

ANNEX 1

Confidential Defence observations on the VWU's proposed mechanisms for exchange of information on individuals enjoying dual status (ICC-02/11-01/11-790-Anx1-Corr)

1. Information to be provided to the Registry	a) The VWU should be aware of the dual status of a protected individual in order to reduce possible risks and to facilitate a proper risk assessment. b) The parties and participants should communicate to the VWU and to the VPRS the fact of the dual status of an individual as soon as they become aware of it. COMMENTARY: If a person chooses to be a witness for the Defence, he or she usually does so with great trepidation. A victim's decision to testify for the Defence is made with tremendous caution. While the Defence agrees that the VWU should know about the dual status, the VPRS should not become involved. In the simplest of terms, the dual status person decided how he or she wants to represent their intentions by testifying for the Defence. The need for redactions should take place between the VWU, the party and the Chamber. c) If the existence of dual status is known at the time of a referral to the VWU for inclusion in the International Criminal Court protection Program (the ICCPP) this should be communicated to the VWU. d) During the assessment interviews, the VWU will ask witnesses whether they have applied for participation and/or reparation. When the VWU assesses a victim it will ask whether the victim is also a witness.
2. Dual status witnesses participating in the ICCPP	a) The fact that an individual participates in the ICCPP shall remain confidential. b) The VWU shall facilitate all contact between a protected individual and the other organs of the Court, the parties and the participants. c) The VWU does not have an obligation to disclose to a party or the participants the details of contact with a protected individual, UNLESS THE CHAMBER ORDERS OTHERWISE. COMMENTARY: The Defence agrees with the parties and participants about this addition.
3. Communication between the legal representative of a dual status witness and the Prosecution	a) When the legal representative of victims believes that their client has dual status, they should provide the Prosecution with the name of the individual, his or her date of birth and other

	identifying information, to the extent possible. b) Thereafter, the Prosecution should check whether or not the individual has dual status, and if so, communicate this in writing to the legal representative (including when the witness is under the ICCPP). c) The Prosecution should also verify whether it intends to make an application for protective or special measures under Rules 87 and 88 of the Rules and communicate this to the legal representative.
4. Communication between the Prosecution, the Defence and the legal representative of a dual status witness	a) When the Prosecution becomes aware that one of the witnesses it will call to testify is also a victim, it will inform the Defence and the legal representative of the dual status witness.
5. Communication between the legal representative of a victim and the Defence	a) The Defence shall inform the legal representative if he becomes aware that a victim is a potential witness for the Defence. COMMENTARY: The Defence should not be required to inform any party or participant of its potential witness until such time that the Defence is required to disclose its list of witnesses. Doing otherwise would require the Defence to disclose prematurely its strategy. Informing the VWU of the dual status witness is sufficient.
6. Modalities of contact with individuals enjoying dual status	a) When a party wishes to contact an individual with dual status, it shall provide notice of this to the legal representative, when it is aware the person has legal representation COMMENTARY: Again, the Defence should not be required to disclose to the legal representative the details of any contact unless the witness desires the Defence to do so. Notice to VWU of such intent is more than satisfactory. b) If a person with dual status participating in ICCPP requests to contact the parties or participants, the VWU will facilitate the contact which will not be revealed to other parties and participants BE REVEALED TO THE PARTY CALLING THE DUAL STATUS PERSON. COMMENTARY: A party or participant should be notified by VWU if a witness referred to the ICCPP wishes to talk to a non-calling party. This would conform to the Protocol on Handling of Confidential Information.

	c) The party contacted should inform the legal representative of the dual status witness concerned COMMENTARY: Generally speaking, a party should not have to inform the legal representative of its contact with its own witnesses, even if such person is a dual status witness. The only person that should be notified is the witness's legal counsel. If the dual status witness wants the party to contact the legal representative, then the party should be required to do so. d) When in situations of urgency, in order to preserve or collect evidence, the Prosecution or the Defence does not contact the legal representative, the party who has contacted the individual shall as soon as possible thereafter inform the legal representative, and where applicable disclose any relevant material. COMMENTARY: Again, a party should not be required to disclose that it talked to a dual status witness unless the witness requests it. In situations of urgency, the party should contact VWU.
7. Contact between a witness with dual status and his or her legal representative	a) The legal representative may contact his or her client if they are a victim with dual status, including if they are in the ICCPP. If the dual status individual is in the ICCPP contact shall be facilitated by the VWU. IF THE DUAL STATUS PERSON IS A WITNESS FOR A PARTY, THE LEGAL REPRESENTATIVE IS REQUIRED TO INFORM THE CALLING PARTY BEFORE TALKING TO THE WITNESS. COMMENTARY: To conform to the Protocol on Handling of Confidential Information, the legal representative should inform the calling party before meeting with one of its witnesses and allow for the calling party to be present at any meeting between the legal representative and witness..
8. Providing the legal representative with a copy of the signed statements and other materials, such as notes and documents, relating to a witness with dual status	a) The legal representative has the right to receive a copy of the statement, transcript or recording made during the interview with the calling party. COMMENTARY: The legal representative should not have a right to receive any information from the interview unless the witness requests the party to give it to the legal representative. In such cases where the witness requests copies to be given to the legal representative, the material must be received with the

	strictest form of confidentiality, available only to the legal representative and not the representative's staff. b) If access is sought to materials (which not only relate to specific participating victims with dual status but were also produced with their involvement and assistance) the legal representative shall submit a detailed request to the calling party outlining the reasons why access should be provided. e) Unless reasons exist for refusing access, the parties shall provide the legal representative of dual status victims, upon request, with a copy of these materials, under conditions of strict confidentiality. c) The party shall seek permission from the dual status person before disclosing any materials to the legal representative. If the dual status person consents, a copy of these materials will be given under strict conditions of confidentiality, i.e. the legal representative is the only person permitted to access the file. COMMENTARY: Since statements and other materials collected from witnesses are done so under strict terms of confidentiality, the Defence cannot disclose material to an outside party or participant without the consent of witness or the Chamber, unless said witness becomes hostile. If the witness is represented by the legal representative, obtaining the release of any information should not be an issue. d) If a party considers that it should not provide particular materials or will only submit them in redacted or summary form, it shall inform the Chamber and the legal representative of the reasons. COMMENTARY: If a party believes that the material needs to be withheld or submitted in redacted form, such information should be submitted to the Chamber in a confidential <i>ex parte</i> manner until such a time that the Chamber makes a determination. The legal representative needs only to know that a petition has been filed with the Chamber. If the material is being submitted in redacted form, the party should give the redacted form to the legal representative at the same time as it submits the petition to the Chamber. e) The Chamber will then consider the matter, if an application is made by the legal representative.
9. Attendance by the legal	a) The legal representative may be present during a

representative at the medical examination of witnesses with dual status and disclosure of any report to the legal representative	medical examination of a victim with dual status, provided that there is consent from the individual concerned. b) The presence of the legal representative must not in any way obstruct a proper medical examination. c) The legal representative <u>must remain silent as to any information related to the case</u> if the dual status person is a witness of one of the parties. COMMENTARY: The Defence argues that this addition will better align this protocol with the Protocol on the Handling of Confidential Information. The legal representative may not be allowed to circumvent the Confidential Information Protocol through this Protocol.
10. Attendance of the legal representative at interviews of a witness with dual status	a) The legal representative may be present during an interview of an individual with dual status, provided there is consent from the individual concerned. b) The presence of the legal representative must not obstruct a proper interview. c) If the party considers that the presence of the legal representative is inappropriate or impracticable, it shall, as soon as practicable, inform the legal representative of the interview. Unless a delay cannot be justified because of urgency, the party willing to interview the individual without the legal representative should raise the matter with the Chamber and (when relevant) ensure that sufficient time is afforded to enable this to happen prior to the interview. COMMENTARY: Again, the parties should only be required to inform the legal representative when the dual status person requests the party to contact the legal representative. d) Where applicable, the party shall provide the legal representative with any relevant material ONLY IF THE DUAL STATUS PERSON REQUESTS. IF THE DUAL STATUS PERSON REQUESTS THAT THE PARTY PROVIDE SAID INFORMATION, THE LEGAL REPRESENTATIVE MUST HOLD THE INFORMATION IN STRICT CONFIDENCE. THE LEGAL REPRESENTATIVE MAY NOT TELL OR SHOW HIS OR HER SUBORDINATES THE INFORMATION. COMMENTARY: Again, materials from interviews

	should only be given to the legal representative after the consent of the dual status person. Moreover, the party may have reason to withhold materials from the legal representative. In such circumstances, section 8 above as re-written should apply.
11. Providing information to the legal representative about the family or legal guardian of a child witness with dual status	a) The parties should share this information with the legal representative of victims with dual status, provided there is consent from the individual concerned. b) When the witness is in the ICCPP the VWU is the competent entity to provide this information to the legal representative, provided there is consent from the individual concerned and the security of the individual or the operation of the protection programme is not put at risk.