

PUBLIC REDACTED VERSION OF
Annex I

I. Paragraph 6

*Prosecution's proposed amendment (in **bold**) to paragraph 6:*

"Parties and participants are under a general obligation not to disclose to third parties any confidential document or information. **Intermediaries should not have access to confidential information except for identity or contact details of prospective witnesses or witnesses, for the purposes of carrying out their functions.** 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."

Defence's comment on paragraph 6:

"The Defence objects to this addition. It is unnecessary. Intermediaries are used *inter alia* to assist in the conduct of investigations by identifying evidentiary leads and potential witnesses (see Guidelines Governing the Relations between the Court and Intermediaries ("Guidelines"); Code of Conduct for Intermediaries ("Code")).

Our concern is that the practical effect of this proposed amendment would be to limit the scope and freedom of Defence investigations in an unwarranted manner. There will be occasions when the Defence will need to share confidential information with an intermediary beyond the information set out in the proposal. Such a situation is envisaged in 5.4 of the Guidelines and Section 4 of the Code. All intermediaries will be asked to sign a confidentiality agreement. The proposed amendment is neither necessary nor proportionate.

In addition, the Defence cannot be expected to limit its investigation activities in a way the Prosecution's activities were not limited. This would be inequitable and prejudicial to the Defence's rights. The fact that such an amendment was not proposed in eg the Duterte case underscores that this amendment is unnecessary."

Prosecution's further comment on paragraph 6:

"The Prosecution's proposal to exclude from intermediaries access to confidential information except for contacts or identity information for the purposes of carrying out their functions is based on the parameters of the Guidelines Governing the Relations between the Court and Intermediaries ("Guidelines"), and Code of Conduct for Intermediaries ("Code"), equally applicable to all parties and participants including the Prosecution as well as the Defence. It is also consistent with existing ICC case law.

This proposal does not preclude Defence or Prosecution in their investigations from using intermediaries to **assist them** in their investigations by "identifying evidentiary

leads and/or witnesses and facilitating contact with potential witnesses”; and in assisting in communications “where direct communication with the Court could endanger the safety of the victim/witness”. But the **confidential information** needed for those purposes must remain limited, as they must not carry out core staff functions, such as of an investigator. Non-confidential information can be provided to provide necessary background/contextual information to identify leads. Only names/contacts are needed to assist with communication. Direct contact of intermediaries with witnesses are rather envisaged where direct communication with the court could endanger the safety of the victim/witness. Instead, as is the Prosecution’s practice in *Prosecutor v El Hishri* - intermediaries assist investigations [REDACTED].

The Prosecution has taken a limited/restricted approach to use of intermediaries in investigations following criticisms from ICC Chambers, that have highlighted risks of intermediaries, in having substantive and direct interactions with witnesses (e.g. allegations of contamination, etc). *See eg Prosecutor v Lubanga*, ‘Decision on Intermediaries, 12 May 2010, ICC-01/04- 01/06-2434-Red2 (public redacted version issued on 31 May 2010).

This limited view of the intermediaries functions, especially in the context of the parties investigations, are supported by the Guidelines:

- In the introduction it is recognized that, intermediaries can provide “valuable support [...] such as access to (remote) affected geographical areas; certain experience; cultural, linguistic or geographic proximity to affected communities or the ability to work with a low profile”. However, clear restrictions on that role and functions are explicitly explained, namely that “*[w]hile intermediaries may assist and support, they should not be called upon to undertake core functions of the Court*”. (p.3).
- Even if levels of support might vary, for the sake of consistency it was stated “there is a need to ensure that intermediaries *are not a substitute for staff for the implementation of the mandate of the Court*” (p.4).
- An intermediary is defined as “*someone who comes between one person and another; who facilitates contact or provides a link[...]*”. (p.5).
- Intermediaries functions including assisting in investigations “by *identifying evidentiary leads and/or witnesses and facilitating contact with potential witnesses*” or *communications with victims or witnesses* (p.5).

II. Paragraph 15

Prosecution’s proposed amendment (in bold) to paragraph 15:

“Where a witness has stated that he or she has suffered sexual or gender based crimes and it is apparent that the witness has not discussed the violence with members of his or her family **and/or ethnic or clan-based community**, parties and participants must exercise particular caution in investigating the allegations, in order to protect the privacy, dignity and well-being of the witness. Parties and participants shall not reveal information about the witness’s alleged victimisation to the family members of the witness or to persons who can reasonably be expected to communicate it to family members **and/or to members of the witness’s ethnic or clan-based community**. Where there are no suitable alternative investigative avenues, the investigating party or participant may communicate the information to such individuals that the 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 witness is a witness of the Court.”

Defence’s comment on paragraph 15:

“The Defence objects to this addition. It is vague, disproportionate and unworkable:

- 1) It may require the parties to investigate whether a witness has discussed victimization with any member of their ethnic or clan-based community. This is burdensome.
- 2) In addition, given that Arabs and Berbers make up around 90% of Libya's ethnic composition, this prohibition potentially covers an enormous proportion of the country’s population. It is disproportionate.
- 3) What precisely is meant by “ethnic or clan-based community” is insufficiently clear. The term is vague and is open to interpretation. It creates significant uncertainty to the parties and participants. Unnecessary and burdensome litigation is foreseeable.
- 4) The requirement is too subjective to be practicable, it requires insight into what the witness considers their community. Some practical examples: witness P-0779, in his witness information, identifies his ethnicity as Libyan. Witness P-0692 identifies his ethnicity as Muslim.

Again, the fact that such an amendment was not proposed in eg the Duterte case underscores that this amendment is unnecessary.”

Prosecution's further comment on paragraph 15:

"Paragraph 15, and the Prosecution's proposed additional language, makes clear that parties must exercise caution in investigating allegations of SGBC where "the **witness has not discussed the violence** with members of his or her family **and/or ethnic or clan-based community**". Therefore, the Defence is not precluded from seeking to speak with individuals whom the victim has explicitly stated that they discussed their violence with.

There is no basis to the Defence's assertion that the terminology used in this addition is too vague or general. In this case Prosecution witnesses have been asked to identify their specific ethnic origin (which in a Libyan context can also be a reference to their clan affiliation). Witnesses have an ethnic origin and/or clan affiliation. In the Libyan context the manner in which a person is named (including by use of their full family names) often indicates their clan affiliations. The examples from the Defence were provided of earlier witness statements, where information about ethnicity was clearly misplaced. Being a Muslim or Libyan is clearly not an ethnicity, but rather their religion and nationality. So that there is no basis to the Defence's concerns that this will be a broader reference to being 'Arab' or 'Berber'.

There is a reasonable basis and need for including the additional language proposed. The original language in paragraph 15 was first proposed by the Prosecution in *Prosecutor v Ntaganda*, where the evidence and facts showed there was a risk of rejection from immediate family members, in particular spouses/partners, especially of female victims. The evidence and facts in *Prosecutor v El Hishri*, indicate that the risks of harm including stigmatization, rejection, extend beyond the immediate family to the broader ethnic group/clan. Additionally, these risks of such harms are not only to the individual victim but for instance, to other immediate family members. See, for instance,[REDACTED]."

III. Paragraph 40

*Prosecution's proposed amendment (in **bold**) to paragraph 40:*

"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. **The calling party or participant, may in the event of a disagreement regarding procedure followed, or a particular line or manner of questioning of the witness, adjourn the interview and apply to the Chamber for appropriate measures, including discontinuance of the interview."**

Defence's comment on paragraph 40 :

"The proposed amendment contravenes the spirit of the paragraph itself (that the calling Party shall not interfere, and should not prevent or dissuade the witness from answering questions freely). This proposed amendment gives the calling Party significant power to adjourn an interview if it is dissatisfied, even unreasonably dissatisfied, with the way an interview might be going. A mere disagreement over a particular line of questioning, or the manner of questioning, could result in the interview being stopped, even if only temporarily. This is potentially highly disruptive of a Party's investigations. Again, the fact that such an amendment was not proposed in eg the Duterte case underscores that this amendment is unnecessary and undesirable."

Prosecution further comment on paragraph 40:

"The purpose of inclusion of this amendment is to enable the Chamber to intervene if there is an improper manner or line of questioning or disagreement regarding procedure, which is not able to be resolved between the parties. The Chamber would remain the ultimate arbiter. At the moment, there is only provision to have resort to the Chamber if the investigating party requests leave to conduct an interview without the presence of the calling party or participant.

This was missing from the Protocol in past cases but does not mean that the potential issue may not arise.

This provision applies equally to all parties and participants so that there is no inequality.

Judicial oversight should not be viewed as akin to being "highly disruptive of a Party's investigations". If a request made is baseless or designed to be disruptive, the Chamber should be able to take the necessary measures."