

PUBLIC

Annex to the Defence's observations on the "Protocol on the handling of confidential information during investigations and contact between party or participant and witnesses of the opposing party or of a participant"

AMENDED 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

A. Introduction

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

B. Definitions

4. For the purposes of this Protocol:
 - (a) ‘Party’ shall mean the Prosecutor and any member of the Office of the Prosecutor authorised to have access to the information in question, and the suspect or the accused and his or her counsel, assistants to counsel and any other persons properly designated as members of the Defence team;
 - (b) ‘Participant’ shall mean any other entity participating in the proceedings, including but not limited to the legal representatives of victims and States, and any other persons properly designated as members of their teams;
 - (c) ‘Third party’ shall include any person except a party or participant as defined above, or a Judge or staff of the Court authorised to have access to the information in question;
 - (d) ‘Confidential document’ shall mean any document not classified as ‘public’ in accordance with Regulation 14(b) of the Regulations of the Registry;
 - (e) ‘Confidential information’ shall mean any information contained in a confidential document which has not otherwise legitimately been made public, and any information ordered not to be disclosed to third parties by any Chamber of the Court;
 - (f) ‘Witness’ shall mean a person whom a party or participant intends to call to testify or on whose statement a party or participant intends to rely -, insofar as the intention of the party or participant to call the witness or to use his or her statement has been clearly communicated to the opposing party. The term “witness” includes expert witnesses.

5. All of the obligations set out in the present Protocol, and which are imposed upon the parties and participants, are also applicable to resource persons and intermediaries acting on instruction of or on behalf of a party or participant.

C. Use of confidential documents and information in investigations

1. General provisions

5.6. Parties and participants are under a general obligation not to disclose to third parties any confidential document or information. This Protocol sets out the conditions and procedures in which the disclosure of confidential documents or information to third parties as part of investigative activities by a party or participant is exceptionally permissible.

6-7. Throughout the investigation and proceedings, parties and participants shall undertake to minimise the risk of exposing confidential information to the greatest extent possible.

7-8. Confidential documents or information which have been made available to a party of participant may only be revealed by that party or participant to a third party where such disclosure is directly and specifically necessary for the preparation 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.

8-9. When a confidential document or confidential information is revealed to a third party under the preceding paragraph, the party or participant shall explain to the third party the confidential nature of the document or information and warn the third party that the document or information shall not be reproduced or disclosed to anyone else in whole or in part. Unless specifically authorised by the Chamber, the third party shall not retain a copy of any confidential document shown to them.

2. Witnesses whose identity has not been made public

9-10. This section of the Protocol applies to witnesses whose identity or relationship with the Court has not been made public; **or who are subject to other protection measures.**

10-11. A party or participant may disclose the identity of such a witness to a third party if such disclosure is directly and specifically necessary for the preparation and presentation of its case. If a party or participant is aware that the witness is in the International Criminal Court Protection Programme ('ICCPP') or has otherwise been relocated with the assistance of the Court, the party or participant shall inform the Victims and Witnesses Unit ('VWU') in advance of the details of the place, time and, to the extent possible, the types of organisations, institutions, and, if available, the person(s) to whom it intends to disclose the identity of the witness, and shall consult with the VWU as to specific measures that may be necessary. If the witness is otherwise protected by the VWU, the party or participant shall inform the VWU of the disclosure of the witness' identity as soon as possible, but in any event prior to disclosure.

~~11~~-12. Notwithstanding the previous paragraph, parties and participants shall not reveal to third parties that the witness is involved with the activities of the Court or the nature of such involvement.

~~12~~-13. Visual and/or non-textual material depicting or otherwise identifying witnesses shall only be shown to a third party when no satisfactory alternative investigative avenue is available. To reduce the risk of disclosing the involvement in the activities of the Court of the person depicted or otherwise reflected, a party or participant shall only use such visual material and/or non-textual material which does not contain elements which tend to reveal the involvement of the person depicted in the activities of the Court. When a photograph of a witness is used, it shall only be shown together with other photographs of the same kind. Unless specifically authorised by the Chamber, the third party shall not retain copies of the visual material subject to this provision.

~~13~~-14. 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 VWU.

3. Investigation of allegations of sexual or gender based crimes

~~14~~-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, 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. 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.

4. Records of the handling of confidential documents or information

~~15~~-16. Parties and participants shall keep a record of any disclosure of confidential documents or information to third parties, which shall include: (i) the name and particulars of the person(s) to whom the confidential documents or information was disclosed; (ii) the name of the person who disclosed the document or information; (iii) the date of disclosure; and (iv) the location of disclosure.

~~16~~-17. Parties and participants shall keep a record of all members of their team having access to confidential documents and information, which shall include: (i) the name and particulars of the member of the team; and (ii) the period during which they had access to confidential documents and information. Any such member of the team shall, upon separation from the team, return all confidential documents in their possession and return or destroy any copies. The head of the team shall take all reasonable measures to ensure that all confidential documents have been returned, and any copies returned or destroyed.

~~17~~-18. Where there are reasonable grounds to believe that confidential documents or information have been disclosed in violation of this Protocol, the Chamber may instruct the

party or participant to disclose to it, and, if appropriate, to other parties and participants, in whole or in part, the records mentioned above.

D. Inadvertent disclosure

~~18~~19. If a party or participant discovers that it has disclosed material which should not have been disclosed or should have been disclosed in redacted form, it shall immediately inform the 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 VWU.

~~19~~ 20. If a party or participant discovers that it has received material which it believes should not have been disclosed or should have been disclosed in redacted form, it shall immediately inform the party or participant who disclosed the material. Pending confirmation by the disclosing party or participant that the material should not have been disclosed or should have been disclosed in redacted form, the party or participant having received the material shall act in good faith and shall ensure that the material is not distributed within the team including, in the case of the Defence, to the accused.

~~20~~ 21. As soon as the disclosing party or participant informs the receiving party or participant or confirms that the material should not have been disclosed or should have been disclosed in redacted form, the receiving party or participant shall return the material to the disclosing party or participant and shall return or destroy any copies. **The receiving party or participant must also inform any person who has read or has had access to the confidential material inadvertently disclosed that they must cease all use of the said document and ensure, as far as possible, that any copies are returned to the disclosing party or participant and that any electronic versions are destroyed.**

~~21~~22. The procedure for exceptions to disclosure under rule 81 of the Rules of Procedure and Evidence shall apply to any dispute as to whether or not the material should have been disclosed or should have been disclosed in redacted form.

E. Breaches of confidentiality

~~22~~23. If a party or participant discovers that a third party knows or understands that a witness whose identity has not been made public is involved with the Court, it shall inform the third party of the confidential nature of this information and instruct the third party not to disclose this information any further. The party or participant shall also inform the VWU of such occurrence as soon as possible.

~~23~~24. A party or participant shall bring to the attention of the VWU as soon as possible any reasonable suspicion that a witness, a member of a witness's family, or another person at risk as a result of the activities of the Court may have been placed at risk for any reason, including reasonable suspicion that a witness's involvement with the Court or protected location has become known to third parties.

~~24~~25. If a party or participant has revealed confidential information, or has become aware of any other breach of the confidentiality of documents or information, or discovers that a third party has become aware of confidential information, it shall inform the recipient of the

confidential nature of such information and instruct him or her not to disclose it any further. In addition, the party or participant shall immediately inform the VWU.

F. Consent to disclosure by witnesses

~~25~~26. When interviewing a witness, a party or participant shall inform the witness of its disclosure obligations and shall seek to obtain consent of the witness to the disclosure of his or her statement and any visual and/or non-textual material obtained from the witness. A party or participant shall give particular regard to the needs of vulnerable witnesses.

G. Contacts with witnesses of other parties or participants

~~27~~27. Except under the conditions specified in this section, a party or participant shall not contact or interview a witness of another party or participant (the ‘calling party or participant’) if the intention to call the witness to testify or to rely on his or her statement has been communicated to the party or participant, or if this intention is otherwise clearly apparent.

~~29~~28. A party or participant shall not make inquiries relating to the current location of protected witnesses or other persons who have been admitted to the ICCPP, who have been assisted by the Court to move away from their initial place of residence, or whose location has been protected by the Chamber. Should the location of such protected witnesses or persons become known or apparent to a party or participant, it shall inform the VWU immediately.

1. Consent of the witness

~~28~~29. A party or participant shall only contact or interview a witness of another party or participant if the witness consents, **and in accordance with the provisions of paragraphs 30 and 32 below.**

~~29~~30. The party or participant seeking to interview a witness of another party or participant shall notify the latter of its intent to do so. The calling party or participant shall ask the witness within five days whether he or she agrees to be contacted or interviewed. The calling party or participant shall not attempt to influence the witness’s decision whether to agree to be interviewed by the other party or participant.

31. If a party or participant contacts a witness of an opposing party or participant inadvertently or during VWS-organized courtesy meetings, the party or participant shall refrain from any discussion of the case and shall under no circumstances seek the witness’s consent to be interviewed directly. A witness’s consent to be interviewed may be obtained only through the calling party or participant, in accordance with the provisions of paragraphs 30 and 32.

~~30~~32 If the calling party is unable to contact the witness within five days, the party seeking to interview the witness may apply to the Chamber and request that the VWU be instructed to attempt to contact the witness.

2. Interview

~~34~~33. If the witness consents to be interviewed, the calling party or participant shall inform the investigating party or participant and contact shall be facilitated as appropriate.

32-34. The calling party or participant shall ensure that, if the witness is particularly vulnerable or otherwise in need of assistance during the interview, such appropriate assistance is provided and that, where necessary, the VWU is informed sufficiently in advance of the scheduled interview in order to arrange for an assessment of the need for assistance by a VWU representative during the interview.

33-35. The witness may choose to have a representative of the calling party or participant attend the interview. The calling party or participant shall inform the witness of this right but shall not attempt to influence the witness's decision. ~~If a representative of the calling party or participant attends the interview, the calling party or participant shall bear the costs.~~ **No party or participant shall be responsible for the costs incurred by the opposing party or participant in attending an interview.**

34-36. 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.

35-37. The parties and participants shall make all necessary logistical arrangements in accordance with best practices. In case of security concerns, the calling party or participant shall inform the VWU for it to assess the situation and if necessary, to assist the parties and participants in organising the meeting in a safe manner.

36-38. 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.

37-39. A video or audio recording of the interview shall be provided to the calling party or participant as soon as practicable after the conclusion of the interview.

3. Objection of a party or participant to the interview of a witness whom the opposing party intends to call to testify

40. If, after having obtained the consent of the witness they intend to call, a party or a participant wishes to object, on an exceptional basis and in the event of a serious problem, for reasons related to the safety or physical or psychological well-being or dignity of the witness, to the request to interview the witness with the opposing party or a participant, the opposing party or participant shall be informed in writing. If, despite their efforts, they cannot reach agreement, the calling party must apply to the Chamber and inform the VWS in writing within two days of the disagreement having been notified by one of the parties or participants to the other.

41. Without prejudice to articles 56 and 57(3)(b) of the Statute and rule 114 of the Rules of Procedure and Evidence, the party or participant seeking the interview with the witness must refrain from holding the interview until the matter has been decided by the Chamber.

3.4. Special provisions for protected witnesses

~~38.~~42. When the party or participant seeking to interview a witness is aware that the witness is a participant in the ICCPP, or has been otherwise assisted by the Court to move away from their place of residence, the party or participant shall, in addition to notifying the calling party or participant, inform the VWU. All contact with individuals who are part of the ICCPP shall be facilitated exclusively by the VWU.

~~39.~~43. In the event that the investigating party or participant wishes to interview a witness who is a participant in the ICCPP, the VWU will inform the investigating party or participant of the location at which the meeting will take place, and the VWU will undertake all necessary logistical arrangements for the witness to be present in the location specified on the date previously agreed with the investigating party or participant.