

ANNEX A

Confidential

Joint Agreement on Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant

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As a result of *inter partes* meetings held between the parties and participants on 19 February 2020, and between the parties on 21 February 2020, the Prosecution and Defence agree to the following amendments to the 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 (ICC-01/12-01/18-40-Anx). No agreements were concluded between the parties and participants.

To further assist, the points of disagreement between the parties, as well as the participants, are also noted. However, the parties and LRV include their observations on additional amendments to the Protocol, which could not be resolved during *inter partes* discussions, in their respective omnibus filings following the Chamber's Order Setting Deadline for Observations on the Conduct of Proceedings (ICC-01/12-01/18-566).

I. Points of Agreement between the parties

A. Costs

The parties agree that provisions relating to the burden of costs as currently set out in paragraph 35 would be better placed within paragraph 37 which deals with the logistical arrangements necessary for the interview in question. As such the following amendments are agreed between the parties:

Paragraph 35:

The witness may choose to have a representative of the calling party or participant attend the interview. The calling party or participant shall inform the witness of this right but shall not attempt to influence the witness's decision. ~~If a representative of the calling party or participant attends the interview, the calling party or participant shall bear the costs.~~

Paragraph 37:

The parties and participants shall make all necessary logistical arrangements in accordance with best practices. **The parties and participants shall bear their own costs for attendance at the interview.** In the event of security concerns, the calling party or participant shall inform the VWS for it to assess the situation and if necessary, to assist the parties and participants in organizing the meeting in a safe manner.

B. Additional proposals

The parties agree that there is no need to include the following provision to the Protocol:

~~The obligations as set out in this Protocol are without prejudice to the Prosecution's obligation to disclose relevant materials that are generated through contacts with the Prosecution and Defence witnesses or which concern such witnesses, or are otherwise material to the preparation of the Defence in accordance with Rules 76 and 77 of the Rules and Article 67(2) of the Statute.~~¹

In light of the participants' disagreement, the parties also agree to withdraw the proposal to expand Section III of the Protocol so as to include information related to victims. As such the following amendments, as highlighted in red, are no longer sought:

~~'Victim' shall mean a person who has been granted the right to participate in these proceedings in accordance with Article 68(3) of the Statute and is not otherwise being called as a witness by either the parties or participants, and whose identity as a participating victim has been communicated to the parties~~²

In the absence of the adoption of the definition of 'victim' above, the parties withdraw the following amendments highlighted in red:³

- J Section III sub-heading 2: ~~Victims and~~ Witnesses whose identity has not been made public
- J Paragraph 10: This section of the Protocol applies to ~~victims and~~ witnesses whose identity or relationship with the Court has not been made public, or who are subject to other protection measures.
- J Paragraph 11: A party or participant may disclose the identity of such a ~~victim or~~ 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 ~~victim or~~ 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 Section ("VWS") in advance of the details of the place, time and, to the extent possible, the types of organizations, institutions, and, if available, the person(s) to whom it intends to disclose the identity of the witness, and shall consult with the VWS as to specific measures that may be necessary. If the ~~victim or~~ witness is otherwise protected by the VWS, the party or participant shall inform the VWS of the disclosure of the ~~victim or~~ witness's identity as soon as possible, but in any event before disclosure.
- J Paragraph 12: Notwithstanding the previous paragraph, parties and participants shall not reveal to third parties that the ~~victim or~~ witness is involved with the activities of the Court or the nature of such involvement.
- J Paragraph 13: Visual and/or non-textual material depicting or otherwise identifying ~~victims or 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 do not contain elements which tend to reveal the involvement of the person depicted in the activities of the

¹ Reflected as paragraph 3 of ICC-01/12-01/18-590-AnxA

² This definition was proposed following the meeting held on 19 February 2020.

³ Reflected in pp. 4-5 of ICC-01/12-01/18-590-AnxA

Court. When a photograph of a **victim or** witness is used, it shall only be shown together with other photographs of the same kind. Unless specifically authorized by the Chamber, the third party shall not retain copies of the visual material subject to this provision.

- J Paragraph 14: If a party or participant is in doubt as to whether a proposed investigative activity may lead to the disclosure of the identity of a protected **victim or** witness to third parties, it shall seek the advice of the VWS.
- J Paragraph 15: Where a **victim or** 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 **victim or** witness. Parties and participants shall not reveal information about the **victim or** witness's alleged victimization to the family members of the **victim or** 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 **victim or** 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, **or that the victim is participating in proceedings at the Court.**
- J Paragraph 19: If a party or participant discovers that it has disclosed material which should not have been disclosed or should have been disclosed in redacted form, it shall immediately inform the receiving party or participant. If the information inadvertently disclosed pertains to a **victim or** witness in the ICCPP or who has been otherwise provided with form of protective measures, the party or participant shall also inform the VWS.

II. Points of disagreement between the parties as well as the participants

A. Definitions

The parties and LRV could not reach an agreement on the following additions to the applicable definitions within the Protocol at paragraph 4:⁴

“Party” shall mean the Prosecutor and any member of the Office of the Prosecutor authorized to have access to the information in question, **including intermediaries**, 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. **This includes any intermediaries acting on instruction of or behalf of a party;**

“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

⁴ Reflected as paragraph 4(d) of ICC-01/12-01/18-590-AnxA and, in part, as paragraphs 4(a), (b), (e) of ICC-01/12-01/18-590-AnxA. The proposal in paragraph 4(f) of ICC-01/12-01/18-590-AnxA has also been withdrawn.

properly designated as members of their teams, including resources persons and any intermediaries acting on instruction of or on behalf of a participant;

“Confidential document” shall mean any document not classified as “public” in accordance with Regulation 14(b) of the Regulations of the Registry. The classification of documents is to be subject to regular review in accordance with Articles 64(7) and 67(1) of the Statute;

“Confidential information” shall mean any information which is directly the subject ~~order~~ of protective measures under Article 68 of the Statute, or which identifies documents or information directly subject to confidentiality agreements or protective measures, ~~contained in a confidential document which has not otherwise legitimately been made public, and~~ including any information ordered not to be disclosed to third parties by any Chamber of the Court or which is otherwise subject to Rules 81(3) or (4) of the Rules of Procedure and Evidence

In light of the lack of agreement with regard to the definition of ‘party’ and ‘participant’, the parties and participants could not agree on the deletion of paragraph 5 of the Protocol:

~~All of the obligations set out in the present Protocol, and which are imposed upon parties and participants, are also applicable to members of their teams, the intermediaries on whom they call and any other person who performs tasks at their request.~~⁵

In addition the parties and LRV could not reach an agreement on the following additional obligations concerning the notifications to be provided to witnesses:⁶

A calling party or participant is obliged to clearly inform all persons it has met with and/or obtained statements from, as to whether or not it intends to rely on that individual as a witness.

A calling party or participant is obliged to direct all persons who have consented to being called as a witness to identify themselves as such when approached by the other party or participants

B. Dual status

The parties and LRV could not reach an agreement on the merging of language from the Ongwen Dual Status Protocol (ICC-02/04-01/15-504-Anx2). Accordingly there is no agreement to the inclusion of the following paragraphs:

⁵ See also paragraph 8 of ICC-01/12-01/18-590-AnxA

⁶ Reflected as paragraphs 6 and 7 of ICC-01/12-01/18-590-AnxA

II. Definitions

“Dual status witness” shall mean a person who is relied upon as a witness in accordance with the provision at paragraph 4(f) above by a party and who is also participating as a victim in the proceedings.⁷

Notification of Dual Witness Status⁸

a) As soon as the Prosecution becomes aware that one of the witnesses it will call to testify is also a victim, it shall inform the Defence and the Legal Representative of the dual status witness.

b) As soon as the Defence becomes aware that one of the witnesses it will call to testify is also a victim, it shall inform the Legal Representative. Subject to the time frame imposed by the Chamber for Defence disclosure, this information shall also be communicated to the Prosecution.

c) When the Legal Representative of Victims believes that their client has dual status, they shall provide the party in question with the name of the individual, his or her date of birth and other identifying information, to the extent possible.

d) Thereafter, the party shall 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). The party shall also inform the Legal Representative if it intends to make an application for protective or special measures under Rules 87 and 88 of the Rules.

VII. Contacts with witnesses of other parties or participants

Consent of the witness

For dual status witnesses, the parties shall provide notice of their intention to contact dual status witnesses to the Legal Representatives as soon as possible and once they are aware that the person has legal representation. Where in situations of urgency, in order to preserve or collect evidence, the parties do not contact the Legal Representative in advance, the interviewing party shall provide notice to the Legal Representative of contact with a dual status witness as soon as possible thereafter, and where applicable, disclose any relevant material, including any statement, transcript or recording made during the interview. 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.⁹

Special provisions for protected witnesses

If a person with dual status participating in ICCPP requests to contact the parties or participants, the VWU will facilitate the contact. The contacted party shall inform the calling

⁷ Reflected as paragraph 4 (g) of ICC-01/12-01/18-590-AnxA

⁸ Reflected as paragraph 5(a) to (d) of ICC-01/12-01/18-590-AnxA

⁹ Reflected, in part, as paragraph 36 of ICC-01/12-01/18-590-AnxA

party and the Legal Representative of any contact made and provide a copy of the video or audio recording of the interview in accordance with the provision at paragraph 42 above.¹⁰

C. Contacts with witnesses

In addition to the provisions as concerns contact with dual status listed above, the parties and LRV could not agree on the following amendments to Section VII of the Protocol:

Paragraph 27¹¹

Except under the conditions specified in this section, a party or participant shall not **knowingly** contact or interview **an individual, who is 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.~~

Paragraph 35

The witness may choose to have a representative of the calling party or participant attend the interview. The calling party or participant shall inform the witness of this right but shall not attempt to influence the witness’s decision. **Communications by which the witness is informed of this right shall be audio recorded by the calling party.**¹²

Paragraph 39

A video or audio recording and any type of notes and record of an accidental contact with a witness of an opposing party or of a participant shall be disclosed to the calling party or participant, to the extent possible, within five days of the said contact.¹³

¹⁰ Reflected as paragraph 48 of ICC-01/12-01/18-590-AnxA

¹¹ Reflected, in part, as paragraph 30 of ICC-01/12-01/18-590-AnxA

¹² Reflected, in part, as paragraph 39 of ICC-01/12-01/18-590-AnxA

¹³ Reflected as comment to paragraph 43 of ICC-01/12-01/18-596-**Conf**-AnxA. The proposal in paragraph 43 of ICC-01/12-01/18-590-AnxA has also been withdrawn.