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CHAMBERS PRACTICE MANUAL

February 2016

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Introduction

This is the first update of the Pre-Trial Practice Manual, which includes the latest agreements reached by the Judges of the Court allowing for an expansion of the Manual in particular as concerns crystallisation of the best practices identified with respect to systems common to various stages of the proceedings.

More specifically, the present update contains a new part B. ("Issues related to various stages of proceedings"), which deals with: (i) procedure for admission of victims to participate in the proceedings; (ii) exceptions to disclosure in the form of redaction of information; and (iii) handling of confidential information during investigations and contact between a part or a participant and witnesses of the opposing part or of a participant.

In addition, as a result of this expansion, the Pre-Trial Practice Manual is now being more appropriately called "Chambers Practice Manual".

Introduction to the first edition of the Manual (at the time "Pre-Trial Practice Manual") released in September 2015

Why this Pre-Trial Practice Manual?

The present manual is the product of discussions held among the Judges of the Pre-Trial Division – Judges Marc Perrin de Brichambaut, Antoine Kesia-Mbe Mindua, Péter Kovács, Chang-ho Chung and myself – since April 2015 with a view to identifying solutions to challenges faced in the first years of the Court and build on the experience acquired so far. Indeed, after more than 10 years of activity, it was considered vital to reflect on the at times inconsistent practice of the different Pre-Trial Chambers, and record what has been identified as best practice to be followed in pre-trial proceedings.

The manual is first and foremost directed at the Pre-Trial Judges themselves, while certain issues are also of relevance to the trial stage of the case, and therefore of interest to the Judges of the Trial Division. It also states the expectations that pre-trial Judges have from the Prosecutor and Defence counsel. The final goal of the manual is therefore to contribute to the overall effectiveness and efficiency of the proceedings before the Court.

The manual was presented to and shared with all Judges of the Court in advance of the Judges' retreat that took place in Nuremberg, Germany, from 18 to 21 June 2015. At the retreat, after discussion, the Judges endorsed the manual and recommended that it be made public as soon as possible.

Needless to say, this manual is a living document. It will be updated, integrated, amended as warranted by any relevant development and therefore the Judges of the Pre-Trial Division will meet on a regular basis in order to discuss the need for any such update. The first update will concern issues with respect to the modalities of victims' applications for participation in the proceedings and the procedure for their admission, on which the Judges of the Division are currently working together with the other Judges of the Court.

Thanks to the colleagues of Pre-Trial Division I have the honour to preside and to the staff members of the Division for their valuable contribution to the preparation of this manual.

Cuno Tarfusser

President of the Pre-Trial Division

A. ISSUES RELATED TO PRE-TRIAL PROCEEDINGS

I. Issuance of a warrant of arrest/summons to appear

1. The ex parte nature of proceedings under article 58

The application of the Prosecutor under article 58 of the Statute and the decision of the Pre-Trial Chamber are submitted and issued *ex parte*. Even if the proceedings are public (which is however not recommended), the person whose arrest/appearance is sought does not have standing to make submissions on the merits of the application.

2. The warrant of arrest/summons to appear

A warrant of arrest/summons to appear should be issued as a single, concise document, by which the arrest of the person is ordered or the person is summoned to appear before the Court at a specified date and time, respectively. Its content is regulated by article 58(3) of the Statute, which states that it shall contain: (i) the name of the person and any other relevant identifying information; (ii) a specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and (iii) a concise statement of the facts which are alleged to constitute those crimes. Any detailed discussion of the evidence or analysis of legal questions is premature at this stage and should be avoided.

If the person presumably speaks either of the working languages of the Court (English or French), and/or, if applicable, the language of the State on the territory of which the person might be found is either of these languages, the warrant of arrest/summons to appear should preferably be issued directly in such working language.

On the basis of the warrant of arrest, the Registrar, in consultation with the Prosecutor, transmits a request for arrest and surrender under articles 89 and 91 of the Statute to any State on the territory of which the person may be found. As recently instructed by the Judges of the Pre-Trial Division, every time that information of travel into the territory of a State Party, whether planned or ongoing, of a person at large who is the subject of a warrant of arrest is related to the Court or one of its organs, the Registrar shall transmit to the concerned State Party a request for arrest or surrender of the person or, in case such request has already been transmitted, a *note verbale* containing a reminder of the State's obligation to cooperate with the Court in the arrest and surrender of that person. In case the person at large is expected to travel into the territory of a non-State Party, the Registrar shall request the State's cooperation in the arrest and surrender of the person, informing or reminding it that it may decide to provide assistance to the Court in accordance with article 87(5)(a) of the Statute with regard to the arrest and surrender to that person,

or reminding the State of any obligation arising from any Security Council resolution referring the situation to the Prosecutor, in case any such obligation has been imposed.

II. The first appearance

1. Timing of the first appearance

The person's first appearance before the Chamber or the Single Judge, in accordance with article 60(1) of the Statute and rule 121(1) of the Rules, should normally take place within 48 to 96 hours after arrival at the seat of the Court upon surrender, or on the date specified in the summons to appear.

2. Language that the person fully understands and speaks

Under article 67(1)(a) of the Statute, the person proceeded against has the right to be informed of the nature, cause and content of the charge in a language which they fully understand and speak.

Even if not raised by the parties, the Pre-Trial Chamber should verify at the first appearance that the person fully understands and speaks a working language, or determine what other language the person fully understands and speaks. In cases of controversy, a report of the Registrar can be ordered. The meaning of "fully understands and speaks" needs to be further refined in practice.

3. The right to apply for interim release

Article 60(1) of the Statute expressly mentions that, at the first appearance, the Pre-Trial Chamber must be satisfied that the person has been informed of the right to apply for interim release pending trial.

The Pre-Trial Chamber should specifically inform the person of this right. This is important because periodic review of detention does not start unless the Defence makes its first application for interim release (*i.e.* the 120-day time limit under rule 118(2) runs from the Chamber's ruling on any such application). Applications for interim release should be disposed of as a matter of urgency and, ordinarily, decided within 30 days.

4. The date of the confirmation hearing

According to rule 121(1) of the Rules, at the first appearance, the Pre-Trial Chamber shall set the date of the confirmation hearing. The typical target date for the confirmation hearing should be around 4-6 months from the first appearance. Efforts

should be made to reduce the average time that passes between the first appearance and the commencement of the confirmation of charges hearing.

However, this depends on the circumstances of each particular case. In particular, it must be borne in mind that sometimes more time may be necessary in order to ensure that the pre-trial proceedings fully execute their mandate in the procedural architecture of the Court. Also, it may typically occur again that a person would be arrested and surrendered to the Court long time after the issuance of the warrant of arrest, reviving a case that would have been dormant for long. In these circumstances, giving more time to the Prosecutor in order to properly prepare the case should be considered. Indeed, in certain circumstances, allowing more time for the parties' preparation for the confirmation of charges hearing may have the counterintuitive consequence of making the proceedings more expeditious, as it would tend to avoid adjournments of the confirmation of charges hearing, other obstacles at the pre-trial stage and problems at the initial stage of the trial.

In this context, the Pre-Trial Chamber should consider that, as recognised by the Prosecutor herself, it would be desirable, as a matter of policy, that the cases presented by the Prosecutor at the confirmation hearing be as trial-ready as possible. This would allow the commencement of the trial, if any, within a short period of time after confirmation of the charges. Therefore, in setting the date of the confirmation hearing, the Pre-Trial Chamber should take into account that it is indeed preferable that, to the extent possible, the Prosecutor conduct before the confirmation process the investigative activities that he/she considers necessary. At the same time, the Chamber shall be mindful that the Appeals Chamber, in line with the system designed by the Court's legal instruments, held that the Prosecutor's investigation may be continued beyond the confirmation hearing, and determined that finding that, barring exceptional circumstances, the Prosecutor's investigations must be brought to an end before the confirmation hearing constitutes an error of law.

III. Proceedings leading to the confirmation of charges hearing

1. Review of the record of the case following the initial appearance

At the latest from the moment of the first appearance, the Defence acquires all procedural rights and becomes a party to proceedings that have thus far been conducted *ex parte*. For this reason, the Pre-Trial Chamber should conduct a review of the record of the case and make available to the Defence as many documents as possible, and, at a minimum, and without prejudice to the necessary protective measures, the Prosecutor's application under article 58 of the Statute and any accompanying documents.

2. *Time limit for responses under regulation 24 of the Regulations of the Court*

The general 21-day time limit for responses (see regulation 34(b) of the Regulations of the Court) is incompatible with the fast pace of pre-trial proceedings. In order to avoid delay and to pre-empt the need to issue numerous procedural orders shortening the general time limit, the Pre-Trial Chamber should order that, throughout the entire proceedings leading to the confirmation hearing, any responses shall be filed within five days, or within another appropriately short time limit. The power to make such order stems from the *chapeau* of regulation 34.

3. *Informal contact with the parties and the Registry*

In order to streamline proceedings, some minor or peripheral matters can be dealt with by email communication, reducing the need for written submissions and orders. Variation of time and page limits, or leave to reply, can often be decided in this way, and the party can then refer to the communication by email in its filing. Similarly, orders to the Registrar can regularly be given by way of email, such as to reclassify documents in the record or to submit reports on particular issues.

The Chamber should, however, make sure that no substantive litigation takes place by email, and should order the submission of formal filings in such cases.

4. *Status conferences*

Pre-Trial Chambers should make full use of the possibility to hold status conferences with the parties. Oral orders and clarifications in relation to the conduct of the proceedings can be provided to the parties during such status conferences, increasing efficiency and eliminating the need for cumbersome written decisions. Parties' procedural requests can also be received, debated and decided at status conferences.

IV. Disclosure of evidence and communication to the Pre-Trial Chamber

1. *Disclosure of evidence between the parties*

Disclosure of evidence between the parties takes place through the Registry in accordance with the E-court protocol developed for this purpose. Until the E-court protocol is somehow codified, the current version of the E-court protocol should be put on the record of the case as soon as possible after the first appearance in order to guide disclosure at all stages of the proceedings.

The Prosecutor has the duty to disclose to the Defence "as soon as practicable" and on a continuous basis, all evidence in his/her possession or control which he/she believes shows or tends to show the innocence of the person, or mitigate the guilt of the person or may affect the credibility of the prosecution evidence (cf. article 67(2) of the Statute), or is material to the preparation of the defence (cf. rule 77 of the Rules).

As far as the incriminating evidence is concerned, it is the Prosecutor's own choice to disclose to the Defence as much as he/she considers warranted. The disclosure of incriminating evidence by the Prosecutor is subject to the final time limit set out in rule 121(3) – *i.e.* 30 days before the confirmation hearing – and, in case of new evidence, in rule 121(5) – *i.e.* 15 days before the confirmation hearing.

Likewise, the Defence may disclose to the Prosecutor (and rely upon for the confirmation hearing) as much as it considers it necessary in light of its own strategy. The time limits for the Defence disclosure are set out in rule 121(6).

No submission of any "in-depth analysis chart", or *similia,* of the evidence disclosed can be imposed on either party.

The Chamber should advise the Defence to take full advantage of the disclosure proceedings at the pre-trial stage to enable adequate preparation for both pre-trial and trial stage. In this regard, the Defence may also be warned that, subject to consideration of the rights contained in article 67(1)(b) and (d) of the Statute, if the counsel of the Defence representing the person at the pre-trial stage is replaced by any new counsel for the trial stage, the new counsel may still be subject to strict scheduling of the date the commencement of trial.

2. Extent of communication of disclosed evidence to the Pre-Trial Chamber

According to rule 121(2)(c) of the Rules, all evidence disclosed between the parties "for the purposes of the confirmation hearing" is communicated to the Pre-Trial Chamber. This should be understood as encompassing all evidence disclosed between the parties during the pre-trial proceedings, *i.e.* between the person's initial appearance (or, in particular circumstances, even before) and the issuance of the confirmation decision.

Communication of evidence to the Pre-Trial Chamber, by way of Ringtail, shall take place simultaneously with the disclosure of such evidence. The evidence communicated to the Pre-Trial Chamber forms part of the record of the case, irrespective of whether it is eventually included in the parties' lists of evidence under rules 121(3) and (6) of the Rules.

Nevertheless, for its decision on the confirmation of charges the Pre-Trial Chamber considers only the items of evidence that are included in the parties' lists of evidence for the purpose of the confirmation hearing. The determination of what and how much to include in their respective lists of evidence falls within the discretion of each party.

Other items of evidence that were communicated to the Pre-Trial Chamber but have not been included in the lists of evidence could only be relied upon by the Pre-Trial Chamber for the confirmation decision provided that the parties are given the opportunity to make any relevant submission with respect to such other items of evidence.

The Chamber should not order the assignment of secondary reference numbers to items of evidence communicated to it in order to distinguish those that were inserted on the list of evidence of a party or for any other reason. The numbering regime under the E-court protocol (ERN code) should be the only numbering regime. Any changes in the status of evidence or any other relevant information can be included as metadata.

V. The charges

1. The factual basis of the charges

The Prosecutor may expand the factual basis of the charges beyond that for which a warrant of arrest or a summons to appear was issued.

However, the Pre-Trial Chamber must ensure that the Defence be given adequate time to prepare (cf. article 67(1)(b) of the Statute providing that the person has the right "[t]o have adequate time and facilities for the preparation of the defence"). While rule 121(3) of the Rules establishes the presumption that 30 days between the presentation of the detailed description of the charges and the commencement of the confirmation hearing are sufficient, the Pre-Trial Chamber may order, in light of the particular circumstances of each case, that the Defence be informed, by way of a formal notification in the record of the case, of the intended expanded factual basis of the charges in order not to be confronted at the last possible moment with unforeseen factual allegations in respect of which the Defence could not reasonably prepare. This advance notice – to be made by way of a short filing – would include only, and no more than, a concise statement of the relevant facts, *i.e.* the time, location and underlying conduct of the crimes with which the Prosecutor will charge the suspect. The detailed description of the charges exhaustively setting out the material facts and circumstances would, in any case, be provided in the document containing the charges 30 days before the confirmation hearing. How much in advance before the confirmation hearing any advance notice of the charges would

need to be provided will depend on the particular circumstances of each case, including the total amount of time foreseen between the person's initial appearance and the confirmation hearing and the extent of the proposed expansion of the factual basis of the case. Failure to provide such notice within the time frame set by the Pre-Trial Chamber would make impermissible the bringing of any charges going beyond the factual basis of the warrant of arrest or summons to appear in the particular confirmation proceedings, without prejudice to these other charges being brought as part of new or other proceedings conducted separately.

Such notice would also constitute the basis for the Pre-Trial Chamber to request in time, through the Registrar, that the surrendering State provides a waiver of the rule of speciality under article 101 of the Statute, if applicable (*i.e.* if the person was surrendered to the Court), as well as the basis for the admission of victims of the alleged crimes to participate in the proceedings.

2. *Distinction between the charges and the Prosecutor's submissions in support of the charges*

The charges on which the Prosecutor intends to bring the person to trial to be presented prior to the confirmation hearing (cf. article 61(3)(a) of the Statute) shall be spelt out in a clear, exhaustive and self-contained way and shall include all, and not more than, the "material facts and circumstances" (*i.e.* the facts and circumstances that must be described in the charges (cf. article 74(2) of the Statute) and which are the only facts subject to judicial determination to the applicable standard of proof at confirmation and trial stages, respectively) and their legal characterisation.

There shall be no confusion between the material facts described in the charges and the "subsidiary facts" (*i.e.* those facts that are relied upon by the Prosecutor as part of his/her argumentation in support of the charges and, as such, are functionally "evidence"). Indeed, the Prosecutor may present submissions by which he/she proposes a narrative of the relevant events and an analysis of facts and evidence in order to persuade the Pre-Trial Chamber to confirm the charges. However, these submissions in support of the charges should not be confused with the charges. These submissions/argumentation can be included either in the same document containing the charges or in a separate filing (a sort of a "[pre-]confirmation brief"). If the Prosecutor chooses to include submissions in the document containing the charges rather than in a separate filing, the two sections – "charges" and "submissions" – must be kept clearly separate, and no footnotes containing cross-references or reference to evidence must be included in the charges.

The Pre-Trial Chamber may remedy defects in the formulation of the charges either *proprio motu* or upon request by the Defence, by instructing the Prosecutor to make the necessary adjustments. The Defence may bring any formal challenge to the charges – *i.e.* challenges which do not touch upon the merits of the charges and do

not require consideration of the evidence – at the latest as procedural objections under rule 122(3) of the Rules prior to the opening of the confirmation hearing on the merits.

In any case, the Pre-Trial Chamber shall bear in mind that the decision on what to charge, as well as on how the charges shall be formulated, is fully within the responsibility of the Prosecutor. The Pre-Trial Chamber's interference with the charges by ordering the Prosecutor to remedy any identified deficiency should be strictly limited to what is necessary to make sure that the suspect is informed in detail of the nature, cause and content of the charge (cf. article 67(1)(a) of the Statute). This will necessarily depend on the particular circumstances of each case. In particular, the required specificity of the charges depends on the nature of the case, including the degree of the immediate involvement of the suspect in the acts fulfilling the material elements of the crimes, and no threshold of specificity of the charges can be established *in abstracto*. What the Pre-Trial Chamber must verify is that the charges enable the suspect to identify the historical event(s) at issue and the criminal conduct alleged, in order to defend him- or herself.

At the commencement of the confirmation hearing on the merits, any questions on the form, completeness or clarity of the charges must be settled. If the Defence does not raise any challenge to the format of the charges at the latest as procedural objections under rule 122(3) of the Rules, it is precluded to raise it at a later stage, being the confirmation hearing or the trial.

VI. The hearing on the confirmation of charges

1. Presentation of evidence for the purposes of the confirmation hearing

In accordance with rule 121(3) and (6) of the Rules, the parties, prior to the commencement of the confirmation of charges hearing, shall present their respective lists of the evidence on which they intend rely for the purposes of the hearing. In order to serve its purpose, the list of evidence should not be presented in the form of a chart linking the factual allegations and the evidence submitted in support thereof, but shall rather be a simple list indicating the items of evidence consecutively in any clear order, for instance by ERN or by categories of evidence (with, *e.g.*, statements/transcripts grouped by witness, official documents grouped by source, etc.).

The inclusion, in the Prosecutor's submissions for the purpose of the confirmation hearing (and possibly in any Defence submission under rule 121(9) of the Rules) of footnotes itemising the evidence supporting a factual allegation – preferably with hyperlinks to Ringtail – is encouraged.

No footnote (whether internal cross-references or hyperlinks to the evidence) can be included in the charges, as they shall be fully self-contained and shall exhaustively set out all, and no more than, the material facts and their legal characterisation. As stated above, how the Prosecutor's evidence substantiates the charges belongs to the "submissions" part, not to the "charges" section. This applies regardless of whether the Prosecutor decides to include his/her submissions in the document containing the charges or in a separate filing.

It is up to the parties to determine the best way to persuade the Chamber: there is no basis for the Chamber to impose on the parties a particular modality/format to argue their case and present their evidence. For example, no submission of any "in-depth analysis chart", or *similia,* of the evidence relied upon for the purposes of the confirmation hearing can be imposed on either of the parties.

2. Live evidence at the confirmation hearing

Use of live evidence at the confirmation hearing should be exceptional and should be subject to specific authorisation by the Pre-Trial Chamber. The parties must satisfactorily demonstrate that the proposed oral testimony cannot be properly substituted by a written statement or other documentary evidence.

3. Procedural objections to the pre-confirmation hearing proceedings

Under rule 122(3) of the Rules, the Prosecutor and the Defence, prior to the opening of the confirmation hearing on the merits, may "raise objections or make observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing".

As clarified above, formal challenges by the Defence to the charges – *i.e.* challenges which do not touch upon the merits of the charges and do not require consideration of the evidence – fall within the scope of the procedural objections under rule 122(3) of the Rules as they relate to the respect of the person's right to be properly notified of the charges. Procedural objections under rule 122(3) of the Rules may also include, for examples, challenges as to the proper time given for the parties' preparation for the confirmation hearing or to the exercise of disclosure obligations by the opposing party, including the propriety of redactions.

Decisions taken by the Pre-Trial Chamber on procedural objections under rule 122(3) become *res judicata* and are also to be considered as preparatory for the ensuing trial. The Pre-Trial Chamber's rulings under rule 122(3) which are joined, pursuant to rule 122(6), to the merits, will be set out in the operative part of the confirmation decision, including for easiness of retrieval by the parties and the Trial Chamber.

According to rule 122(4) of the Rules, "at no subsequent point may the objections and observations made under sub-rule 3 be raised or made again in the confirmation or trial proceedings". Arguably, the parties are precluded to raise at subsequent points (whether at confirmation or trial) procedural matters related to the proper conduct of the pre-trial proceedings prior to the confirmation hearing, also when they have chosen not to do it before the hearing on the merits is opened, while being in a position to do so.

4. The conduct of the confirmation hearing

The parties should be encouraged, as appropriate, to make use of the opportunity to lodge written submissions on points of fact and on law in accordance with rule 121(9) of the Rules in advance of the confirmation hearing. The filing of such written submissions presenting the full set of the parties' arguments on the merits of the charges would allow them to focus their oral presentations at the hearing to the issues that they consider most relevant. In order to properly organise the conduct of the confirmation hearing, the Pre-Trial Chamber should consider requesting that in these written submissions the parties also provide advance notice of any procedural objections or observations that they intend to raise at the beginning of the hearing pursuant to rule 122(3) of the Rules before the commencement of the hearing on the merits.

In any case, at the opening of the confirmation hearing, after the reading out of the charges as presented by the Prosecutor, the Presiding Judge will request the parties whether they have any procedural observations or objections with respect to the proper conduct of the proceedings leading to the confirmation hearing that they wish to raise under rule 122(3) of the Rules. The parties will be informed that no such matter might be raised at any subsequent point – whether at confirmation or at trial – if they choose not to do it before the hearing on the merits is opened.

As part of the confirmation hearing on the merits, the parties (and the participating victims) shall be allocated a certain amount of time in order to make their respective presentations, without the need that each and every item of evidence be rehearsed at the hearing. In any case, the Pre-Trial Chamber, for the decision on the confirmation of charges, will consider all the evidence that is included in the parties' lists of evidence, and, as explained above, any other evidence disclosed *inter partes* provided that the parties are given an opportunity to be heard on any such other item of evidence.

As soon as the parties (and the participating victims) finish with their respective oral presentations the Pre-Trial Chamber will consider whether it is appropriate to make a short adjournment (few hours or one/two days maximum) before the final observations under rule 122(8) of the Rules. In these final observations, the parties could only respond to each other's submissions: no new argument can be raised.

After the final oral observations at the hearing, the confirmation hearing will be closed. No further written submissions from the parties and participants will be requested or allowed.

The 60-day time limit for the issuance of the decision on the confirmation of charges in accordance with regulation 53 of the Regulations of the Court starts running from the moment the confirmation hearing ends with the last oral final observation under rule 122(8) of the Rules.

VII. The decision on the confirmation of charges

1. The distinction between the charges confirmed and the Pre-Trial Chamber's reasoning in support of its conclusions

According to article 61(7)(a) of the Statute, the Pre-Trial Chamber, when it confirms those charges in relation to which it has determined that there is sufficient evidence, "commit[s] the person to a Trial Chamber for trial on the charges as confirmed". In terms of the factual parameters of the charges, article 74(2) provides that the article 74 decision "shall not exceed the facts and circumstances described in the charges".

The charges on which the person is committed to trial are those presented by the Prosecutor (and on the basis of which the confirmation hearing was held) as confirmed by the Pre-Trial Chamber. Accordingly, the confirmation decision constitutes the final, authoritative document setting out the charges, and by doing so the scope of the trial.

The description of the facts and circumstances in the charges as confirmed by the Pre-Trial Chamber is binding on the Trial Chamber. Any discussion in terms of form of the charges (clarity, specificity, exhaustiveness, etc.) and in terms of their scope, content and parameters ends with the confirmation decision, and no issues in this respect can be entertained by the Trial Chamber.

As clarified above, this requires that the charges presented by the Prosecutor and those finally confirmed by the Pre-Trial Chamber are clear and unambiguous, and that any procedural challenge to the formulation of the charges be brought before the Pre-Trial Chamber, at the latest, as objections under rule 122(3) of the Rules.

Correspondingly to the distinction between the charges presented by the Prosecutor and the Prosecutor's submissions in support of the charges, in the confirmation decision the charges confirmed by the Pre-Trial Chamber must be distinguished from the Chamber's reasoning in support of its findings.

In a decision confirming the charges the operative part shall reproduce *verbatim* the charges presented by the Prosecutor as confirmed by the Pre-Trial Chamber.

As already clarified, the charges presented by the Prosecutor, as confirmed by the Pre-Trial Chamber and reproduced in the operative part, set the parameters of the trial: after the charges are confirmed (in whole or in part) by the Pre-Trial Chamber there shall be no discussion or litigation at trial as to their formulation, scope or content. The binding effect of the confirmation decision is attached only to the charges and their formulation as reflected in the operative part of decision. No such effect is attached to the reasoning provided by the Pre-Trial Chamber to explain its final determination (narrative of events, analysis of evidence, reference to subsidiary facts, etc.). The subject-matter of the confirmation decision is limited to the charges only, and does not extend to the Prosecutor's argumentation/submissions as such, whether provided in the same document containing the charges or in a separate brief.

Findings on the substantial grounds to believe standard are made exclusively with respect to the material facts described in the charges, and there is no requirement that each item of evidence or each subsidiary fact relied upon by either party be addressed or referred to in the confirmation decision – nor would this be realistic or otherwise providing any benefit. In decisions confirming the charges, in order not to pre-determine issues or pre-adjudicate probative value of evidence which will be fully tested only at trial, the Pre-Trial Chamber should keep the reasoning strictly limited to what is necessary and sufficient for the Chamber's findings on the charges. Decisions declining to confirm the charges may require, depending on circumstances, a more detailed analysis, given that, as a result thereof, proceedings are terminated.

In a decision confirming the charges, the Pre-Trial Chamber may make the necessary adaptations to the charges in order to conform to its findings. By doing so, the Pre-Trial Chamber cannot expand the factual scope of the charges as presented by the Prosecutor. Its interference should be limited to the deletion of, or adjustment to, any material fact that is not confirmed as pleaded by the Prosecutor. This must be done transparently and be clearly identifiable in the confirmation decision, for example by presenting the charges as formulated by the Prosecutor at the beginning of the confirmation decision and the charges as confirmed in its operative part.

2. *The structure of the confirmation decision*

It is fundamental that the structure of the confirmation decision makes clear the distinction between the Chamber's reasoning, on the one hand, and the Chamber's disposition as to the material facts and circumstances described in the charges and their legal characterisation as confirmed, on the other hand.

Typically a decision on the confirmation of charges should be structured as follows:

(i) The identification of the person against whom the charges have been brought by the Prosecutor.

(ii) The charges as presented by the Prosecutor.

(iii) A brief reference to the relevant procedural history of the confirmation proceedings.

(iv) Preliminary/procedural matters, including consideration of any procedural objections or observations raised by the parties under rule 122(3) of the Rules that the Pre-Trial Chamber, pursuant to rule 122(6) of the Rules, decided to join to the examination of the charges and evidence.

(v) Factual findings ("the facts"), in which the Pre-Trial Chamber provides a narrative of the relevant events (whether chronologically or otherwise), determining whether there are substantial grounds to believe with respect to the material facts and circumstances described in the charges presented by the Prosecutor, both in terms of the alleged criminal acts and the suspect's conduct. Reference to evidence (including to subsidiary facts) is made to the extent necessary and sufficient to support the factual findings on the material facts.

(vi) Legal findings ("the legal characterisation of the facts"), in which the Pre-Trial Chamber provides its reasoning as to whether the material facts of which it is satisfied to the required threshold constitute one or more of the crimes charged giving rise to the suspect's criminal responsibility under one or more of the forms of responsibility envisaged in the Statute and pleaded by the Prosecutor in the charges.

(vii) The operative part, the only part of the confirmation decision which is binding on the Trial Chamber. In a decision confirming the charges the operative part shall reproduce *verbatim* the charges presented by the Prosecutor that are confirmed by the Pre-Trial Chamber (both the material facts and circumstances described in the charges confirmed and the confirmed legal characterisation(s)). No footnote or cross-reference shall be added. The operative part should also include the Pre-Trial Chamber's decision on any procedural objections or observations addressed before the determination of the merits.

3. Alternative and cumulative charges

In the charges, the Prosecutor may plead alternative legal characterisations, both in terms of the crime(s) and the person's mode(s) of liability. In this case, the Pre-Trial Chamber will confirm alternative charges (including alternative modes of liability)

when the evidence is sufficient to sustain each alternative. It would then be the Trial Chamber, on the basis of a full trial, to determine which one, if any, of the confirmed alternative is applicable to each case. This course of action should limit recourse to regulation 55 of the Regulations, an exceptional instrument which, as such, should be used only sparingly if absolutely warranted. In particular, it should limit the improper use of regulation 55 immediately after the issuance of the confirmation decision even before the opening of the evidentiary debate at trial.

The Prosecutor may also present cumulative charges, *i.e.* crimes charged which, although based on the same set of facts, are not alternative to each other, but may all, concurrently, lead to a conviction. In this case, the Pre-Trial Chamber will confirm cumulative charges when each of them is sufficiently supported by the available evidence and each crime cumulatively charged contains a materially distinct legal element. In doing so, the Pre-Trial Chamber will give deference to the Trial Chamber which, following a full trial, will be better placed to resolve questions of concurrence of offences.

4. The record transmitted to the Trial Chamber

Following the confirmation of charges and the assignment of the case to a Trial Chamber, the record is transmitted to the Trial Chamber pursuant to rule 130 of the Rules. This includes all evidence which has become part of the record by way of its communication to the Pre-Trial Chamber following *inter partes* disclosure (cf. also rule 121(10) of the Rules).

Considering that the evidence would then be individually considered for formal admission during trial, its inclusion in the record of proceedings before professional judges is not problematic. The transmission of the complete record with all its contents is also the preferred solution because of its simplicity.

B. ISSUES RELATED TO VARIOUS STAGES OF PROCEEDINGS

Considering that nothing in the procedural system of the Court precludes the continued validity of procedural orders of the Pre-Trial Chamber after the transfer of the case to a Trial Chamber, such procedural order continue to apply, subject to necessary adjustments by the competent Chamber. This will simplify proceedings and make them more efficient.

I. Procedure for admission of victims to participate in the proceedings

Rule 89 of the Rules of Procedure and Evidence sets out the basic requirements for the admission of victims to participate in the proceedings. The core elements of the system designed by rule 89 are, in essence, the following: (i) victims who wish to participate in the proceedings must make written application to the Registrar; (ii) the application is transmitted to the Chamber; (iii) a copy of the application is provided to the Prosecutor and the Defence, who are entitled to reply within a time limit to be set by the Chamber; and (iv) the Chamber, *proprio motu* or upon request of the Prosecutor or the Defence, may reject the application *inter alia* if the person does not qualify as a victim.

In accordance with rule 89 of the Rules, the system for admission of victims to participate in proceedings, which is applicable at all stages of proceedings, is as follows:

(i) The Registry collects and receives the applications for participation by victims. The short, one page only, simplified application form containing the essential information that has been elaborated in the recent practice should become the standard form. Such a simplified standard form, *inter alia*, reduces the time required for the preparation of the redactions and facilitates any assessment of the application.

(ii) The Registry assesses all victim applications for participation collected or otherwise received, and identify those applications which are complete and fall within the scope of the relevant case, *i.e.* in which the applicant alleges to have personally suffered harm, whether direct or indirect, as a result of one or more crimes which are referenced in the warrant of arrest or summons to appear (counts) or, subsequently, charged by the Prosecutor (as formulated in the document containing charges and, thereafter, as confirmed by the Pre-Trial Chamber). Upon conducting this assessment, the Registry must transmit to the Chamber, by way of a filing in the record of the case, all applications, including any supporting documentation, which are complete and fall within the scope of the concerned case.

(iii) The complete applications are transmitted, together with any supporting documentation, as annexes to the transmission report provided for by Regulation 86(5). As part of the report, the Registry also provides a list of the transmitted applications together with the information as to the alleged crime(s) and harm – this information is automatically generated from the Registry's database, filled in while processing the applications.

(iv) The applications that, in the view of the Registry, are incomplete and/or fall outside the scope of the concerned case are not to be transmitted to the Chamber. Indeed, if applications are plainly incomplete (for example because no proof of identity was provided at all) or manifestly fall outside the scope of a case, there is no benefit in transmitting them. Rather, the Registry informs those applicants accordingly, so as to allow, if possible, the person to apply again or to supplement the application with the missing information, as provided for in rule 89(2). The Registry includes in the transmission report information on the applications that have not been transmitted, and the main reasons for it. In case the Registry, for any reason, is unable to determine whether a particular applicant or group(s) of applicants qualify as victims in the concerned case, the Registry consults the Single Judge/Chamber in order to obtain guidance as to whether the concerned application(s) should be transmitted or not to the Chamber and the parties.

(v) In accordance with rule 89(1), all complete applications falling within the scope of the concerned case that are transmitted to the Chamber, and any supporting documentation, are also provided, together with the transmission report, to the Prosecutor and the Defence, at the same time and by way of the same filing in the record of the case made for the transmission to the Chamber.

(vi) Consistent with article 68(1) of the Statute, which is also explicitly referred to in rule 89(1) of the Rules, if there exist security concerns in case the applicant's identity and involvement with the Court were to be known to the Defence, the Registry transmits the application, and any supporting documentation, to the Defence in redacted form, expunging the person's identifying information. The predictability of this requirement places the Registry in a position to start preparing the redactions *vis-à-vis* the Defence, as warranted, as soon as applications are collected or received, rather than waiting until the competent Single Judge/Chamber issues a decision on the system for admission of victims. Furthermore, the use of a simplified application form of one page only facilitates the redaction process, as the Registry would need to redact, as appropriate, only this page and the supporting document.

(vii) The Prosecutor and the Defence, in accordance with rule 89(1), are entitled to provide observations on the applications and request, as provided in rule 89(2), that one or more individual applications be rejected. The Single Judge/Chamber shall establish a time limit within which the parties may present specific objections to the admission as victims of any individual applicant. Evidently, neither party has a duty in this respect: it is entirely within their discretion to determine the extent of time and resources, if any, which they find worthy dedicating to the assessment of the applications.

(viii) In case any objection is raised by either party, the Single Judge/Chamber assesses the contested application(s) individually. Conversely, upon expiration of the time limit for the parties' objections, all those victims whose applications for participation have not been objected by either party, or otherwise rejected by the Single Judge/Chamber, are admitted *ex lege* to participate in the proceedings, as envisaged in the last sentence of rule 89(1), in conjunction which rule 89(2), which states that without prejudice to the possibility for a Chamber to reject applications on its own motion or when prompted by the parties, the Chamber upon receipt of the application shall proceed to specify the proceedings and modalities for participation. In sum, the Chamber is seized with a decision on an individual application only in case either party objects, for any particular reason, the person's admission contesting the Registry's original assessment.

This system applies equally to all stages of the case.

In light of the procedural progression as envisaged in the Court's legal instruments, the relevant time frame should be as follows:

- Sufficiently in advance of the commencement of the confirmation of charges, the Registry transmits the complete applications falling into the scope of the concerned case as defined in the warrant of arrest/summons to appear; at the expiration of the time limit set for the parties' objections, the Single Judge/Chamber appoints a legal representative of the unrepresented victims whose participation has not been contested; the contested applications are decided individually as soon as possible and the Single Judge/Chamber appoints a legal representative of the admitted unrepresented victim. This allows the legal representative(s) to start working on the case and participate in the proceedings leading to the confirmation of charges hearing as early as possible.

- As soon as the document containing the charges is filed, the Single Judge/Chamber, if appropriate, may set a short time limit for the Registry to transmit any further application received by victims who

were considered falling outside the scope of the case on the basis of the warrant of arrest/summons to appear but fall into the scope of the case as described in the charges. As appropriate, any other adjustment to the list of victims is made before the commencement of the confirmation hearing.

- After the charges are confirmed, all victims who claim to have suffered harm as a result of events falling within the parameters of the confirmed charges continue to participate in the trial proceedings without any "re-admission". In case of partial confirmation of charges, the Pre-Trial Chamber adjusts the list of admitted victims by terminating the participation of victims of events falling outside the parameters of the confirmed charges. For this purpose, the Pre-Trial Chamber uses the automatically generated information on the victims included in the transmission reports provided by the Registry under regulation 86 and, if necessary, may request further information from the Registry. This list is then filed in the record of the case.

- When the case moves to trial, the Trial Chamber receives the list of victims who participate in the proceedings – adjusted, as explained, in case of partial confirmation of charges. These victims continue to participate in the proceedings. The Trial Chamber sets a final time limit, sufficiently before the commencement of the trial, for the transmission of any further application by victims of the crimes charged.

II. Exceptions to disclosure in the form of redaction of information

Under rules 81(2) and (4) of the Rules, the Prosecutor may redact information from evidence disclosed to the Defence. Redactions can be implemented without need for a prior authorisation of the Chamber, which is seized of the matter only upon challenge by the Defence. In this case, the Prosecutor retains the burden of proof to justify the challenged redaction. For any redaction applied, the Prosecutor shall indicate the category by including in the redaction box the code corresponding to each category, unless such indication would defeat the purpose of the redaction.

Redaction of the identity of a witness (*i.e.* anonymity) at the pre-trial stage of the proceedings under rule 81(4) of the Rules must be specifically authorised upon motivated request by the Prosecutor. This applies also to non-disclosure of an entire item of evidence by the Prosecutor with the Defence not being informed of its existence.

This system should be ordered, and remain applicable at all stages of proceedings, through the inclusion of the following text into a decision of the Chamber, ideally the first decision regulating disclosure following the initial appearance:

> 1. The following procedure shall apply for exceptions to disclosure by the Prosecutor which are subject to judicial control, *i.e.* under rule 81(2) and (4) of the Rules of Procedure and Evidence.
>
> 2. The Prosecutor shall disclose evidence with redactions under rule 81(2) and (4) of the Rules without discrete application to the Chamber, except as provided in paragraph 5. When disclosing redacted evidence, the Prosecutor shall indicate the type of redaction in the redaction box by using the following codes:
>
> *Under rule 81(2) of the Rules*
>
> • Category "A.1": Locations of witness interviews/accommodation, insofar as disclosure would unduly attract attention to the movements of the Prosecutor's staff and witnesses, thereby posing a risk to ongoing or future investigations;
>
> • Category "A.2": Identifying and contact information of the Prosecutor's, VWU or other Court staff members who travel frequently to, or are based in, the field, insofar as disclosure of this information could hinder their work in the field and thereby put at risk the ongoing or future investigations of the Prosecutor (to be further specified as "A.2.1" for translators, "A.2.2" for interpreters, "A.2.3" for stenographers, "A.2.4" for psycho-social experts, "A.2.5" for other medical experts and "A.2.6". for other staff members falling within this category);
>
> • Category "A.3": Identifying and contact information of translators, interpreters, stenographers and psycho-social experts assisting during interviews who are not members of the Prosecutor's staff but who travel frequently to, or are based in the field, insofar as disclosure of this information could hinder their work so that the Prosecutor could no longer rely on them, and thereby put at risk ongoing or future investigations of the Prosecutor (to be further specified as "A.3.1" for translators, "A.3.2" for interpreters, "A.3.3" for stenographers, "A.3.4" for psycho-social experts, "A.3.5" for other medical experts and "A.3.6". for other persons falling within this category);
>
> • Category "A.4": Identifying and contact information of investigators, insofar as disclosure of this information could hinder their work in the field thereby putting at risk the ongoing or future investigations of the Prosecutor;
>
> • Category "A.5": Identifying and contact information of intermediaries, insofar as disclosure of this information could hinder their work in the field thereby putting at risk the ongoing or future investigations of the Prosecutor;
>
> • Category "A.6": Identifying and contact information of leads and sources, insofar as disclosure of this information could result in the leads and sources being intimidated or interfered with and would thereby put at risk the ongoing or future investigations of the Prosecutor (to be further specified as "A.6.1" for individual sources, "A.6.2" for NGOs, "A.6.3" for international organisations; "A.6.4" for national governmental agencies, "A.6.5" for academic sources, "A.6.6" for private companies and "A.6.7" for other sources);
>
> • Category "A.7": Means used to communicate with witnesses, insofar disclosure of this information may compromise investigation techniques or the location of witnesses and would thereby put at risk the ongoing or future investigations of the Prosecutor;
>
> • Category "A.8": Other redactions under rule 81(2) of the Rules;

Under rule 81(4) of the Rules

- Category “B.1”: Recent contact information of witnesses, insofar necessary to protect the safety of the witness;

- Category “B.2”: Identifying and contact information of family members of witnesses, insofar necessary to protect their safety;

- Category “B.3”: Identifying and contact information of “other persons at risk as a result of the activities of the Court” (“innocent third parties”), insofar necessary to protect their safety;

- Category “B.4”: Location of witnesses who are admitted in the International Criminal Court Protection Programme and information revealing the places used for present and future relocation of these witnesses, including before they enter the ICCPP;

- Category “B.5”: Other redactions under rule 81(4) of the Rules.

3. When so disclosing evidence with redactions, the Prosecutor shall assign unique pseudonyms to any persons whose identity is redacted. The Prosecutor need not provide the category code and/or a pseudonym when doing so would defeat the purpose of the redaction but shall make clear which codes/pseudonyms are missing for this reason. The Prosecutor shall also file in the record of the case a report stating which categories of redactions have been applied to particular items of evidence. In this report, the Prosecutor shall also briefly indicate, to the extent possible, the basis for each redaction falling under categories “A.8” and “B.5”.

4. Should the Defence consider that a particular redaction is unwarranted or should be lifted as a result of changed circumstances, it shall approach the Prosecutor directly. The parties shall consult in good faith with a view to resolving the matter. If they are unable to agree, the Defence may apply to the Chamber for a ruling. In such case, the Prosecutor shall have the burden to justify the particular redaction, and shall file her submissions in the record of the case within five days, unless otherwise decided by the Chamber. Thereafter, the Chamber will rule as to whether the particular redaction is to be lifted or maintained.

5. The above procedure shall not apply to the non-disclosure of witnesses’ identities prior to the commencement of trial and to the non-disclosure of entire items of evidence. In such cases, the Prosecutor shall submit to the Chamber a discrete application.

6. The Prosecutor shall monitor the continued necessity of redactions, and shall re-disclose evidence with lesser redactions as soon as reasons justifying them cease to exist, or, if applicable, make an application under regulation 42(3) of the Regulations of the Court.

7. If the Prosecutor redacts evidence prior to disclosure on the basis of rule 81(1) of the Rules of Procedure and Evidence, she shall mark this in the redaction box as category “E”.

III. Handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant

Regularly, evidence is disclosed confidentially in the interest of the safety or privacy of witnesses, victims or other persons. To regulate the use of confidential documents

or information during the investigations of the receiving party or participant, parties and participants should be ordered to comply with certain technical obligations.

A protocol annexed to the manual lays out the obligations of the parties and participants in this regard. It also regulates contact of a party or participant with the witnesses of another party or participant.

The Chamber, acting under articles 57(3)(c) and 68(1) of the Statute, should order the parties and participants to comply with this protocol, and put it on the record of the case, ideally in the first decision regulating disclosure following the initial appearance. The protocol would then remain applicable throughout the proceedings.

Annex

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

I. 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.

II. 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.

III. Use of confidential documents and information in investigations

1. General provisions

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

7. 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. 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. This section of the Protocol applies to witnesses whose identity or relationship with the Court has not been made public.

10. 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. 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. 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. 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. 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. 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. 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. 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.

IV. Inadvertent disclosure

18. 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. 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. 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.

21. 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.

V. Breaches of confidentiality

22. 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. 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. 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.

VI. Consent to disclosure by witnesses

25. 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.

VII. Contacts with witnesses of other parties or participants

26. 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.

27. 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. A party or participant shall only contact or interview a witness of another party or participant if the witness consents.

29. 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.

30. 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

31. 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. 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. 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.

34. 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. 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. 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. 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. Special provisions for protected witnesses

38. 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. 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.