34\)](#), ICC-01/19-37, 21 September 2020, paras 23-32.

<sup>56</sup> *Prosecutor v Ongwen*, [Public Redacted Version of Decision on the "Prosecution's submissions on the conduct of proceedings pursuant to decision ICC-02/04-01/15-277"](#), ICC-02/04-01/15-293-Red, 23 March 2016 (confidential version dated 18 August 2015), paras 5, 16-17.

for an arrest warrant, so that a request for measures under Article 57(3)(e) can be made at that time.

53. Chambers have recognised that any risk of granting such access is minimal, given that victims' lawyers are bound to preserve confidentiality not only by the Code of Professional Conduct for counsel,<sup>57</sup> but also (once it is adopted) by the *Protocol on Confidential Information and Witness Contact*. Moreover, the ICC's jurisprudence has routinely limited (albeit through various modalities) the extent to which confidential information received from the Court or other parties (as opposed to confidential information sourced from the victims themselves) may be shared with victims themselves.<sup>58</sup> This protects from widespread disclosures in situations where thousands of victims participate.

54. Of course, this does not preclude the possibility that certain matters remain so sensitive that they can remain *ex parte* vis-à-vis the victims, the Defence, the Registry, or even the OTP, as recognised by Regulation 23bis of the Regulations of the Court. However such restrictive classifications must be explicitly justified, and redacted versions should be filed wherever possible.<sup>59</sup>

## 6 RELIEF SOUGHT

55. For the above reasons, the LRV respectfully requests that the Chamber:

**INVITE** submissions from OPCV, OPCD, VPRS, the VWU, and any other actors considered appropriate, as well as from the OTP and any other victims' counsel;

**ADOPT** a protocol as set out in Annex 1 to this filing; and

<sup>57</sup> [Code of Professional Conduct for Counsel](#), article 8.

<sup>58</sup> See eg: *Prosecutor v Mutharua and Kenyatta*, [Decision on victims' representation and participation](#), ICC-01/09-02/11-498, 3 October 2012, para. 67; *Prosecutor v Gbagbo*, [Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record](#), ICC-02/11-01/11-749, 19 January 2015, para. 15; *Prosecutor v Ntaganda*, [Decision on victims' participation in trial proceedings](#), ICC-01/04-02/06-449, 6 February 2015, para. 56; *Prosecutor v Ongwen*, [Decision on contested victims' applications for participation, legal representation of victims and their procedural rights](#), ICC-02/04-01/15-350, 27 November 2015, para. 31; *Prosecutor v Al Mahdi*, [Public redacted version of 'Decision on victim Participation at Trial and on Common Legal Representation of Victims'](#), ICC-01/12-01/15-97-Red, 8 June 2016, para. 41; *Prosecutor v Al Hassan*, [Decision on Principles Applicable to Victims' Applications for Participation, to Legal Representation of Victims, and to the Manner of Victim Participation in the Proceedings](#), ICC-01/12-01/18-289-Red-tENG, 20 March 2019, para. 47.

<sup>59</sup> See eg: *Prosecutor v Kenyatta*, [Decision on the Legal Representative's request for access to confidential filings and evidence](#), ICC-01/09-02/11-794, 22 August 2013, para. 11.

**ORDER** that legal representatives of victims be granted access to confidential filings in the present situation, to facilitate the representation of the their clients.

Respectfully submitted,



Megan Hirst



Kate Gibson and Clare Brown



Nicholas Leddy

Dated this 25<sup>th</sup> day of October 2023  
At The Hague, Geneva and New York