

# **ANNEX A**

## **PUBLIC**

### **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**

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**I. Introduction**

1. This Protocol sets out the procedures governing the handling of confidential information during investigations, including the circumstances in which disclosure of the identity of a protected witness from the opposing party can be effectuated, as well as the conditions under which the investigating party or participant is authorised to contact witnesses of the opposing party or of a participant. The purpose of the 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 the accused.
2. The parties and participants shall adhere to the high standards set out in, inter alia, the Code of Professional Conduct for counsel, the Code of Conduct for Investigators and the Code of Conduct of the Office of the Prosecutor.
3. Any deviation from this Protocol requires the prior authorisation of the Chamber.

**II. Definitions**

4. In this Protocol, the terms below shall have the following meaning:
  - a. “party” shall mean the Prosecutor or Mr Al Hassan Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud, as the case may be, and their respective teams, including counsel, resource persons, and investigators;
  - b. “participant” shall mean the legal representative of victims and their teams;
  - c. “public” shall include all persons, governments, organisations, entities, associations and groups but shall not include a “party” or “participant” as defined above, a judge or legal officer of the International Criminal Court (“Court”) or a member of the Registry of the Court;
  - d. “others at risk” are persons at risk on account of the activities of the Court;
  - e. “confidential information” shall mean any information classified as such in accordance with regulation 14 of the Regulations of the Registry or classified as “*ex parte*”, “confidential” or “under seal”, only known to the parties and, if appropriate, to the participants, and not to be disclosed to the public;
  - f. “witness” shall refer to any person whom a party or participant intends to call to testify or whose statement the party or participant intends to rely upon, provided that such intention has been conveyed to the non-calling

party or participant by means that establish a clear intention on behalf of the calling party or participant to rely upon the individual as a witness. The term “witness” shall include expert witnesses as well as all other kinds of witness.

5. All obligations listed in the current Protocol that apply to the parties and participants also apply to their staff, the intermediaries they use, any other individuals who perform tasks on their behalf and the suspects or accused.

### III. Use of Confidential Information in the Course of the Investigations

6. The provision of confidential information between parties and participants and its subsequent use and disclosure is governed by the legal instruments of this Court, including without limitation the Rome Statute (“Statute”), the Rules of Procedure and Evidence (“Rules”), the Code of Professional Conduct for Counsel, the Code of Conduct for Investigators, the Code of Conduct of the Office of the Prosecutor and the relevant jurisprudence of the Court.
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 confirmation documents or information to third parties as part of investigative activities by a party or participant is exceptionally permissible. [Note: paragraph 5 of Practice Manual Protocol]*
8. Every party or participant shall apply best practices throughout the investigation. An integral part of these best practices is to minimise the risk of exposing confidential information to the greatest extent possible.
9. Confidential information disclosed *or made available* to a party or participant by the opposing party or participant may only be disclosed to the public *or a third party* where such disclosure is directly and specifically necessary for the preparation and presentation of their case. *A party or participant shall only disclose to third parties those portions of a confidential document of which the disclosure is directly and specifically necessary for the preparation and presentation of its case. [Note: incorporating language from paragraph 7 of Practice Manual Protocol]*
10. When confidential information is made known to a member of the public by a party or participant, that party or participant will explain to such a person the confidential nature of the information and that such information shall not be reproduced or disclosed to anyone else in whole or in part. Unless otherwise authorised by the Chamber, members of the public should not retain a hard copy of the information.

11. Visual and/or non-textual material such as photographs depicting witnesses should be used only when no satisfactory alternative investigative avenue is available. To reduce the risk of disclosing the involvement in the activities of the Court of the persons depicted, the parties and participants shall only show photographs which do not contain elements which tend to reveal such involvement. Additionally, when photographs depicting witnesses or victims are used, these shall only be shown together with other photographs of the same kind. Unless otherwise authorised by the Chamber, members of the public should not retain a hard copy of photographs depicting witnesses or other individuals involved with the Court.
12. The party or participant disclosing confidential information shall keep a record in any form of the circumstances in relation to such disclosure during their investigation and/or preparation of the case, including: (i) the name and particulars of the person(s) to whom the information was communicated; (ii) the name of the person who communicated the information; (iii) the date at which the information was communicated; and (iv) the location where the information was communicated.
13. The party or participant shall keep a record of all the members of the party's or participant's team having access to this material and the period during which they had such access. Any member of the legal teams of the parties and participants shall, upon separation from those teams, return all confidential material in their possession to the relevant person within the team. The head of such legal teams shall endeavour to take reasonable measures to ensure that such confidential material is returned.
14. *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. [Note: paragraph 17 of the Practice Manual Protocol].*
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 witness to third parties, it shall seek the advice of the VWS. [Note: paragraph 13 of the Practice Manual Protocol].*

#### ***IV. Investigation of allegations of sexual or gender based crimes***

16. *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, 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 the 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. Where there are no suitable alternative investigative activities, 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. [Note: paragraph 14 of the Practice Manual Protocol].*

## **V. Inadvertent Disclosure**

17. In the event that a disclosing party or participant discovers that it has disclosed material that should not have been disclosed or should have been disclosed in redacted form, it shall immediately inform the receiving party or participant. *If the information inadvertently disclosed pertains to a witness in the ICCPP or who has been otherwise provided with form of protective measures, the party or participant shall also inform the VWS. [Note: incorporating language from paragraph 18 of the Practice Manual Protocol].*
18. In the event that the receiving party or participant discovers that it has received material that it believes should not have been disclosed or should have been disclosed in redacted form, the receiving party or participant shall bring that fact immediately to the attention of the disclosing party or participant. 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 member of the team having received the said material shall act in good faith and refrain from sharing the material in any manner, including with the accused and, to the extent possible, with other members of the team.
19. 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 to the disclosing party the material as well as any copies that it may have made. The receiving party or participant shall delete any electronic copies in its possession.
20. Should a dispute arise as to whether the material should have been disclosed or should have been disclosed in redacted form, the parties and participants shall first seek to resolve the dispute between themselves. If they are unable to do so, the matter may be brought to the attention of the Chamber by way of written application.
21. Moreover, the receiving party or participant will instruct any individuals who have read or have had access to the inadvertently disclosed material to refrain from using the material any further and will ensure that all remaining copies of

the inadvertently disclosed material are returned to the disclosing party and any electronic copies destroyed.

## **VI. Disclosure of the Identity of Witnesses of Other Parties and Participants In the Course of Investigations**

22. This section of the Protocol applies to witnesses whose identity or relationship with the Court has not yet been made public by a party, participant or by the Chamber or who have other protective measures known to the investigating party or participant.
23. It is essential that the investigating party or participant avoid whenever possible the security risk of disclosing to a member of the public the identity of witnesses. The provisions of this Protocol concern situations where such disclosure is considered directly and specifically necessary for the purpose of investigation or research.

### *Use of Names or Other Identifying Information*

24. The investigating party shall use the names of witnesses of the opposing party or participant only when directly and specifically necessary for the purposes of its investigation and/or preparation of its case.
25. If the investigating party or participant finds it directly and specifically necessary for the preparation and presentation of its case to disclose to a member of the public the identity of a witness, the party or participant shall under no circumstances reveal (i) that the person is involved, directly or indirectly, with the activities of the Court; or (ii) the nature of such involvement. In case of doubt as to the necessity of the disclosure, the investigating party or participant shall seek guidance from the Chamber.
26. Should the investigating party or participant need to disclose the identity of a witness who is in the ICCPP or who has otherwise be relocated with the assistance of the Court during the course of specific investigations related to that witness, the investigating party or participant shall liaise with the Victims and Witnesses Section (“VWS”) prior to the mission in which such disclosure may take place and shall communicate the details of the place, time and, to the extent possible, the person(s) that the party or participant intends to contact and to whom it intends to disclose the identity in question. Additionally, the way disclosure will take place will be discussed with the VWS, which shall provide the investigating party or participant with its best practices and advice in relation to the specific information communicated by that party or participant.

27. Should the investigating party or participant need to disclose the identity of a witness who is otherwise protected by the VWS, the investigating party or participant shall inform the VWS as soon as possible.
28. The investigating 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 apparent to the investigating party or participant, it shall inform the VWS Head of Protection as soon as possible.

*Breaches of Confidentiality*

29. If the investigating party or participant finds that the recipient of the information knows or understand that a witness, including a witness admitted in the ICCPP, is involved with the Court, it must expressly inform the recipient of the confidential nature of this information and instruct him or her not to disclose this information any further. The investigating party or participant must also inform the VWS Head of Protection of such an occurrence as soon as possible.
30. All investigating parties and participants shall bring to the attention of the VWS Head of Protection any reasonable suspicion that a witness, members of his or her family, or others at risk may have been placed at risk for any reason (for example, if his or her participation as a witness is known, or his/ her protected location has become known) as soon as possible.
31. Likewise, if a party or participant has revealed confidential information, or has become aware of any other breach of the confidentiality of information under the present Protocol, or realises that a third party has become aware of confidential information, it shall inform the recipient of the information about the confidential nature of such information and instruct him or her not to disclose it any further. In addition, it shall immediately inform the VWS, who will keep confidential any information that could impact ongoing investigations into such a breach.

*Prior consent to disclosure secured from witnesses by the calling party*

32. Witnesses may perceive themselves to be at a very high level of risk by realising that investigative activities related to them are conducted in the field. While this perception does not always correspond to the objective level of risk, it may still cause difficulties in the management of expectations and may ultimately have an effect on the willingness of those affected to cooperate with the Court.
33. These concerns are amplified with regard to witnesses who are considered to be vulnerable. A key element in the process of traumatising arises from the sense of loss of control (of their lives, wellbeing and/or physical and psychological

integrity) and unwanted intrusion that may occur within a single traumatic event or series of traumatic events. In a similar way, treatment for many survivors of traumatic abuse can involve processes to aid the individual in resuming control and psychosocial integrity. Given these considerations, the disclosure of identifying information related to these individuals without prior informed consent may reinforce a sense of helplessness and represent a further intrusion (that indeed may risk the vulnerable witnesses experiencing a form of re-traumatisation).

34. The parties or participants carry the responsibility of ensuring that witnesses they intend to call provide, whenever possible, their informed consent to their involvement with the Court. This consent should be provided before the provision of any witness statement. The parties and participants bear a higher responsibility in this regard when their activities may involve vulnerable witnesses.
35. If the party or participant collects visual and/or non-textual material from the witness, it shall clarify explicitly how these materials may be disclosed.

## **VII. Regulation of Contacts Between a Party or Participant and a Witness of the Opposing Party or participants**

36. This section of the Protocol governs the conditions under which the investigating party or participant is authorised to contact witnesses of the opposing party or participant.
37. This section applies only to a “witness” as defined under paragraph 1(f) of the Protocol.

### *Consent*

38. A party or participant who seeks to interview a witness of the opposing party or of a participant can only do so if the witness consents, through the calling party or participant, to the interview.

### *Notification to the Opposing Party or Participant*

39. The party or participant seeking to contact a witness of the opposing party or participant will provide the latter with reasonable notice of its intent to do so. Such a procedure will allow the opposing party or participant to ask the witness whether he/she agrees to be contacted or interviewed. After being notified, the party or participant calling the witness shall seek the consent of the witness within ten business days of receiving notification.



40. The decision whether to be interviewed is up to the witness. The calling party or participant shall not attempt to influence the witness's decision whether to agree to be interviewed by counsel of the other party or participant.
41. If an investigating party or participant contacts a witness of an opposing party or participant inadvertently or merely for courtesy purposes, the investigating party or participant shall refrain from any discussion of the case and shall under no circumstances seek the witness's consent to be interviewed. Consent to be interviewed may be obtained only through the calling party ***subject to paragraph 42***, using the procedure described in the preceding paragraphs.
- 42. If the calling party is unable to contact the witness within ten days, the party seeking to interview the witness may apply to the Chamber and request that the VWS be instructed to attempt to contact the witness. [Note: based on language from paragraph 30 of the Practice Manual Protocol].***

*Contact with Individuals Participating in the ICCPP and those subject to an assisted move*

43. When the party or participant wishing to interview a witness is aware that the witness is a participant in the ICCPP, or has been otherwise relocated with the assistance of the Court, the party or participant shall, in addition to notifying the calling party or participant, also inform the VWS.
44. All contact with individuals who are participants in the ICCPP shall be facilitated exclusively by the VWS.

*Objections to the Interview*

45. If the party or participant who intends to call or rely upon a witness objects to the interview of that witness, it shall inform the investigating party or participant. If they cannot reach an agreement, despite genuine efforts to do so, they may raise the matter with the Chamber.
46. Without prejudice to Articles 56 and 57(3)(b) of the Statute and Rule 114 of the Rules, the party or participant seeking the interview shall not proceed with said interview until the Chamber rules on the matter.

*Presence of a representative of the calling party during the Interview*

47. The witness is entitled to have a representative of the calling party attend the interview. This is the choice of the witness; the calling party or participant shall not influence the witness's decision on whether to have a representative present during the interview.

48. In addition, independent of the wishes of the witness, it is the responsibility of the calling party or participant to ensure that, if the witness is particularly vulnerable or otherwise in need of assistance during the interview, the appropriate assistance is provided and that, where necessary, it contacts the VWS well in advance of the scheduled interview in order to arrange for an assessment of the need for assistance by a VWS representative during the interview.
49. *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. [Note: paragraph 36 of the Practice Manual Protocol].*

#### *Arranging the interview*

50. Once the witness has given his or her consent to be interviewed, the party or participant calling the witness or relying on his or her statement shall inform the investigating party or participant and contact shall be facilitated as appropriate. If the calling party or participant attends the interview, it shall bear its own travel and other costs associated with the interview.
51. In principle, the parties and participants shall make all the necessary logistical arrangements in accordance with best practices. However, should there be any remaining security concerns, the calling party or participant shall inform the VWS for the latter to assess the situation and, if necessary, take relevant steps in order to assist the parties and participants in organising the meeting in a safe manner.
52. In the event that the investigating party or participant wishes to meet a witness who is a participant in the ICCPP, the VWS will inform the investigating party or participant of the location at which the meeting will take place, and the VWS 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.
53. *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. [Note: paragraph 34 of the Practice Manual Protocol].***

*Recording of the Interview*

54. A video or audio record of the entire interview will be provided to the party or participant calling the witness or relying on his or her statement as soon as practicable, and not more than five business days, after the conclusion of the interview.