

Annex

Public

Protocol on disclosure of the identity of witnesses of other parties and of the LRV in the course of investigations, use of confidential information by the parties and the LRV in the course of investigations, inadvertent disclosure and contacts between a party and witnesses not being called by that party ('Protocol')

1. This Protocol sets out the procedures governing: (i) the use of confidential information in the course of investigations; (ii) the circumstances in which the identity of protected witnesses of the opposing party or the LRV may be disclosed; (iii) the procedure for dealing with inadvertent disclosure of information; and (iv) the conditions in which the investigating party is authorised to contact witnesses not being called by that party. The purpose of the Protocol is to protect the safety of witnesses, victims and other individuals at risk, as well as the integrity of investigations, in a manner consistent with the rights of the accused.
2. This Protocol is divided into four distinct sections, each regulating one of the four aforementioned matters. An introductory section defines the terms used in the Protocol.
3. The parties and the LRV shall adhere to the high standards set out in, *inter alia*, the Code of Professional Conduct for counsel, the Code of Conduct for Investigators and the Code of Conduct for the Office of the Prosecutor.
4. Any deviation from the Protocol shall require the prior authorisation of the Chamber.

I. Definitions

5. In this Protocol:
 - (a) The term 'party' shall refer to the Office of the Prosecutor and members of her team, Mr Gbagbo, Mr Blé Goudé, counsel representing them, and members of their teams;
 - (b) The term 'Legal Representative of Victims' ('LRV') shall refer to the common legal representative of victims and her team;
 - (c) The term 'public' shall refer to any person, government, organisation, entity, association or group. The term does not include the parties or the LRV, as defined above, or the Judges or members of the Chamber;

- (d) The term 'confidential information' shall refer to any information classified as such in accordance with regulation 14(b) of the Regulations of the Registry or classified as '*ex parte*', 'confidential' or 'under seal', known to the parties or to the LRV and which must not be disclosed to the public; and
- (e) The term 'witness' shall refer to a person whom a party or the LRV intends to call to testify or whose statement the party or the LRV intends to rely upon, provided that such intention has been conveyed to the non-calling party or the LRV by means that establish a clear intention on behalf of the calling party or the LRV to rely upon the individual as a witness.

II. Disclosure of the identity of witnesses not being called by that party in the course of investigations

6. This section of the Protocol applies to witnesses whose identity or relationship with the Court has not yet been made public by a party, the LRV or the Chamber, or who are covered by other protective measures known to the investigating party or to the LRV. It is intended to protect the witnesses of a party or of the LRV when reference is to be made to their identity in the course of an investigation.
7. This section of the Protocol must comply with the principles of necessity and proportionality and must not affect the ability of the parties or the LRV to conduct effective investigations.
8. The following provisions are not intended to be exhaustive or to cover all possible situations. They establish principles which will structure the actions of the parties and of the LRV.
9. It is essential that whenever possible, the investigating party or the LRV avoid the security risk of disclosing to a member of the public the identity of witnesses. The following provisions concern situations where such disclosure

is considered directly and specifically necessary for the investigation and/or preparation of a case.

10. Should the investigating party or the LRV find it directly and specifically necessary for the preparation and presentation of its case to disclose to a member of the public the name or identifying information of a witness, the party or the LRV shall in no circumstances reveal: (i) that the person is involved, directly or indirectly, with the activities of the Court; or (ii) the nature of such involvement. In case of doubt as to the necessity of the disclosure, the Chamber shall decide.
11. Should the investigating party or the LRV become aware that the person being interviewed knows or understands that an individual mentioned during the interview or at the meeting is involved with the Court or has witness status, he or she shall explicitly inform the person in question of the confidential nature of such information and enjoin that person not to disclose it. The investigating party or the LRV shall inform the Chamber and the Victims and Witnesses Unit ('VWU') as soon as possible that a person being interviewed is aware that a particular individual is involved with the Court or has witness status.
12. Should the investigating party or the LRV need to disclose the identity of a witness who is in the International Criminal Court Protection Programme ('ICCPP' or 'Protection Programme') or who has been relocated with the assistance of the Court, during the course of specific investigations related to that witness, the investigating party or the LRV shall liaise with the VWU prior to the mission in which such disclosure may take place, and shall communicate the details of the place, time and, to the extent possible, the person(s) that the party or the LRV intends to contact and to whom it intends to disclose the identity in question. Additionally, the manner of disclosure will be discussed with the VWU, which shall inform the investigating party or

the LRV of its best practices and provide advice in relation to the specific information communicated by that party or the LRV.

13. Should the investigating party or the LRV need to disclose the identity of a witness who is otherwise protected by the VWU, the investigating party or the LRV shall inform the VWU as soon as possible.
14. The investigating party or the LRV shall inform the VWU as soon as possible should it discover the location of any witness participating in the Protection Programme or who has been relocated with the assistance of the Court or whose place of residence the Chamber has resolved must remain confidential. The party calling the witness or the LRV must also be informed by the VWU.
15. The investigating parties and the LRV must be mindful that their investigations could endanger witnesses. They shall inform the Chamber and the VWU as soon as possible of any reasonable suspicion that a witness may have been placed at risk for any reason (for example, if the witness's protected location has been discovered or if his or her participation as a witness is known).
16. The parties or the LRV are responsible for ensuring that any witnesses they intend to call provide, whenever possible, their informed written consent to their involvement with the Court. This consent should be provided before or when any witness statement is made. The parties and the LRV bear a higher responsibility in this regard when their activities could involve vulnerable witnesses.
17. It is crucial that the aforementioned provisions be applied strictly, in particular by the resource persons and investigators of the parties or of the LRV.
18. The VWU is available to provide advice and guidance on any issue or concern that the parties or the LRV may have in relation to the security of witnesses in general or the protection of any of their witnesses.

III. Use of confidential information by the parties and the LRV in the course of investigations

19. This section of the Protocol concerns the use of confidential material by the parties or the LRV in the course of investigations. It is intended to establish a set of general guidelines and is to be applied as necessary on a case-by-case basis.
20. The parties and the LRV shall apply best practices throughout the investigation. These best practices include minimising the risk of exposing confidential information to the greatest extent possible.
21. Confidential information¹ disclosed to a party or to the LRV by the opposing party or by the LRV may only be disclosed to the public where such disclosure is directly and specifically necessary for the preparation and presentation of their case.
22. When confidential information is made known to a member of the public by a party or by the LRV, the party or the LRV shall explain to that person the confidential nature of the information and that it may not be reproduced or disclosed to anyone else in whole or in part. Unless otherwise authorised by the Chamber, members of the public must not retain a hard copy of the information.
23. The party or the LRV disclosing confidential information shall keep a record in any form of the circumstances of such disclosure during their investigation and/or preparation of the case, including: (i) the name and particulars of the person(s) to whom the information was communicated; (ii) the name of the person who communicated the information; (iii) the date of communication; and (iv) the location of communication. The investigating party or the LRV shall monitor the process for gaining access to confidential information so as

¹ For the purpose of this protocol, 'confidential' shall mean confidential, *ex parte* or under seal.

to prevent such information being read, seen, reproduced or disseminated to a wider audience, or being lost.

24. Visual and/or non-textual material such as photographs depicting witnesses should be used only when no satisfactory alternative investigative avenue is available. To reduce the risk of disclosing the involvement in the activities of the Court of the persons depicted or otherwise reflected, the parties and the LRV shall use only such visual and/or non-textual material that contains nothing that could reveal such involvement. Additionally, when photographs depicting witnesses or victims are used, these shall only be shown together with other materials or photographs of the same kind. As with other confidential information, a detailed account on disclosure must be kept by the investigating party or the LRV. Unless otherwise authorised by the Chamber, members of the public must not retain a hard copy of photographs depicting witnesses or other individuals involved with the Court.
25. The party or the LRV shall keep a record of all members of the party's or the LRV's team having access to this material and the period during which they had such access. Upon separation, members of the legal teams of the parties and the LRV shall return all confidential material in their possession to the relevant person within the team. The head of those legal teams shall take reasonable measures to ensure that confidential material is returned.

IV. Inadvertent Disclosure

26. Should a disclosing party or the LRV discover that it has disclosed material that should not have been disclosed or should have been disclosed in redacted form, it shall immediately inform the receiving party or the LRV. The VWU shall also be informed if the witness concerned is in the ICCPP or is otherwise covered by protective measures.
27. Should the receiving party or the LRV discover that it has received material that it believes should not have been disclosed or should have been disclosed

in redacted form, the receiving party or the LRV shall bring that fact to the attention of the disclosing party or to the LRV immediately upon discovery. Pending confirmation by the disclosing party or by the LRV that the material should not have been disclosed or should have been disclosed in redacted form, the team member having received the said material shall act in good faith and refrain from sharing it in any manner, including with the accused and, to the extent possible, with other members of the team.

28. As soon as the disclosing party or the LRV has informed the receiving party or the LRV or confirmed that the material should not have been disclosed or should have been disclosed in redacted form, the receiving party or the LRV shall return the material to the disclosing party and delete any copies in its possession.
29. Should a dispute arise as to whether or not the material should have been disclosed or should have been disclosed in redacted form, the parties and the LRV shall first seek to resolve the dispute among themselves. If they are unable to do so, the matter may be brought to the attention of the Chamber by way of written submissions.

V. Contacts between a party and witnesses not being called by that party

30. This section of the Protocol governs the conditions in which the investigating party is authorised to contact witnesses of the opposing party or of the LRV. It is intended to establish a set of general guidelines and is to be applied as necessary on a case-by-case basis.

Consent

31. A party who seeks to interview a witness of the opposing party or of the LRV may do so only if the witness consents to the interview.

Notification to the opposing party or the LRV

32. The party seeking to contact a witness of the opposing party or of the LRV must provide the latter with notice of its intent to do so. Such a procedure will enable the opposing party or the LRV to ask the witness whether he or she agrees to be contacted or interviewed. Once notified, the party or the LRV calling the witness shall seek the consent of the witness within 10 working days of receiving notification.
33. It shall be for the witness to decide whether or not to be interviewed. The calling party or the LRV shall not attempt to influence the witness's decision whether or not to agree to be interviewed by the other party or the LRV.
34. Any witness whom the opposing party wishes to interview shall have 15 days from the date of transmission of the request in which to respond.
35. On expiry of that period, the party whose witness it is shall have five days in which to inform the opposing party of the response of its witness.

Contact with individuals participating in the ICCPP and those subject to an assisted move

36. The VWU is the only appropriate channel through which a witness of the opposing party or of the LRV admitted to the Protection Programme may be contacted.
37. Consequently, the party wishing to meet or interview a witness who is in the Court's Protection Programme shall, in addition to informing the opposing party or the LRV, also inform the VWU in order that it might take the necessary steps to organise the meeting and/or interview. Once the VWU has obtained the witness's consent, it shall take all necessary steps to organise the meeting.
38. When the party wishing to interview a witness is aware that the witness has been relocated with the assistance of the Court, it shall, in addition to notifying the calling party or the LRV, also inform the VWU.

Objections to the interview

39. Should the party or the LRV intending to call or rely upon a witness object to the witness being interviewed, it shall inform the investigating party. If no agreement can be reached, despite genuine efforts, the matter may be raised with the Chamber.
40. Without prejudice to articles 56 and 57(3)(b) of the Statute and rule 114 of the Rules, the party seeking the interview shall not proceed with said interview until the Chamber has ruled on the matter.

Presence of a representative of the calling party during the interview

41. The witness is entitled to have a representative of his or her choice attend the interview. Neither the calling party nor the LRV shall influence the witness's decision on whether to have a representative present during the interview.
42. Furthermore, independent of the wishes of the witness, it is the responsibility of the calling party or of the LRV to ensure that the appropriate assistance is provided if the witness is particularly vulnerable or otherwise in need of assistance during the interview, and that, where necessary, the VWU is contacted well 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.

Arranging the interview

43. Once the witness has given his or her consent to be interviewed, the party or the LRV calling the witness or relying on his or her statement shall inform the investigating party and contact shall be facilitated as appropriate. If the calling party or the LRV attends the interview, it shall bear its own travel and other costs associated with the interview.
44. In principle, the parties and participants shall make all the necessary logistical arrangements in accordance with best practices. However, should there be

any remaining security concerns or when the witness is vulnerable, the calling party or participant shall inform the VWU for the latter to assess the situation and, if necessary, take relevant steps in order to assist the parties and participants in organising the meeting in a safe manner.

45. In the event that the investigating party or participant wishes to meet 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.

Recording of the Interview

46. A video or audio record of the entire interview will be provided to the party or participant calling the witness or relying on his or her statement as soon as practicable after the conclusion of the interview.

Investigation of Information of Sexual Violence

47. Where a witness has stated that she or he has suffered sexual and/or gender based crimes and it is apparent that the witness has not discussed the violence with members of his or her family, the investigating party must exercise real caution in investigating the allegations to protect the privacy, dignity and well-being of the witness. It shall not reveal this information to these family members or to persons who will communicate the information to family members and any inquiries it undertakes must be done so as to ensure the confidentiality of the information. Where there are no suitable alternative investigative avenues available, the investigating party may communicate the information that the witness suffered sexual or gender based crimes to those individuals that the witness has stated she or he has informed or has confirmed are aware of the sexual and gender based crimes suffered,

provided that in doing so the investigating party does not reveal that she or he is a Court witness.