

**PRACTITIONER'S HANDBOOK ON**

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**Defence Investigations  
in  
International Criminal Trials**



المحكمة الخاصة بلبنان  
SPECIAL TRIBUNAL FOR LEBANON  
TRIBUNAL SPECIAL POUR LE LIBAN

PRACTITIONER'S HANDBOOK ON

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# **Defence Investigations in International Criminal Trials**

EDITED BY THE DEFENCE OFFICE  
OF THE SPECIAL TRIBUNAL FOR LEBANON

NOVEMBER 2017



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المحكمة الخاصة بلبنان  
SPECIAL TRIBUNAL FOR LEBANON  
TRIBUNAL SPÉCIAL POUR LE LIBAN

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## FOREWORD

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International criminal courts and tribunals are often described as a laboratory for the globalisation of justice. They apply a combination of laws, bringing together different legal systems. In order to do so, they regularly take inspiration from national experiences shared through dialogue between international and national judges.

That dialogue also takes place among Defence lawyers from all legal systems in the context of the International Meetings of the Defence, led by the Defence Office of the STL. Such is the context surrounding the Investigations Handbook. The Handbook is the fruit of collaborative efforts between lawyers, investigators and legal officers who have extensive experience in the field of international criminal investigations. This concrete and pragmatic project, designed for lawyers practising before international criminal courts and tribunals, forms part of the STL's legacy for international criminal justice, as well as for Lebanese and Arabic-speaking lawyers.

This Handbook will contribute to improved legal certainty by facilitating shared understanding of the role of counsel and offering practical advice to confront common challenges. It also defines ethical standards for lawyers in their evidence-collecting missions by identifying good practices and, to the contrary, strategies to be avoided. Lastly, it is a tool that can be used in response to the more practical difficulties encountered by counsel during their missions in the field.

I should like to sincerely thank all the lawyers who participated in the production of this Handbook, which will contribute to strengthen the quality of the Defence before the international criminal courts and tribunals. Facilitating the identification and production of evidence will make it possible to reconcile the adversarial process and efficiency of investigations, resulting in an international justice that is both faster and fairer.



**IVANA HRDLIČKOVÁ**

President of the Special Tribunal for Lebanon

## FOREWORD

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This was a task that needed to be done. You've done it. Congratulations!

Congratulations and thank you on behalf of our profession. This compilation of information and advice, based on practical experience, is a unique example in the history of international criminal justice.

There is no doubt it will be a source of inspiration and learning for many lawyers in their discovery of this new field, but also for those with more experience who will also find in it much useful advice, as to be a lawyer is to learn every day, and particularly from real life experiences.

It is true that this is particularly relevant to adversarial proceedings in which lawyers must conduct their own exculpatory investigations. Those proceedings, unfortunately however, are too often bombarded with thousands of items of incriminating evidence and subsequent discussions which are completely useless...

In the future, that should be put right, while maintaining one of the cornerstone principles of those proceedings: respect for the fairness of the proceedings. In the balance to be found between a system in which the trial is entirely led by the parties before Judges who also have the role of arbitrators, and another in which it is led by the Judges on the basis of a common case file generally established, with incriminating and exonerating facts, by a Judge or an investigation commission, let us ensure that the possibility will always remain for the lawyers to conduct their own investigations to serve the defence for which they are mandated. Without question, this Practical Guide will accompany them throughout their defence work and will be a source of reflection and action to come up with the International Criminal Law of tomorrow, a law which will be enriched by cultural diversity and multilateralism.



**FRANÇOIS ROUX**

Head of the Defence Office of the Special Tribunal for Lebanon

## ACKNOWLEDGMENTS

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This Practical Handbook is the culmination of a collective effort that began during the Third International Meetings of the Defence held in Geneva in October 2015, during which it was decided that the Defence Office of the Special Tribunal for Lebanon would coordinate this work. It could not have been finalized without the assistance of many people to whom we wish to express our gratitude:

### WORKING GROUP

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It would not have been possible to produce this Handbook without the involvement of the members of the Working Group on the Defence Investigations Handbook, which was set up in May 2016 following the Third International Meetings. Its members are Caroline Buisman, Caroline Buteau, Vincent Courcelle-Labrousse, Thomas Hannis, Catherine Mabilie, Marie O’Leary and Johann Soufi. The members of the Working Group have met regularly to determine the main orientations of the Handbook, to share their ideas and analysis and to participate in the creative process. Caroline Buteau and Johann Soufi were the coordinators of this Working Group and the editors of the Handbook.

### AUTHORS

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Our sincerest thanks go to the authors, who have devoted time and energy to the drafting of one or more chapters of the Handbook. The authors are: Marie-Pier Barbeau, Caroline Buisman, Caroline Buteau, Catherine Denis, Julian Elderfield, Chloé Grandon, Lueka Grogga Bada, Paula Lynch, Daniel Mburu, Marie O’Leary, Maud Sarlieve, Johann Soufi and Héleyn Uñac.

### REVISERS

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## OTHER

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The Fourth International Meetings, which were held in London in November 2016, also gave the opportunity to practitioners from the profession, Defence Offices and Sections of the various International Criminal Tribunals and professional lawyers’ associations to share their vision and contribute significantly to the Handbook on Defence investigations. We also thank the **participants of the Fourth Meeting** for their essential contribution. We likewise extend our gratitude to **all members of the profession** who have taken time to answer the questionnaire prepared by the Working Group in order to share their experience and propose concrete possible solutions to the difficulties and challenges faced by Counsel within the context of their investigations in the field.

The **Language Services Section** of the Special Tribunal for Lebanon should also be thanked for allowing this Handbook to be published in the two languages of the STL and soon in Arabic. We also thank **Ko van Hespén** for editing and publishing this project.

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**CAROLINE BUTEAU & JOHANN SOUFI**

## PHOTO CREDITS

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## METHODOLOGY

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The International Meetings of the Defence have been held on an annual basis since 2013. These Meetings, organised at the initiative of the Defence Office of the Special Tribunal for Lebanon, gather representatives of the Defence Offices and Sections of the International Criminal Tribunals, lawyers, as well as professional lawyers' associations, in order to create a space for discussion and reflection on the permanent challenges faced by the Defence before those courts. Since the First International Meeting, passionate discussions have allowed the participants to express their concerns with respect to the difficulties lawyers face when carrying out their duties each day before those courts, and to propose solutions to the permanent challenges encountered by the Defence.

The creation of a Practical Handbook aimed at assisting the members of Defence teams in their investigations is the result of collective reflection which began during the Third International Meeting of Defence which was held in Geneva in October 2015, and responds to a need expressed by Defence Counsel practising before the International Criminal Tribunals.

Many Defence Counsel have commented that, whatever their legal background and professional experience, they are often insufficiently equipped to meet the challenges posed by Defence investigations, in both practical and ethical terms. Conversely, the Office of the Prosecutor often has considerable institutional memory available, human resources and investigative means which enable it to meet those challenges and often to enjoy significant advantage from the investigative stage, which *in fine* could play a decisive role in the outcome of the trial.

One of the main goals of this Handbook is therefore to provide a tool aimed at reinforcing the professional skills of Defence Counsel practising before the ICTs, and that of the members of their team, with regard to investigations.

Following the Third International Meetings of the Defence, the Working Group was set up with the aim of producing a practical handbook on Defence investigations. That Working Group has continued the reflective work begun during the previous International Meetings, and has concentrated its work on drafting a Detailed Plan. This Detailed Plan, which was submitted to the in-depth analysis of the participants of the Fourth Meeting in London in November 2016, served as a basis for the draft-

ing of this Handbook, presented at the Fifth Meeting in Nuremberg in November 2017.

The approach taken by the Working Group is a practical one, based on the actual experience of those who have been practicing since the first ICTs were established, and aimed at proposing concrete possible solutions adapted to the particular characteristics of Defence investigations. From the very start of its discussions, the Working Group considered it to be useful and relevant to seek the direct contribution of Counsel, investigators and legal officers who are familiar with investigations in order to collect their experiences and their opinions with respect to the issues raised in the Handbook. The Working Group drew up a questionnaire which was transmitted to practitioners. The answers received were compiled and analysed in order to extract the basic material to be used to draft the Handbook. A review of the answers received made it also possible to observe any uniform practice, common principles and established customs. The Working Group thereby identified “guidelines” which it is pleased to present to you here.

The Working Group called upon the participation of anyone wishing to contribute to this Handbook, either as an author of a chapter or as a reviser. The whole project was then edited and harmonized by Caroline Buteau and Johann Soufi, coordinators of the Working Group and editors of the Handbook.

## ABBREVIATIONS

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<b>ECCC</b>	Extraordinary Chambers in the Courts of Cambodia
<b>ICC</b>	International Criminal Court
<b>MICT</b>	Mechanism for International Criminal Tribunals
<b>NGO</b>	Non-Governmental Organisation
<b>UN</b>	United Nations
<b>ICTs</b>	International Criminal Courts and Tribunals
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>STL</b>	Special Tribunal for Lebanon
<b>SCSL</b>	Special Court for Sierra Leone
<b>VWU</b>	VWU is the abbreviation of “Victims and Witnesses Unit” in English; this Unit could bear a different name according to the International Criminal Tribunal or Court concerned

## NOTE TO THE READER

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The Handbook on Defence investigations is for Defence Counsel practising before the international criminal courts and tribunals and their team members, as well as for anyone interested in investigations in the context of international criminal trials.

While it aims at providing its readers with recommendations and best practices in investigations, it is not an exhaustive presentation of all practices, techniques or rules applicable to Defence investigations and the specificities of each of the international criminal court or tribunal.

The editors of the Handbook also wish to underline that, in this Handbook, they have used a vocabulary that sometimes covers several concepts. For example, the term “witness” used throughout the handbook also includes, in certain circumstances, “potential witness” or “source of information” of the Defence team.

Finally, in order to facilitate the reading of the Handbook, the authors have used the masculine as a neutral gender to designate both women and men who contribute daily to the work of international criminal courts and tribunals.

## INTRODUCTION

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A lawyer who wishes to be added to the list of Counsel, and subsequently be appointed as such before an ICT, must have significant experience in criminal law, and if possible, in international criminal law. Newly appointed Counsel will need to be quick off the mark. An induction training will probably be necessary not only to assist him in assimilating applicable texts, but also to help him form a Defence team, familiarize himself with a case file of disproportionate size, learn about a new case from its geographical, cultural, socio-political and historical perspectives, etc. Newly appointed Counsel will perhaps in addition be faced with new professional challenges, such as conducting investigations, preparing witness interviews and cross-examinations, travelling to post-conflict or unstable environments, etc.

Counsel will also have to adjust, depending on his own legal tradition, to applicable procedure before the ICTs. Indeed, with a few exceptions, the procedure applicable before all the ICTs is greatly influenced by common law and is modelled on an adversarial system, which relies on the premise that the truth will come out from the confrontation between two theories, that of the Prosecution and that of the accused.

This system is in all respects opposite to the inquisitorial model, which gives a central role to the investigating Judge, whose task is to prepare the case file for the trier of fact by fully investigating the evidence for and against the accused. A Defence lawyer practising in the adversarial system has one essential role: he must test the Prosecution case, and where possible present evidence to defend his client. Such is the role of Counsel practicing before the ICTs, on whom rests the task of ensuring that the rights of his client are respected, in addition to establishing the Defence strategy, testing the evidence presented by the Prosecution, and where necessary, conducting investigations and presenting evidence.

Thus, one of the most important challenges that Counsel will have to tackle is in relation to Defence investigations which, despite the limited resources and the difficult conditions in which he will find himself, he will have to conduct professionally, diligently and effectively. Failure to do so could compromise the integrity of the evidence gathered, Counsel could be held liable, and the Defence, from a general point of view, could be discredited.

The Working Group hopes that this Handbook will provide Counsel with answers to the questions raised by the conduct of Defence investigations and with solutions to the practical or ethical problems encountered in the field.

# PRELIMINARY ASSESSMENT OF THE CASE





## PRELIMINARY ASSESSMENT OF THE CASE

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Once appointed as Counsel in a case, and well before going into the field to conduct an investigation, Counsel must acquire the necessary knowledge which enables them to gain a proper understanding of the case entrusted to them. Together with the suspect or the accused, Counsel will have to determine the Defence theory, start developing a strategy which will enable the Defence to submit its theory to the Chamber and, lastly, focus on possible Defence investigations in the field. Counsel should not underestimate that first task incumbent upon them and it should be dealt with efficiently and promptly. Unlike the Prosecution, which will have begun its own analyses and investigations some months – indeed, years – before, Counsel may have no more than a few weeks to familiarize themselves with the facts of the case and prepare for the confirmation hearing (ICC) or for trial. Although the basic texts of the Courts guarantee the fundamental right of a suspect or an accused to have adequate time and facilities for the preparation of his or her defence, in practice, Counsel have to contend with tight deadlines and limited resources, and will possibly still be working on the preliminary assessment even though the proceedings have already started.



The term **case** file refers to the file containing all of the documents pertaining to a given case, including documents and other evidentiary material disclosed by the parties and participants, written filings, decisions and orders of the Judge or of the Chamber seized of the case, transcriptions of hearings held in the context of that case and other related case materials.

The preliminary assessment of the case, which leads to the development of an investigative plan, is conducted in three phases:

1. Analysing the Prosecution case;
2. Developing the Defence theory; and,
3. Based on the case analysis and on the Defence theory, formulating a Defence strategy.

### 1. ANALYSING THE PROSECUTION CASE

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To begin with, Counsel must undertake a full and in-depth analysis of the case file and, in particular, the evidence disclosed by the Prosecution. The lines of defence, the Defence strategy, together with all future decisions by Counsel in the context of

the proceedings, will depend on the quality of this preliminary analysis. It is crucial that the Defence theory and strategy are based on an objective and thorough assessment of the evidence submitted by the Prosecution.

A proper understanding of the evidence available to the Defence will shed new light on the Prosecution evidence and *vice versa*. It goes without saying that the analysis of the case file continues throughout the proceedings and that during that time, Counsel will broaden their knowledge of the case file as the proceedings progress and more information emerges.

### A. Studying the contextual framework

Prior to embarking on a detailed analysis of the Prosecution evidence, it is essential to study the social, historical and political context in which the alleged crimes were committed in order to have an understanding of the issues at play. In fact, regardless of the nature and scope of the charges laid against the accused, they invariably form part of a broader contextual framework. The facts and, very often, the armed conflict in which they occur, will have inevitably been affected by the socio-political, cultural and historical situation of a country or a region.

Not much of such information may be available, depending on the length of time which has elapsed since the events or on account of difficulties in accessing the conflict or post-conflict zone involved. A thorough expert analysis may not yet exist, but some open source documents should be available, in particular, reports from the UN or NGOs and other similar organizations regarding the region or state where the alleged facts took place. Counsel should exercise caution as to the objectivity of the analysis contained in those reports and the reliability of such evidence which may vary significantly according to the source. It is however useful to take note of these reports, not only because the Prosecution tends to rely heavily on such reports, but also to



#### Recommendation

As soon as he receives the case file transmitted by the Prosecution, Counsel must check, to the extent possible, that all the evidentiary material was indeed disclosed to the Defence and, if not, request their immediate disclosure. Counsel must ensure that, at a minimum, the following items in particular have been disclosed: all evidentiary material presented in support of the arrest warrant and the indictment, any documents relating to the arrest of the suspect/accused and any documents seized at that time or during any house search carried out at the suspect/accused's residence, transcriptions of any hearings held in the case in question prior to the appointment of Counsel, as well as any requests submitted by the Prosecution and any decisions rendered during the pre-trial stage of the case.

develop a chronological timeline of the events. Counsel will also be able to call on experts to assist them in the analysis of the contextual framework. When choosing these experts, it would be constructive to take into consideration, if necessary, the specific religious, cultural and political aspects of the case.

## **B. In-depth examination of the evidence**

The next step is to conduct a thorough examination of the evidence the Prosecution intends to produce in support of the charges laid against the suspect or the accused. The scope of such an exercise at the preliminary stage depends on the volume and nature of the evidence disclosed to the Defence, and on the time and facilities Counsel have at their disposal at this stage of the proceedings. Generally, Counsel can expect to receive thousands of pages of documents, numerous witness statements, several hundred hours of video or audio recordings and other evidence, all of varying relevance. According to the size of the case file, Counsel might at this stage need to classify the evidence disclosed so as to extract the evidentiary material which, *prima*

### **1 2 3 Items to be consulted and/or analysed in order to become familiar with the relevant facts of the case :**

- ❖ The arrest warrant and the supporting documents;
- ❖ The indictment or the document containing the charges (ICC) and the supporting documentation;
- ❖ The incriminating evidence disclosed by the Prosecution and any analysis submitted by the Prosecution regarding that evidence;
- ❖ Exculpatory evidence which is “necessary for the defence of the accused” disclosed by the Prosecution;
- ❖ Transcriptions or video recordings of any hearings which were held, if applicable, in the case prior to the appointment of Counsel, if the content of the hearings was disclosed to the Defence;
- ❖ Motions submitted by the Prosecution and decisions rendered by the Judges or Chambers in that case prior to the appointment of Counsel;
- ❖ Expert reports concerning the facts of the case or the political, social, cultural and historical context;
- ❖ Relevant evidence presented before the ICT by the Prosecution or the Defence;
- ❖ Geographical maps;
- ❖ Open source reports prepared by the UN or by NGOs regarding the events cited by the Prosecution;
- ❖ Scientific books and articles on the socio-political, historical and cultural situation in the region covered in the charges; and
- ❖ Newspaper articles or video reports made at the time of the events alleged by the Prosecution.

*facie*, is more relevant and which directly concerns the alleged facts in order to focus the analysis specifically on such material.

It should be noted that, generally, full disclosure of the evidence is not made until much later and the names of key Prosecution witnesses tend to be redacted. Counsel must, at the earliest opportunity, request the Prosecution and, in the event of dispute, the Chamber, for full disclosure of the evidence in a non-redacted version. Even though the Prosecution's disclosure of evidence is likely to be partial in nature, Counsel must endeavour, where at all possible, to have an idea of the evidence the Prosecution intends to produce in support of the accusations.

Starting with these first analyses, Counsel is advised to proceed with determination and methodology. As such, it can be useful to start a comparative analysis of the various narratives of the Prosecution witnesses relating to the same incidents, and to record that analysis in, for example, the form of a table. With a table, any striking contradictions between these narratives, as well as any inconsistencies within the statements, can be identified. Moreover, Prosecution evidence can prove to be an important source with regard to investigations. Throughout the analysis process, Defence Counsel is therefore advised to create a "to do" list for upcoming Defence investigations in which they should note all potential investigative leads.

Lastly, at this stage, the contribution made by the client and the local resource person and/or investigator, as the case may be, will likewise be crucial insofar as their personal knowledge of the facts or of the context could greatly facilitate the work of analysing the statements of Prosecution witnesses and the documents collected by the Prosecution.

1  
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3

#### List of possible investigations to be conducted

- ❖ The names or descriptions of persons mentioned in the Prosecution evidence, who could provide useful information, either because they appear to be or are said to be eyewitnesses to a significant event, or because they might be in possession of useful information regarding the Prosecution witnesses, the accused or others;;
- ❖ Any other category of potential sources of information which were not specifically mentioned or identified in the Prosecution evidence (based, for example, on location, family links, political or military associations, etc.);
- ❖ Documentary evidence to be obtained (for example, school reports, birth certificates, identification documents (to challenge the identity or age of a witness), contemporary media or other reports, video recordings, etc.);
- ❖ A list of locations to be visited, photographed or filmed; and
- ❖ Any other potentially useful line of inquiry.

## 2. DEVELOPING A DEFENCE THEORY

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Based on the preliminary assessment of the case and whilst continuing to conduct an in-depth case analysis, Counsel should develop the Defence theory together with the client. This must respond fully and specifically to all the charges laid against the suspect or the accused. This is a time-consuming exercise. The Defence theory may evolve over time, bearing in mind that the starting point of such a theory is the client's position relating to the facts of which he or she stands accused and the progress of the investigation.

The client provides Counsel with his version or understanding of the facts by way of a detailed narrative of those facts such as he experienced or perceived them. Counsel will therefore have to take note of this narrative, which is either given to them orally during their meetings with the client through a document written by the client, the first option being preferable.

Indeed, by allowing his client to relate to Counsel their version of the facts orally, Counsel may guide the client to ensure the focus remains on the relevant issues and that the account rests within the applicable legal and factual framework. Defence Counsel may also advise the client on how a certain narrative will likely be perceived by the judges and how it fits in the analysis of the Prosecution evidence, as well as in any possible Defence evidence. This primarily enables Counsel to verify whether their client's version of the facts is consistent with the evidence in the case file. Defence Counsel may, for instance, ask the client to clarify any contradictions between their account and other evidence or alert the client regarding a number of points in his / her version of the facts which seem barely credible. Counsel should however resist the temptation to lead the client and construct the narrative for him.

Therefore the client plays a key role in guiding the investigations, firstly because Counsel will have to compile the evidence to corroborate the client's account, but also because the client is, in principle, the one best placed to suggest investigative leads. The client might, for example, provide the name and contact details of certain witnesses, direct Counsel towards documents or archives that should be collected, and suggest locations that should be visited. Any information discovered in the course of the investigations may, in turn, have an impact on the client's narrative and the Defence theory. The client may sharpen or nuance certain aspects of his narrative in light of the results of the investigations, in cases where, for example, the accused might be prompted by the evidence collected to recall certain details regarding a particular event. Likewise, the evidence gathered could also direct Counsel towards

new lines of inquiry and possibly contribute towards improving the Defence theory. In this way, any new evidence collected could enable the accused to understand certain facts of which they were not previously aware, for example, when the accused was not present at the time a crime for which they stand accused would have been committed.

### 3. FORMULATING A DEFENCE STRATEGY

#### **1 2 3** Basis of the Defence theory

- ❖ The facts alleged against the suspect/accused;
- ❖ The client's narrative;
- ❖ The Defence analysis of the Prosecution evidence;
- ❖ Evidence collected by the Defence during its investigations; and
- ❖ An understanding of the socio-political, cultural and historical context.

In light of the Prosecution evidence presented in support of the accusations and the position or explanations of the client regarding such evidence, the Defence will develop, in consultation with the client, the Defence strategy. The purpose of this strategy is to determine the most appropriate manner and time to present the Defence theory and the underlying material to the Trial Chamber (or the Pre-Trial Chamber, as the case may be), in response to the charges laid against the accused.

This strategy may vary significantly from one case to another, according in particular to the nature of the evidence offered by the Prosecution and the position of the client.

Even if the accused acknowledges the allegations made against him or her and intends to plead guilty to the charges, Counsel should nevertheless undertake an in-depth analysis of the Prosecution evidence and develop a Defence theory, so that the accused fully comprehends the facts they admit to having committed and understands the consequences thereof. When the accused acknowledges the allegations made against him or her, Counsel can then negotiate the terms and scope of a guilty plea with the Prosecution and possibly come to an

#### **1 2 3** The Defense must decide whether

- ❖ It will enter a plea of guilty or not guilty for each charge;
- ❖ It will invoke specific grounds of Defence or "grounds for excluding criminal responsibility";
- ❖ It will challenge the Prosecution evidence; and
- ❖ It will present evidence in support of its case.

agreement with the Prosecution on a sentencing proposal which will then be subject to control by Judges. In certain cases, the Defence will first be able to conduct investigations in order to collect evidence regarding mitigating circumstances which could allow Counsel to negotiate a reduced sentence proposal with the Prosecution.

Should the accused intend not to acknowledge the allegations made against him, the strategy adopted will be very different depending on the mode of responsibility alleged by the Prosecution. As an example, the Defence cannot just challenge the presence of the accused at the crime scene if the accused is alleged to have participated, at a distance, through a form of facilitation, instigation or ordering the commission of the crime.


The strategy adopted will also depend on the extent to which the Defence theory contradicts or correlates with the evidence produced by the Prosecution. Counsel may decide to challenge the credibility and reliability of a witness or the reliability and authenticity of a document presented by the Prosecution; in other cases, Counsel might choose to offer a different interpretation of the facts based on those same documents, namely, to give an alternative view of the evidence without challenging the reliability or credibility/authenticity of the evidence itself. In the event of a clear contradiction between the Prosecution evidence and the Defence theory, an attack on the credibility and reliability of the Prosecution witnesses, as well as the reliability and authenticity of the Prosecution documentary evidence may be a more appropriate line of defence.

Counsel must always ensure that investigations are conducted in a diligent manner. This is even more important in cases where the Defence decides to present a specific ground for excluding criminal responsibility – for example, in the case of an alibi defence which is subject to specific provisions obliging the Defence to notify the Prosecution of certain materials sufficiently in advance. Under those circumstances, the Defence should consider giving priority to that aspect during the course of its investigations in the field.

#### 4. CONCLUSION

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In summary, once appointed as Counsel for an accused before an international criminal court, the lawyer must immerse himself in the case entrusted to him in order to gain a full understanding of the issues at stake. That analysis should not be confined to the facts cited by the Prosecution, but should extend beyond so as to include the background to those facts. Counsel will develop a strategy or lines of defence based



on that analysis and the client's version of the facts. On that basis, Counsel will determine then what evidence should be collected in order to demonstrate the Defence theory and prepare their investigative plan accordingly.



## NOTES

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# FUNDAMENTAL PRINCIPLES OF EVIDENCE



## FUNDAMENTAL PRINCIPLES OF EVIDENCE

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The purpose of a Defence investigation before an ICT is to find and collect evidence (testimonies, documents, physical or electronic evidence) which will be presented to the Chamber either through a witness or through a motion (bar table motion).

Parties can tender any piece of evidence that they deem relevant to their case.

Once a piece of evidence is admitted, its weight will be assessed in light of the entirety of the evidence.

It is of paramount importance for Counsel to familiarize himself as early as possible with the rules of evidence governing the international Court before which he is appearing.

### 1. GENERAL PRINCIPLES OF ADMISSIBILITY OF EVIDENCE

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Although each Court has developed, in its Rules of Procedure and Evidence (RPE) and in its jurisprudence, particular sets of rules and principles applicable to the admissibility of evidence, the general principles remain similar.

A Trial Chamber may admit any relevant evidence it deems to have probative value. A piece of evidence will be admitted when:

- A. It is *prima facie* relevant to the case;
- B. It has *prima facie* probative value; and
- C. Its probative value is not substantially outweighed by its prejudicial effect on the proceedings.

#### **A. *Prima facie* relevance of evidence**

A piece of evidence will be relevant if it relates to issues that are to be considered by a Trial Chamber in its evaluation of the charges against the accused.

If the relevance of a piece of evidence is not obvious, Counsel will have to demonstrate to the Trial Chamber how it might prove or disprove a fact in the case.

#### **B. *Prima facie* probative value of evidence**

The term “probative” refers to the function of proving or demonstrating something.

Generally, to demonstrate that a piece of evidence has probative value, the tendering party only needs, at the admissibility stage, to show that it has indicia of reliability. To the contrary, Trial Chamber will declare a piece of evidence inadmissible if it is so lacking in terms of the indicia of reliability as to be devoid of any probative value.

Trial Chambers have considered that evidence is reliable when it has satisfactory information on the sources of the information and the methodology used to obtain it. There is no exhaustive list of indicia but Trial Chambers have taken into account factors such as proof of authenticity of a document (including signatures or stamps), its origin, or the fact that the content of the document or testimony is corroborated by information already admitted into evidence.

#### *i. Documentary evidence*

In order to establish the reliability of a document (i.e. birth certificate, official national records, etc.), Counsel will be expected to provide information pertaining to its authenticity including:

- Where was the document collected?
- What is the date of creation of the document?
- Who created the document?
- Is it an original or a copy?
- Where was it kept between the time of its collection and its introduction into evidence?

Obtaining this information may prove difficult in the context of international investigations because of their complexity, the multiplicity of actors involved, and chaotic situations. Still, as discussed in Chapters 11 and 16, it is very important that Defence investigations implement the proper procedures and records to be able to account for each piece of evidence collected. If such information is not accessible or available, this should be recorded.

Counsel may verify that documentary or physical evidence is reliable by:

- Examining the investigation methods used and the manner of collection of the documentary or physical evidence;



In order to verify the credibility of my witnesses, I had taken with me a number of photos of the Accused and his family that were taken at the time of the event... It enabled me to deter some people who did not even know our client but who wanted to testify in his favour in the hope of receiving indemnities from us."

***A Defence Investigator***

- Confirming that the documentary or physical evidence is authentic and that it has not been tampered with or fabricated;
- Confirming that the chain of custody of the document or physical evidence has not been broken; and
- Examining to what extent the documentary or physical evidence is corroborated or contradicted.

#### *ii. Testimonial evidence*

As for testimonial evidence, Counsel may verify that it is reliable in the following manner:

- Ascertain whether the witness's account is voluntary, truthful, and trustworthy;
- Analyse the witness's ability to remember and clearly communicate the evidence;
- Analyse the witness's direct knowledge of the evidence;
- Examine to what extent the witness's evidence is corroborated or contradicted;
- Analyse inconsistencies in the witness's evidence; and
- Examine whether the witness has any personal interest in the outcome of the investigation.

### **C. Probative value vs. prejudice to a fair trial**

Evidence will not be admitted by a Trial Chamber if its probative value is substantially outweighed by the need to ensure a fair trial.

For instance, when a party has not had the opportunity to test or cross-examine a piece of evidence which has limited probative value, such evidence may be excluded because its prejudicial effect significantly outweighs its probative value.

## **2. EXCLUSIONARY RULES**

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International Courts have adopted express rules providing for the non-admissibility of evidence.

One of the common exclusionary rules adopted by international Courts is that evidence will not be admitted if it was obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to and would seriously

damage the integrity of the proceedings. In particular, evidence obtained in violation of internationally recognized human rights will not be admitted.

Trial Chambers have considered that the “antithetical” test is met by balancing the fundamental rights of the accused with the interest of the international community in the prosecution. As for the “integrity of the proceedings”, this expression refers to the fundamental fairness of the proceedings, the respect afforded to the parties’ and participants’ rights and other elements necessary for the proper administration of justice.

Trial Chambers could also consider that the integrity of the proceedings would be seriously damaged if the evidence was obtained in violation of domestic law, although illegally obtained evidence will not be automatically excluded. Several factors are taken into account when assessing exclusion of evidence obtained in breach of domestic law, including (i) the nature of the violation, (ii) whether force was used, (iii) the proportionality of the interference, (iv) the interest in the evidence obtained unlawfully, (v) the good or bad faith of the entity/authority that collected the evidence, (vi) the seriousness of the prejudice caused to the accused, and (vii) the gravity of the charges against the accused.

Counsel should thus ensure that evidence is collected in conformity with statutory provisions of the relevant international criminal Court, internationally recognized human rights as well as domestic laws, where applicable.

### 3. OTHER PRINCIPLES

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#### A. Burden of proof

Counsel should always keep in mind that the Defence does not have the burden of proof and that the accused is presumed innocent. From an investigative point of view, this means that in principle, the evidence presented by the Defence needs only to raise a reasonable doubt in the mind of the Judges.

#### B. Corroboration

Generally, there is no legal requirement that a piece of evidence has to be corroborated by other evidence in order for the Chamber to be able to rely on it. Depending on the evidence, it may suffice in itself to establish a fact.

However, in general, evidence that is corroborated by another independent source will bear more weight. For example, a witness testimony which is corroborated by documentary evidence will generally have more weight than a testimony by itself.

### **C. Hearsay evidence**

Hearsay is second-hand information, as opposed to information provided by a witness from his own observations. Hearsay is usually considered not as reliable as evidence based on a witness' personal observations or knowledge.

Hearsay is not excluded *per se* before international criminal Courts, but it usually requires corroboration. The probative value to be afforded to such evidence, if any, will be analysed on a case-by-case basis.

### **D. Best evidence rule**

The best evidence rule is a principle of common law which provides that the copy of a document will not be admissible if an original exists and can be obtained.

Even though the “best evidence rule” does not generally apply in international criminal trials, Counsel should, when possible, find the best evidence possible to demonstrate a fact relevant to the case.

For example, the original of a document (or certified copy) will usually be given more weight than an uncertified copy of poor quality. Similarly, as described above, first-hand evidence will be given more weight than hearsay.

### **E. Tendering evidence through a witness or a written motion**

Depending on the ICT, a document may have to be tendered through a witness who can vouch for its authenticity. ICTs that do not impose such a rule generally allow documents to be tendered through “the bar table”, i.e. through a written motion.

# NECESSARY RESOURCES FOR DEFENCE INVESTIGATIONS





# NECESSARY RESOURCES FOR DEFENCE INVESTIGATIONS

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In order to carry out the difficult task of investigating, Defence Counsel must have necessary and sufficient human, material and financial resources. If the accused or suspect is indigent, it is the responsibility of the Registrar (ICTR, ICTY, MICT, ICC) or of the Head of Defence Office (STL) to provide Counsel with adequate means and relevant continuing professional training to effectively represent his client.

Depending on the budget allocated, Counsel will have to:

- Start recruiting team members, including one or more persons in charge of investigations;
- Set aside a budget for carrying out investigations;
- Ensure that team members are informed of their obligations regarding investigations and receive the necessary training.

## 1. HUMAN RESOURCES

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Lead Counsel is responsible for the recruitment and supervision of all members of the Defence team. Counsel must ensure that the team composition will allow him to perform his duties diligently, in particular by including persons with diverse and complementary experience within the team and taking into consideration the skills of each person (language, legal system) and the cultural aspect of the case.

### A. Standard Defence team

The legal aid regimes adopted before the ICTs provide for the establishment of a standard team, whose composition varies according to the ICT and the various phases of the proceedings.

Before the ICTs, a team is usually composed of a Lead Counsel, one or more co-Counsel, a legal officer and a case manager. Depending on the ICT concerned, additional positions can be assigned to the team, such as an investigator, an interpreter, or an evidence analyst.

Depending on the specific circumstances of the case, additional resources may be sought by Lead Counsel, if necessary and reasonable, by filing a reasoned request

with the appropriate organ (based for instance on the complexity of the case, the scale of the trial and/or the stage of the proceedings).

Counsel generally has a certain amount of flexibility in the management and allocation of funds available to him in order to pay the team and cover the expenses incurred during investigations.

## **B. Staff responsible for investigations**

Although Counsel, co-Counsel, the legal officer and the case manager can conduct investigations, Counsel should recruit one or more persons exclusively in charge of carrying out Defence investigations.

### *i. Presence in the field*

The permanent, or at least regular, presence of one or more persons working in the field, namely at the place where investigations are to be conducted, is highly recommended. This presence ensures that a person is available at all times to verify information or collect material evidence and that a continuous effort is being applied in the field for Defence investigations. For example, if Counsel notes during cross-examination that additional information is required in order to properly develop a line of questioning, he can quickly contact the investigator or local resource person and have transmitted the information sought.

Depending on the case, more than one geographical area may be of interest. This would require having one person in each area concerned or moving one person from one area to another.

### *ii. Professional investigator v. local resource person*

Conducting an international criminal investigation is a particularly arduous task requiring a high level of expertise.

In theory, the Defence should therefore employ the services of an experienced professional in criminal investigations, such as a police officer or a private detective, to conduct its investigations. This profile has many advantages for Counsel: a professional investigator usually has the necessary skills and experience to carry out complex investigations, can handle a large caseload and pays attention to detail, has an expert knowledge of interview techniques and of drafting documents, and understands and respects the procedures and professional ethics relating to investigations.

The recruitment of a professional investigator is an advantage in that he is independent vis-à-vis the client. The assignment of a person to the post of investigator has to conform to strict conditions regarding professional experience, according to the ICT concerned. At the ICC, an investigator must have ten years' experience.

Nevertheless, despite his skills and vast experience, the professional investigator can present significant lacunae with regard to his knowledge of the country (e.g. history, geography, culture, and traditions), the relevant events of the case and the working language. There is also a risk that he may not be as fully accepted by the client or the community to which the client belongs.

Therefore, ideally a professional investigator who is completely independent of the client yet speaks the same language, shares the same culture and is familiar with the events in question, should be recruited.

In practice, this is relatively rare.

A second ideal option would be to combine, within the team, the assistance of a professional investigator with experience in criminal investigations with that of a local resource person who has an excellent understanding of the field, the language and the traditions of the country or region concerned, or even of the facts which are the subject of the investigation in question. This combination would use the specific skills of each team member and so make the most of the investigation.

In practice, Defence Counsel is often obliged to make a choice between recruiting a professional investigator or a local resource person for budgetary reasons.

Due to the relatively high salaries of professional investigators (or other experienced professionals), Counsel often prefers to forgo the services of a professional investigator and use a local resource person whose salary will be less and who has the essential

**1 2 3** According to Counsel who have practised before the ICTs, a good local resource person must have the following qualities

- ❖ A strong sense of integrity
- ❖ An ability to handle large caseloads
- ❖ A sense of organization and attention to detail.
- ❖ Initiative and common sense;
- ❖ A sense of loyalty towards the Defence team
- ❖ The client's trust and that of the community to which they belong;
- ❖ An in-depth knowledge of the terrain, the facts, the culture, the language and the local political situation;
- ❖ Experience in investigations, (for example, as a journalist, a police officer and so forth);
- ❖ Awareness concerning witness protection ; and
- ❖ Interpersonal qualities (empathy, listening skills, patience, open mindedness).

advantage of knowing the field, enabling him to quickly identify any significant investigative leads.

If, in the absence of a better option, this choice appears sensible, Counsel must however be vigilant at the time of selecting the local resource person. If it is the accused himself who suggests the local resource person and that person comes from their social circle of acquaintances, Counsel must be careful to check the independence of the local resource person vis-à-vis the client, the quality and reliability of the information collected, as well as his integrity so as to ensure that there can be no corrupt influence of witnesses.

Ultimately, it is for Counsel to determine, according to the specific circumstances of the case and the available budget, if it is preferable to recruit an investigator and/or a local resource person.

Irrespective of his choice, several criteria must be taken into consideration:

- The investigator or local resource person must be familiar with the facts of the case or, at a minimum, be able to rapidly acquire an understanding of it by virtue of their experience and competence;
- The investigator or local resource person must appear neutral towards the various actors involved in the events that they will meet during the course of the investigations;
- The investigator or local resource person must speak the language or languages of the environment in which he will be carrying out the investigations;
- The investigator or local resource person must be trained in conducting investigations and should be informed of the professional obligations incumbent on both Defence Counsel and himself.

Once recruited, the investigator and/or local resource person will work under the direct supervision of Counsel who will be responsible for all actions undertaken. Counsel shall ensure that the investigator and/or local resource person receives clear instructions on the investigative actions to be carried out, the timeframe within which to do so and the expected result. Counsel should also ensure that ethical standards are respected by the investigator and/or local resource person throughout the course of his work.

Counsel should be familiar with and observe the directives and rules of the ICT governing the work of investigators.

### *iii. Other professionals*

#### **- Interpreters**

Depending on the case, the interpretation needs of Counsel may vary. If the budget allocated to Counsel so permits – which is rarely the case – it is advisable to recruit an interpreter within the team with an expert knowledge of the local languages which will enable Counsel

- to investigate in the sites where the facts took place;
- to communicate with witnesses; or
- to communicate with the client if he does not speak the language(s) of Counsel.

The recruitment of an interpreter as a team member guarantees his availability and ensures the continuity and confidentiality of his work. If the allocated budget does not permit such recruitment, Counsel will have to evaluate other possibilities available.

Firstly, Counsel can recruit within the team an investigator or local resource person who is fluent in one or more of the local languages spoken by the potential witnesses or information sources. The presence of an investigator or local resource person who speaks at least one of the local languages is a considerable advantage and an appropriate solution limiting expenses incurred by hiring an interpreter. In this way, the team will have direct contact, without any intermediaries, with those persons. However, Counsel should bear in mind that if the investigator or local resource person is acting as an interpreter, and were the Prosecution to be informed of this fact it could, alleging the interpreter's lack of objectivity, challenge the reliability of the interpreted testimony. This is particularly important if written statements are to be collected, as the interpreter's name will be mentioned.

Secondly, Counsel could evaluate whether it is appropriate to make use of the language services of the Registry of the ICT or request the service of an external interpreter. Employing the services of the Registry or an external interpreter may be necessary if the interpreter within the Defence team, the local resource person or the investigator is not fluent in the witness's language or dialect. If Counsel were to request a Registry interpreter or an independent one, he must ensure that the interpreter will safeguard the confidentiality of the Defence investigations.

In any event, Counsel should ensure that the interpreter does not come from an ethnic group or community which, because of contextual circumstances, could lead

to the potential witnesses being disinclined to talk. The interpreter should receive clear instructions from Counsel regarding his role and professional obligations. He should also be trained and supervised by Counsel if it is expected that he will participate in the team's interview of a vulnerable witness (See Chapter 10).

Lastly, in any event, the person interpreting will have to sign a document, confirming especially that he has interpreted the words of the witness as accurately as possible and in conformity with his confidentiality obligations.

### **- Experts**

Some particular cases will require inclusion, within the team, of professionals with specific expert knowledge (military or telecommunications experts, for example). While this possibility is provided for in the legal aid system of the STL, it does not exist at the ICC, where Counsel does not have any budget allowing for the recruitment of an expert. In this context, in case he really needs expertise assistance, Counsel should request additional funds from the Legal Aid Unit to recruit an expert.

It might also be useful for the Defence to use the services of a psychologist during an interview with a vulnerable person (See Chapter 10).

### ***iv. Intermediaries***

An intermediary is a person (or organization) that assists, usually on an ad-hoc basis, with the collection of information or evidence, or facilitates contacts or acts as a link between the Defence and witnesses or sources of information. These persons usually carry out these tasks on a voluntary basis, but can also be remunerated for their services.

For various reasons, Counsel may wish to call on intermediaries to perform certain investigative tasks, such as establishing contact with a witness, seeking some specific information and collecting evidence.

Counsel shall be entirely responsible for actions performed by that person on behalf of the Defence, even if that person is not an official member of the Defence team.

Therefore, Counsel must exercise the utmost caution with regard to the selection of this person, the formalization of the relationship with that person, the instructions he will receive, the information transmitted to him, the supervision of his work and with the evidence that will be obtained with the aid of this person. It goes without saying that Counsel should thoroughly examine the evidence collected in this way so as to avoid any complications.

Lastly, Counsel should be familiar with and observe the directives and regulations of the ICT which govern any work performed by intermediaries.

## 2. MATERIAL AND FINANCIAL RESOURCES

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### A. Investigation budget

Depending on the ICT before which he practises, Counsel will have to ensure a rigorous management of a limited investigation budget. For example, before the ICC, regardless of the nature and scope of the charges against the suspect or accused, Counsel has a fixed budget available for the entire duration of the case. The amount allocated has to cover all the expenses of the investigation, including the fees of the investigator and/or local resource person, the costs for transporting team members over thousands of kilometres, and the costs incurred by team members during the investigative mission.

It is for Counsel to submit requests for additional funds to finance investigations which have to be conducted from the pre-trial phase to the end of the case. It is important to note that investigations might also continue up to the appeal or even the reparation stage. The complexity and scale of the case in question and the pace of the trial imposed by the Judges can be taken into consideration during the examination of these requests. In fact, the more complex and numerous the facts are, the greater the scope of the investigations. Likewise, the faster the pace of the proceedings, the greater the need for human resources in order to cover both the investigations relating to the evidence presented by the Prosecution, as well as those investigations whose purpose is to enable the Defence to present its own evidence.

Before the STL, the Defence Office has adopted a more flexible approach. At any time during the proceedings, Counsel may submit a travel request, if required and reasonable, for one or more team members for the purpose of the investigation, particularly in order to become familiar with the crime scenes, meet potential witnesses and experts and collect information, documents or other evidence. Requests presented in this regard are examined on a case-by-case basis and their approval is subject to the budgetary constraints of the legal aid regime. That approach is similar to the prevailing procedures at the ICTR and the ICTY.

## **B. Other resources**

To enable Defence teams to conduct effective and efficient investigations, ICTs have to ultimately provide them with logistical support for investigative planning and security. Depending on the ICT concerned, that support will be more or less efficient and can sometimes prove to be more of a hindrance than a help.

If the prevailing legal aid system so permits, Counsel may apply for material resources, such as portable computers and printers, secure USB sticks, cameras, microphones and suchlike.

## **3. TRAINING**

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Counsel must have adequate resources so that team members carrying out investigations can follow professional training courses designed to supplement their professional skills in terms of investigation, regarding practical, legal or ethical aspects, if so required. Although not necessarily the case before all the ICTs, a specific budget should be allocated to Counsel for that purpose.

Counsel must also be realistic and aware of his own limitations, and follow any necessary training so as to be able to successfully conduct Defence investigations in a professional, diligent and efficient manner, despite the lack of resources and the difficult conditions under which the investigations are conducted.



# ANNEX



## BUDGET

**Country:**

**Mission reference:**

**Participants:**

**From:** / / **to** / /

**Currency:**

	Expenses	Total
HOUSING	Accommodation for the team	
	Place for interviewing the witnesses	
	Meals for the team	
	Other	
TRANSPORTATION	Flight tickets	
	Public transportation and taxi	
	Car rental	
	Visas	
	Airport taxes	
	Other	
EQUIPMENT	Recording material	
	Sealed boxes, gloves, etc.	
	Telephone (SIM card, roaming costs, etc.)	
	Working supplies (paper, copies, etc.)	
	Other	
OTHER	Reimbursement of incurred costs by witness (meals, transport, etc.)	
	Reimbursement of incurred costs by local resource person	
	Other	
	Total expenses	

## NOTES

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# PREPARATION PRIOR TO DEPARTURE



## PREPARATION PRIOR TO DEPARTURE

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A successful investigation essentially depends on good mission preparation. The limited time and resources usually allocated to Counsel to conduct their investigations requires effective preparation, involving all Defence team members.

At the preparation stage, Counsel should take several steps aimed at ensuring the success of the mission. These steps include: (1) assessing the security situation in the field, (2) planning the mission, (3) preserving the confidentiality of the mission, (4) organizing logistics for the mission, (5) preparing witness interviews and (6) gathering the required equipment and materials.

### 1. SECURITY IN THE FIELD

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#### A. Security and risk assessment

The primary concern of Counsel should be the security of his Defence team and everyone it interacts with while on mission.

Before deciding on whether or not an investigation mission should take place in a particular country or area, Counsel should conduct a comprehensive risk assessment, taking into consideration a wide range of factors as explained in detail in Chapter 6.

Counsel should also ensure that the investigation team does not compromise the information it collects or carries in the field, as it could enhance the risk of security issues.

After having conducted a comprehensive analysis of the security situation and identified and assessed its specific risks (if any), Counsel will have to decide whether or not the mission should be conducted and if so, what kind of security precautions should be taken.

#### B. Security precautions

Counsel should take the appropriate security precautions, in order to guarantee his security, his team members' security and the security of the witnesses.

As mentioned in Chapter 6, security precautions can include a wide range of measures, such as choosing safe accommodation during the mission, arranging safe trans-

portation between different locations during the mission, the choice of a secure and discrete location where witness interviews are to be conducted, etc.

Counsel should always keep in mind the necessity to preserve the confidentiality of the mission, which includes the information gathered and the material used during the mission.

With regard to the security of witnesses, Counsel should meet with the Victims and Witnesses Unit of the court to discuss the range of protective measures available for Defence witnesses, as well as Counsel's duties and obligations in that regard. Counsel should also be aware of any modalities applicable to the referral to the Unit of the case of a witness who is facing security issues, as this question may arise during (or after) the mission. Chapter 7 is specifically devoted to this issue.

## 2. MISSION PLANNING

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### A. Assembling an investigation team

Counsel is responsible for choosing, from his staff, those who will participate in the mission, taking into consideration various factors such as the age, gender and language spoken by the witness, the location and duration of the mission, and the required technical skills. For example, if the witness is a female victim of sexual violence, including a woman with experience in gender-based crimes in the team is recommended.

Once the team is formed, Counsel can define precisely the role, tasks and responsibilities of each participant according to the mission plan. Counsel should ensure that each team member is properly briefed before the mission and clearly understands the importance of confidentiality and security while in the field.

Counsel should also designate, among the team members remaining at the seat of the Court, a person who will serve as the focal contact point for the investigation team. This person should be kept informed daily of mission developments and should be able to contact the relevant authorities or the relevant court should any issue arise during the mission. The focal point should also have a copy of the passport, visas or any relevant travel documents of each member of the investigation team.

## **B. Mission planning and scheduling**

The preparation of a comprehensive and detailed mission plan allows Counsel and members of his team to properly define the goals of the mission, sites to visit, the individuals to be met and the evidence to be collected.

For organizational purposes, the investigator or the local resource person (or the team member in charge of organizing the interviews with the witnesses) should prepare a schedule for all the activities to be performed during the field mission, including information such as the time, location and duration of the activity.

This schedule should remain strictly confidential and sufficiently protected to guarantee the security of witnesses and the confidentiality of the Defence's mission. For example, if possible, the schedule should be encrypted and protected by a password and witnesses referred to therein should be assigned pseudonyms.

This schedule should be consulted regularly by all the members of the investigation team and be updated/modified according to the development of the mission.

The focal point at the seat of the Court should always keep a copy of the schedule in order to know precisely where all the members of the investigation team are at any given point.

The schedule should be realistic and flexible enough to allow the team to adapt to any changes, setbacks or other unforeseen events that can occur at any point during the mission.

If the investigation team needs to travel between different locations, the schedule should always ensure that sufficient time is allowed between appointments, bearing in mind that transportation is susceptible to several hazards (e.g. road conditions and traffic jams).

## **3. MISSION CONFIDENTIALITY**

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As a matter of principle, Defence investigations are strictly confidential. Preserving the confidentiality of all investigations must be a priority for the team. Counsel should remind all team members of this obligation before departure.

As such, Counsel should take appropriate measures to ensure the confidentiality of communication between team members while on mission. (See Chapter 6). When possible, Counsel and team members should not travel with physical documents but use electronic encrypted copies to be saved in a secure place, when original

documents are not needed. (See Chapter 6). Defence team members should also assign pseudonyms to potential Defence witnesses to keep their identities confidential during the entirety of the investigation as explained in Chapter 7.

## 4. MISSION LOGISTICS

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### A. Prior authorization from the Defence Office or the Registry

When the Defence is funded by the Legal Aid Programme (if the accused is indigent), Counsel should request and obtain prior authorization from the relevant Office or Section to conduct the mission.

Under the legal aid regime most, if not all costs related to the mission will be covered by the ICT. Flights tickets, hotel, local transportation and meals will usually be covered by a *per diem* allowance for each day of the mission. Counsel and members of the investigation team will be given this *per diem* allowance (DSA) to cover their expenses themselves.

In order to obtain the necessary budget, Counsel will submit a travel request to the Section or Office, providing detailed information about the mission including its location, the number of participants, the number of days required, the number of witnesses to be met and a general explanation of the purpose of the mission. Counsel should balance the transparency of his request with his duty to preserve the confidentiality of the Defence's investigations.

Because the Legal Aid budget is often limited, it is advisable for Counsel to informally discuss with the Legal Aid Unit about the available budget for missions before submitting any travel request. This will allow Counsel to adapt his request (including in terms of number of persons participating or days required) to the funds available and ensure that the request will be approved.

### B. Prior authorizations from State or International Organizations

When required to do so by national authorities to carry out certain investigative steps, Counsel must seek authorizations in advance of departure.

Prior authorisations from governments or international organizations can sometimes be necessary to meet a witness, or to obtain certain documents. For example, waiver of immunities could be required for international organization officials, or an authorization to visit the witness should be obtained from the judicial authorities and,



if applicable, from a witness's lawyer when he/she is detained. Similarly, prior authorizations from the relevant national government can be required to allow Counsel to consult and obtain a copy of official documents in the field such as police, civil or judicial records, or to access certain restricted areas. It is essential for Counsel to request this kind of authorization in advance and, once obtained, to carry it during the entirety of the mission to avoid any problems.

**//** There is a permanent situation of risk for Defence investigators. All the same, in order to question witnesses I have travelled to more than 20 countries on "tourist" visas, including to the USA, without authorisation [...]. In my view, there will be no improvement until there is a political judicial decision to give Defence investigators proper status, giving them powers to investigate as well as protection"

***A Defence Investigator***

Necessary authorizations could also include requests for issuance of badges to access the field office of the Court or movement permits.

### **C. Travel arrangements**

Counsel should verify the conditions of entry in the relevant country, for all the mission participants and seek assistance, where necessary, from the Defence Office or section of the institution in obtaining this authorization.

Even when visas are not required, some countries can request a prior travel entry authorisation (such as ESTA for the US) or require passports to be still valid for a certain period after the trip. Counsel should verify these requirements in advance by consulting the website of the Ministry of Foreign Affairs or by visiting the embassy of the country in his state of residence.

Counsel should also ensure, when possible, that flights, taxis (or rental cars) and accommodation are booked sufficiently in advance.

As indicated above and in Chapter 6, safety comes first. Counsel should research and choose safe options when booking accommodation and obtaining means of transport (safe neighbourhoods, well-known and reliable taxi companies, etc.).

The necessary bookings can be made by the local resource person or the travel section according to Counsel's instruction. Counsel should also consider fall-back solutions.

## **5. PREPARATION OF WITNESS INTERVIEWS**

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Chapter 8 provides more information on conducting interviews with witnesses.

### **A. Contact with potential witnesses**

Once the mission plan is completed, the investigator or the local resource person should prepare the mission by identifying, locating and contacting the potential witnesses and determining roughly the content and duration of their interviews.

If Counsel finds it appropriate, the investigator or local resource person may conduct a preliminary interview with the witness to assess the importance of the testimony and the type of information that will be provided. In order to do so, the investigator or local resource person could complete a questionnaire with the witness information, for Counsel's perusal, recording for instance any family links between the witness and other persons of interest (witnesses, the accused or any person relevant to the case), the status of the witness (eye witness, victim, potential suspect), his/her age, his/her health status, his/her criminal record. The questionnaire could also briefly describe the evidence that is likely to be provided. This information should enable Counsel to anticipate the subjects on which the potential witness could testify, and prepare the interview as described in Chapter 8.

When setting a time for the interview with a witness, Counsel should ensure that the witness is made aware of the likely duration of the interview and that necessary arrangements are being made (eg. transportation and an explanation for the witness's absence).

### **B. Location of witness interviews**

Counsel should choose and book in advance, with the assistance of the investigator and or local resource person, the location where interviews will be conducted.

In choosing an interview location, Counsel should be mindful of security and confidentiality considerations. Counsel should avoid meeting the witness too close to his/her residence (exposing him/her to being identified) or too far (requiring him/her to travel long distances and creating additional costs and risks for the witness).

## **6. REQUIRED EQUIPMENT**

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### **A. Financial consideration during the mission**

Counsel should verify, before departure, which mode of payment can be used in the destination country.

Counsel should ensure to have the correct currency before departing or to have sufficient cash in an easily and quickly exchangeable currency once on site (usually US Dollars) as ATMs are not always available or do not function properly in the relevant country.

Upon arrival at the airport, it is advised to change money and request small bills or coins, as this will be required to pay minor expenses (taxis, meals) or refund witness-related expenses (e.g. transportation or beverages).

## **B. Equipment**

A defence team should prepare an investigation kit which should be carried to the field for each mission. Members of the investigation team should familiarize themselves with all items included in the kit, and any broken or missing items should be replaced as soon as possible.

The kit should include:

- Recording equipment: digital voice recorders, microphone, tripod, camera, video camera and scanner;
- Communication equipment: mobile phone and sim cards;
- Location and measuring equipment: Global Positioning System (GPS) device, ruler and tape measure;
- Note-taking equipment: laptop, portable printer, paper and pencils;
- Digital storage equipment: USB flash drive and memory cards; and
- Material storage equipment: boxes, bags and envelopes to protect and seal documents.

The investigation team should not forget to bring chargers, batteries and spares in the event equipment malfunctions.

It could be useful to identify prior to the mission public secured Wi-Fi and printers (library, hotels) accessible during the mission, which could be used, where necessary, although this practice is not recommended for obvious confidentiality and security reasons. (See Chapter 6).

# INVESTIGATIVE PLAN



## INVESTIGATIVE PLAN

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From the onset of the preliminary phase of the case, the Defence team should prepare an investigative plan describing the issues being investigated, the strategic investigatory objectives, the evidence required to achieve those objectives, the possible sources of information, and how the investigations should be conducted.

### 1. WHAT IS AN INVESTIGATIVE PLAN?

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The investigative plan is a general guide used for the efficient and coordinated conduct of the investigations. Each investigative plan is tailored to the Defence's strategy for a specific case. It sets out the investigative objectives, as well as the methods and steps towards meeting these objectives. The investigative plan may also be used as a case management tool when it defines the steps required to prepare the Defence, the corresponding tasks, and how each of these tasks are to be allocated in the team. The investigative plan should be designed to assist the team and not burden it with extra work. It must be flexible and evolve as the investigations unfold.

### 2. WHY IS AN INVESTIGATIVE PLAN IMPORTANT?

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The investigative plan provides for a common understanding of the goals of the investigation and how they will be achieved. It is a reference document to be used by all the members of the Defence team. Keeping the investigative plan constantly updated enables team members to keep themselves abreast of developments in the investigations, of the work yet to be done and of the remaining available resources.

### 3. WHEN SHOULD THE INVESTIGATIVE PLAN BE DRAWN UP?

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The investigative plan is generally drawn up at the end of a preliminary analysis of the case, after developing a Defence theory and strategy based on a summary and an analysis of the Prosecution case, including all allegations against the accused and the evidence disclosed by the Prosecution. From that preliminary analysis, Counsel should be able to identify, with the assistance of the client, persons to interview, material to collect and places to visit.

This preliminary assessment of the evidence disclosed by the Prosecution, in consultation with the client, will assist Counsel to identify, for each allegation against the accused:

- Facts that have been found in the evidence disclosed;
- Material that has already been collected by the Prosecution;
- Material that needs to be located and collected by the Defence;
- Witnesses that have provided a statement to the Prosecution;
- Witnesses that have to be located and interviewed by the Defence;
- Persons of interest that the Defence should meet; and,
- Places of interest that the Defence should visit.

As the investigations progress, the investigative plan should be reviewed to reflect the results of the investigative missions, the evidence collected, and, where appropriate, to adjust the strategic goals.

#### 4. WHO SHOULD DESIGN THE INVESTIGATIVE PLAN?

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Ideally, the preparation of the investigative plan should involve each member of the Defence team to ensure that all perspectives are taken into account, to take full advantage of the legal and cultural backgrounds of each individual, and to agree on a common *modus operandi*.

The investigative plan may also be prepared by one member of the team, generally the investigator, under the supervision of the Lead Counsel. In such a case, the investigative plan should then be circulated to all members of the team for them to provide their comments and observations prior to the final version being approved by the Lead Counsel of the team.

Under certain circumstances, Counsel may find it more prudent to inform only a part of the team – such as the permanent members of the team or the professional investigator(s) – about the investigative plan in order to preserve the secrecy of the Defence strategy.

#### 5. WHAT MUST BE INCLUDED IN THE INVESTIGATIVE PLAN?

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Although the exact content of an investigative plan will depend on the circumstances of each case, the investigative plan should generally include the following elements:

### **A. General context of the case**

This section includes a description of the broader context of the charges against the suspect or accused, that is, a description of the circumstances in which the alleged offences occurred (historical, geographical, political and social context).

This may include information on the origins of the armed conflict, a description of the different armed groups active in the conflict, etc.

### **B. Allegations and evidence against the accused**

This section includes the exact description of the charges against the accused as well as the evidence adduced by the Prosecution in support of the charges.

The factual issues of the case should be clearly stated. Otherwise, the investigations will lack the required focus to effectively identify and collect the evidence necessary to put the Defence case.

### **C. Applicable law and procedure**

The definition or interpretation of the required *actus reus* or *mens rea* for the charged crimes may be contentious. This in turn will have an impact on the facts to be established and on the supporting evidence to be collected.

The investigative plan should therefore include a list of the main legal issues (for example, the elements of the crime) and the corresponding factual and evidential gaps in the Prosecution case.

This will help the investigators use these uncertainties when collecting evidence.

### **D. Defence theory and strategy**

This section states the client's position on the allegations of the Prosecutor and the evidence to be presented in support of them, the Defence theory and its strategy. If the Defence intends to rely on an alibi, or any other specific defence, or if it intends raising a ground for excluding criminal responsibility, it should be specified in this section.

It should also articulate the position of the Defence regarding each count of indictment and the position of the Defence with respect to the Prosecution evidence, in particular the Prosecution witnesses.

### **E. Approach chosen by the Counsel**

This section should explain how the Defence intends to conduct its investigations, including the strategy, the steps to follow and the method to be applied.

### **F. Facts the Defence wishes to investigate**

This includes a description of the evidence to be gathered, such as persons to be met by the Defence, documents and other evidence (material, electronic, etc.) to be gathered by the Defence.

This section may be organized, for example, by evidence type, location(s) or count(s).

### **G. Problems to be anticipated**

This section aims at identifying the main problems or obstacles that could be encountered by members of the Defence team in their investigations, and practical solutions to these problems. The following subsections may be included:

- i. Security of the Defence team;
- ii. Privileges and immunities of the Defence team;
- iii. Security of witnesses;
- iv. Possibility of certain evidence being destroyed or falsified;
- v. Problems with State cooperation;
- vi. Specific difficulties with witnesses (for example, vulnerability, detained witness status, credibility or reliability, collusion between witnesses, the fact that a witness refuses to meet with the Defence, etc.); and
- vii. Specific difficulties relating to material or documentary evidence (for example, difficulties in proving authenticity of an item, the need to prepare certified copies, difficulties in accessing evidence, etc.).

### **H. Main ethical issues that could arise during the course of the investigations**

This section should state the obligations of the team while investigating. In particular, any decision or order from the Chamber that could affect the Defence's investigations should be specified.



## **I. Main phases of the investigation and overall timeline**

This section should include the main steps of the investigations (e.g. investigations into incriminating evidence and investigations to find exculpatory evidence), deadlines for disclosure, any factor that could impact on the duration of investigations, and important dates.

It must also set realistic targets and deadlines.

As the investigations are completed, the objectives and timelines may be reviewed by Counsel.

## **J. Resources**

The resources necessary to complete each investigative task should be identified and assessed in detail as early as possible, including resources such as an expert, consultant, laboratory analysis or other.

An estimated budget, including cost of transportation, accommodation, food and visas should be prepared.

Regarding human resources, questions to be determined include: Who will participate in the investigations? How many team members will participate in each mission? Is there a preferred profile (gender, age, etc.)? Should an investigator or a resource person be included? Will the services of an interpreter be needed? Would a driver be required, etc.?

# ANNEX



# INVESTIGATION PLAN

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## 1. SUBJECT OF THE INVESTIGATION

- A. Context of the case
- B. Summary of the charges and incriminatory evidence
- C. Main legal questions raised, including material facts to be proved by the Prosecutor
- D. Summary of the Defence's theory and strategy

## 2. APPROACH

- A. Strategy
- B. Steps of the investigation
- C. Method selected

## 3. EVIDENCE SOUGHT

- A. Witnesses
- B. Documentary evidence
- C. On-site visit
- D. Open source evidence

## 4. ANTICIPATED DIFFICULTIES

- A. Safety of the Defence team
- B. Privileges and immunities of the Defence team
- C. Safety and security of the witnesses
- D. Possibility that evidence might be forged or destroyed
- E. State cooperation problems
- F. Specific difficulties related to witnesses
- G. Specific difficulties related to material or documentary evidence

## 5. NECESSARY RESOURCES

- A. Human resources
- B. Material resources
- C. Financial resources

## 6. ETHICS AND DEONTOLOGY

## 7. PHASES AND TIMELINE

# BEST SECURITY PRACTICE



## BEST SECURITY PRACTICE

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Beyond the specific issue of witness and victims protection (dealt with in Chapter 7), Defence team members should, more generally, be aware of good security practice regarding not only their own physical safety and psychological well-being but also the security of information received and collected. It should also be borne in mind that privileges and immunities are a corollary to the issue of security of Counsel and his team members. Both questions will therefore be addressed in this Chapter.

### 1. PHYSICAL SECURITY OF DEFENCE TEAM MEMBERS

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Experience has shown that Defence team members are often the subject of serious threats from various actors during their investigations in the field. It is therefore essential that, before departing on mission, they are warned of the difficulties they might encounter once in the field.

Counsel must ensure that the necessary security measures are in place for the effective functioning of the investigative mission.

#### **A. Conditions for undertaking the investigative mission**

The first decision Counsel should make regarding security, after taking into consideration the security situation and the available security measures, is whether or not it is reasonable to conduct the investigative mission.

##### *i. Assessment of the security situation*

Counsel should make a thorough and precise assessment of the security situation of the area covered by the investigative mission.

The assessment can be undertaken jointly with the security office (or section) of the ICT which might have specific information regarding the security situation of the country or region concerned. The Security and Safety Section is also likely to have a reference person *in situ* who can provide a concise, accurate and current overview of the security situation. That same person could also have links with law enforcement agencies (local police officers, government security agents, United Nations peace-keeping missions and so forth). Valuable information can also be obtained from States, through their embassies, in the country where the mission will take place.

Counsel should also consult their client, those team members residing in the country or area concerned and the local resource persons or investigators from that region. These individuals are often best placed to provide Counsel with accurate information tailored to the specifics of the mission and the work of the Defence.

Information can also be obtained from colleagues from the region or from those who have already carried out investigations in that area.

The website of the Ministry for Foreign Affairs (or equivalent) of Counsel's national State can also be consulted to obtain an additional assessment of the security situation and the risks involved. Counsel can also read open access documents, including press articles or NGO reports relating to the security situation in the area where the mission will take place.

After conducting a full analysis of the security situation and of the specific risks (if any) identified and evaluated, Counsel will have to decide whether or not the mission should be undertaken and, if so, what measures should be taken so as to ensure the security of the team members and persons with whom they will interact.

#### *ii. Decision on conducting the mission*

By determining whether or not it is reasonable to carry out the mission under the circumstances, Counsel should take into consideration the importance of the evidence that will be sought during the mission and the nature and degree of the risks incurred by the investigation team.

There are two options for consideration:

#### **- The security situation is such that the mission can proceed**

If it is determined that the security situation is such that the mission can go ahead, Counsel should ensure that members of his team act in accordance with the measures implemented and with the security guidelines issued by the Registry of the ICT.

Counsel should also bear in mind that the situation could worsen at any time. Therefore, even where conditions allow the investigative mission to go ahead, it is essential that Counsel and the relevant services of the ICT establish a contingency plan to be transmitted to the team members participating in the investigation.

**- The security situation and/or the Registry's proposed measures are such that they prevent the mission proceeding**

In the most extreme cases, Counsel may decide to postpone, or even cancel, the investigative mission on the territory of the relevant State.

Alternatively, Counsel could examine the possibility of conducting their investigations from a secure area or neighbouring State. That situation, which is far from ideal, would nevertheless allow Counsel to carry out, on a temporary basis, certain investigations, such as witness interviews when witnesses are able to travel to the secure area.

However, if the security situation is such that it prevents the Defence from carrying out effective investigations, Counsel should inform the relevant Chamber of this fact and, if circumstances so require, request the temporary suspension of the proceedings, or even a stay of proceedings, on the basis of the violation of the fundamental right of the accused to prepare his or her defence.

***iii. Measures to ensure the physical security of the team***

Depending on the result of their analysis of the security situation, Counsel should ensure that the relevant sections of the Registry of the ICT concerned implement the appropriate measures.

For their part, those sections will undertake an analysis of the security situation and establish a list of measures to be implemented in order to ensure the security of team members participating in the mission. These measures could include, for example:

- Limited travel to and transfers within secure areas only;
- The use of secure means of transport (e.g. armoured vehicles);
- An armed escort;
- The wearing of protective equipment (e.g. bullet-proof vests, helmets and suchlike); or
- The use of means of communication such as radio transmitters to ensure continuous communication between team members and the security team *in situ*.

If Counsel consider that the measures proposed are not sufficient to ensure the security of the team or, on the contrary, hinder the smooth functioning of the investigation, changes to the measures can be discussed with the relevant section of the ICT.

If despite Counsel's requests, the sections refuse to relax the proposed security measures, Counsel could request to put their own signatures to a document which would release the institution from any responsibility with regard to the security of the Defence team. Such document will have significant consequences for the entire investigative team, and therefore Counsel should discuss the matter with the team and obtain their agreement.

// During one mission, we used the services of a local driver to take us to the locations that were relevant for our investigations and to transport our witnesses from their homes to the place reserved for the interviews. That person was arrested, detained and beaten by the national police to force him to reveal information relating to our investigations."

***A Defence Counsel***

## **B. Good security practice**

Given that it is impossible to anticipate every potential danger, it is important to assume a mode of conduct and adopt practices so as to reduce risks as far as possible.

Even in cases where the mission takes place in a State which does not a priori present any difficulty of that type, Defence team members must always conduct themselves in a manner that will minimize the risks pertaining to their work.

The Defence team should adhere to the following principles at all times:

### ***i. Discretion***

Generally, it is wise to keep a low profile and to show respect for the culture and customs of the host country so as not to attract attention.

The Defence team should avoid drawing attention to themselves during the mission. Unless necessary, the team should avoid disclosing the purpose of their trip, particularly in hotels and shops. If necessary, team members can provide a cover story, namely a story that can be used to protect themselves and the people with whom they are in contact, i.e. pretending to be a tourist or a student. This cover story should not, under any circumstances, be employed with a witness, as Counsel and



**The following Guides provide relevant information**

- ❖ Digital Security and Privacy for Human Rights Defenders, FrontLine
- ❖ Safety Guide for Journalists, Reporters Without Borders



members of their team are under an obligation to present themselves under their true identity and give their job title.

To avoid being robbed, team members should not openly draw attention to any money or computer equipment they are travelling with. The theft of computer equipment, in addition to hindering the team's work, might compromise confidential information stored on the computer.

Defence team members should avoid wearing badges or any other means of identification outside the Court premises.

*ii. Exercising caution*

**- Accommodation**

Counsel should choose secure accommodation providing facilities that enable the investigative team to work without interference.

- Regional office

A certain number of ICTs set aside rooms and offices in their regional branches for Defence teams. This option has numerous advantages. It is often less expensive, or even free of charge, and is a secure and practical option. As such, Counsel and their team will have, at all times, direct access to the services provided by the ICT: transport, Internet, electrical power, computer equipment and suchlike.

- Hotels or private accommodation

If this first option is not available, or if Counsel do not consider it appropriate, hotel or private accommodation can also be used. Counsel may also choose from a list of hotels recommended by the ICT.

In any event, it is essential to choose accommodation located within a secure area, which offers at least minimum security guarantees. Although an international hotel with the highest levels of security can offer useful services (including electricity, Internet, etc.) a smaller hotel, on the other hand, can sometimes offer greater discretion.

It is strongly recommended not to leave any confidential documents or computer equipment in the hotel room, including the safe.

The choice of hotel and booking should be made prior to departure, in order to avoid any difficulties once in the field. Transportation between the airport and the hotel should also be organized through the hotel, if necessary.

### - Travelling around

Counsel and his team should be careful when travelling, including by road.

For road travel, Counsel should take into consideration the following recommendations:

- Choose a driver carefully on the basis of his qualifications and discretion;
- Ensure that the vehicle is in good condition; have the necessary spare parts at hand for any repair work resulting from ordinary use; check whether there is a full tank of fuel;
- Study the proposed itinerary and, in particular, obtain information on the areas at risk and on the presence of roadblocks or checkpoints;
- Whenever possible, avoid travelling at night;
- Check the state of the roads on the route to be taken, particularly during the rainy season; and
- Obtain, where required, the necessary laissez-passers.

// During an investigation in Rwanda to obtain documents, the Rwandan authorities sent police officers to my hotel to take back the documents I had obtained. Defence teams must have some immunity during investigations so that the Defence teams may enjoy the same rights as the members of the Prosecution during investigations."

*A Defence Counsel*

### - Transportation of confidential documents

Counsel and Defence team members should, as far as possible, avoid taking confidential documents on mission. If Counsel have to use certain documents during the mission, it is better to make and carry digital copies. These documents, as with any other digital data transported by Counsel and the members of their team, must be encrypted or password protected.

As detailed at the end of this Chapter, Counsel and team members must be in possession of the necessary documents, including any certificates or cards attesting to the privileges and immunities they enjoy by virtue of the applicable texts. While travelling from place to place, team members will be able to exercise their rights, in

particular at airports or checkpoints, to avoid being searched or having their property seized. In any event, they must ensure that the confidential documents or digital information in their possession remain in sight to avoid it being compromised or spywares being installed on the digital equipment.

#### **- Health risks**

With regard to health conditions, it is also important to take precautions prior to departure and during the course of the mission so as to avoid any health-related issues which might disrupt the smooth running of the mission.

Certain precautions to be taken prior to departure are as follows:

- Enquire about the health risks in the country visited and on that basis have the necessary equipment (e.g. a mosquito net for the bed);
- Have a medical check-up;
- Take out an insurance policy, if necessary;
- Update vaccinations and the yellow fever certificate (mandatory in certain countries, including the DRC);
- Have all the necessary medicines available for the duration of the mission, including anti-malarial treatment and, where necessary, obtain a copy of any doctors' prescriptions; and,
- Prepare a first-aid kit to take on mission.

## **2. PSYCHOLOGICAL WELL-BEING OF THE DEFENCE TEAM MEMBERS**

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Counsel must ensure that, prior to departure, those team members going on mission are clearly informed of the fact that the difficult working conditions associated with the mission can result in increased levels of stress.

Being far from home, the isolation, the long working hours, the insecure environment and the distressing testimonies the team members may have to listen to will inevitably make the situation stressful. However, any added stress experienced by team members needs to be kept at an acceptable level.

Counsel should:

- assess the psychological risks relating to the investigative mission;
- if the risks are constant, make any necessary adjustments by changing the working conditions;

- invite team members to consult health professionals where necessary.

Lastly, Counsel could, if possible, put into effect specific best practice to help reduce team members' stress levels when on mission, such as: promoting unity and inclusion among the members of the team; planning time off during lengthy missions; planning reasonable working hours and meal times; reminding team members to maintain professional distance with witnesses and victims.

### 3. INFORMATION SECURITY

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Counsel must keep information received, used, transported and stored as part of their investigations confidential, in accordance with the codes of professional conduct of the various ICTs.

Counsel must be particularly vigilant since the disclosure, even accidental, of any such information could result in significant risk for the team members or for persons with whom they interact, and could constitute a violation of the applicable texts.

#### A. Protection of communications

Counsel must assume that all electronic communications received or transmitted by the Defence team are recorded and stored and may eventually be analysed by third parties. In this context, team members should never use non-protected forms of communication to transmit confidential information. In the event of an emergency, if no other form of communication is available, the traditional means of communication should be used only on a restricted basis.

That being said, team members participating in the investigation will obviously have to communicate with one another, the witnesses or with other team members remaining at the ICTs' headquarters. Certain precautions, particularly encryption (communications that can only be read by the sender or recipient) can be taken to reduce the risks:

##### *i. Emails*

- Use the email system provided by the ICT, if need be, for communication between team members;
- Use a free encrypted email system.

#### *ii. Internet*

- Install a VPN (Virtual Private Network, such as Cloak) which makes any connections on Internet anonymous;
- Use an application that allows the user to browse sites anonymously (e.g. Tor).

#### *iii. Instant messaging*

- Use an encrypted instant messaging system.

#### *iv. Telephone calls*

- Purchase telephones with limited features (not smart phones) and prepaid SIM cards for the most sensitive calls;
- Use a free encrypted Voice over IP (VoIP).

#### *v. Transmission of documents*

- Use secure software such as Cryptshare for the encrypted transfer of confidential documents.

### **B. Protection of computer equipment**

Although it is an essential tool for investigative work, Counsel should also bear in mind that computer equipment can be used to spy on the activities of the Defence team. In particular, webcams, microphones, memory cards, 3G modems and other devices of this kind can be used to listen to and record the conversations of the team.

Responsible use of computer equipment includes:

- Updating the operating system, the browser and antivirus;
- Locking the computer equipment with a reinforced password and encrypting the hard disk;
- Always removing documents or computer equipment from the hotel room or from the vehicle used for travelling from one place to another;
- Keeping electronic equipment on your person at all times so that it cannot be compromised, stolen or damaged; and,
- Deactivating, when not in use, the Wifi, Bluetooth and location services which enable the location of the team members to be identified.

### **C. Use of public services**

Counsel should use the field office of the ICT, as it generally provides guarantees in terms of security and confidentiality. If the office is being used simultaneously by

other organs, such as the Prosecution or Victims, the Defence will need to take all necessary precautions so as to avoid revealing confidential information regarding its investigations.

Although it might at first seem to be the most secure option, it is best not to meet any potential witnesses in the field office of the ICT. The identities of these persons will be registered at the entrance and could be disclosed to third parties or these persons may risk meeting a staff member of the ICT.

If Counsel have to work in a public place, they should choose a place which will enable them to safeguard the confidentiality of their investigations, and they should, in particular, take the following precautions:

- Never discuss confidential matters in public;
- Be wary of cameras installed in public and private places which could film documents and the contents of a computer or telephone;
- Take any necessary steps to ensure that the passwords of team members (on computers, telephones, emails, encryption software programmes, etc.) cannot be intercepted by other means (e.g. cameras, prying eyes); and
- Attach privacy filters to computer screens to avoid prying eyes.

Counsel and members of their team must exercise the utmost caution when using the Internet, computers, printers and photocopiers in publicly accessible locations, such as hotels, libraries or cyber-cafes. There is a serious risk that the documents might be left behind in a printer, due to an oversight or technical issues.

Counsel should bear in mind that search engines and computers' hard disk usually keep a history of websites visited and documents downloaded or opened.

As such, when Counsel or a member of their team needs to access their mailbox from a public computer, they should use "incognito" or "private" browsing. They should ensure that it is indeed disconnected after use and that the password has not been automatically memorized (or deselect the box "remember user's email address" in order not to register the login details). It is also essential to close down all browser windows or other programmes which have been used, clear the browsing data, and delete the download history, cookies and the memory cache. Counsel should also ensure that all downloaded documents have been deleted and that the computer's recycle bin has been emptied.

## D. Use of social networking sites

When team members use social networking sites, confidential information regarding the Defence investigations could be disclosed. For instance, when a team member updates a profile (photograph, geolocation, etc.) it could inadvertently reveal, firstly, that the Defence is on an investigative mission and, secondly, the location of the mission. Counsel should issue clear instructions to their team in this respect.

## 4. PRIVILEGES AND IMMUNITIES OF COUNSEL AND MEMBERS OF THEIR TEAM

Counsel enjoy certain privileges and immunities which enable them to perform their functions without impediment or coercion. They should not hesitate to invoke such privileges and immunities if a difficult situation so requires. To allow Counsel and those assisting them to exercise these privileges and immunities when required, the ICT also provides a certificate or card certifying the privileges and immunities that the holder enjoys under the applicable texts.

Privileges and immunities granted to Counsel differ according to the ICT before which they practise. There are a number of privileges and immunities which are relevant to Defence team members:

- Immunity from personal arrest or detention and from seizure of their personal belongings;
- Inviolability of all papers, documents, in whatever form, and materials relating to the performance of their functions;
- The right to receive and send papers and documents, in whatever form, for the purposes of communications relating to the exercise of their functions;
- Exemption from immigration restrictions and alien registration;
- Exemption from inspection of their personal belongings, unless there are serious grounds for believing that the belongings contain articles the importation or exportation of which is prohibited or controlled by the quarantine regulations of the host State; an inspection in such a case shall be conducted in the presence of the Counsel concerned.

// During an investigation in Rwanda to obtain documents, the Rwandan authorities sent police officers to my hotel to take back the documents I had obtained. Defence teams must have some immunity during investigations so that the Defence teams may enjoy the same rights as the members of the Prosecution during investigations."

*A Defence Counsel*

If investigations are conducted on the territory of a State which is not under any obligation to cooperate, Counsel and members of their team are not protected by those privileges and immunities.

It was established that Counsel practising before the ICTY, the ICTR and the MICT enjoy functional (or work-related) immunity, allowing them to exercise their functions independently.



## NOTES

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# PROTECTING WITNESSES



## PROTECTION OF WITNESSES

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Whether called by the Prosecution or by the Defence, all witnesses testifying before ICTs can potentially be the target of pressure or threats. Contrary to popular belief, witnesses testifying for the Defence may also be exposed to considerable risk.

Consequently, Defence teams regularly interacting with witnesses during an investigation must limit the risks inherent in that interaction. Indeed, the way Counsel deals with witnesses may have a great impact on the witnesses' security or that of their relatives.

In order to limit the potential risks to witnesses, Counsel should request his staff, particularly those working in the field (such as investigators and resource persons), to adopt best practices and safeguard confidentiality at all times. Witnesses should be reminded that they are also responsible of their own safety and should not reveal their interaction with the Defence.

Witness protection should start at a very early stage of the Defence's work and continue both during the case and after its closure.

In particular, Counsel should take special care (1) before initiating contact with witnesses; (2) when interacting with witnesses; and (3), after interacting with them.

**//** I think that the best way to protect your source is to ensure that your movements are not being monitored, to meet sources in safe locations and to never mention sources' names in any communications."

***A Legal Officer***

This chapter provides some general suggestions designed to reduce these risks. They are specifically addressed to Defence team members in the field who deal with witnesses potentially at risk.

Additionally, with the exception of section 3 (b), (c) and (d), this chapter also applies to all those providing information to the Defence (i.e. sources).

### 1. PRELIMINARY STEPS PRIOR TO ANY WITNESS INTERACTION

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Before establishing initial contact with a witness, Counsel should take steps to ensure that their activities will not put the relevant individual at risk.

### **A. Risk assessment for the region in which Defence investigations are to take place**

The first step that Counsel should take to protect Defence witnesses is to familiarize himself with the prevailing political and social context of the region where Defence investigations are to take place.

Before initiating any contact with a witness, Counsel should make a thorough, independent and global risk assessment for witnesses residing in the region of interest. Given its political and social features, the assessment should address potential risks posed by specific persons, groups or entities. Where possible, it should also include an on-site visit, by the Counsel or their investigator, in order to evaluate the exact nature and scale of the risks that witnesses may face.

Whilst it is important to engage with the individuals concerned and to seek their views on tangible security risks, it is essential that the final risk assessment be carried out independently. This is important because an assessment solely based on such concerns as reported by witnesses may not be accurate. Indeed, security concerns may be fabricated in the hope of receiving financial or other benefits. Witnesses may also under or overestimate their own security concerns. (See Chapter 6).

In sum, once completed, this assessment should enable Counsel to:

- have an instructive overview of the prevailing security situation in the region;
- identify possible risks and threats that Defence witnesses residing in the region could face;
- determine the best way to contact and interact with witnesses;
- identify appropriate post-interaction measures; and
- pinpoint risks that are specific to certain categories of witness.

### **B. Operating in close conjunction with the Victims and Witnesses Unit**

Counsel should contact the Victims and Witnesses Unit (VWU) of the Court to discuss what best practices should be used in the field. The VWU can also provide exhaustive information about the witness protection mechanisms currently implemented by the Court. This should be done as early as possible and before any interaction with witnesses. This Unit is both independent and neutral, mandated to provide protective and security measures for witnesses testifying before the Court.

Crucially, before identifying any witness, Defence Counsel must contact the VWU's local representative; this will serve to make an initial contact and identify who the contact person is.

Counsel will also be able to familiarize himself with any existing protocol, with how the Unit operates, as well as the services it can provide, depending on the situation at hand. Having this general information in advance will also help Counsel better inform witnesses about the relevant ICT's general protection framework.

Once Defence witnesses' specific protection issues have been identified, Defence team members can revert back to the VWU (see below). Good relations with the VWU are critical to the smooth implementation of any protection programme.

## **2. BEST PRACTICE WHEN INTERACTING WITH WITNESSES**

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Once the security situation has been discussed and assessed with the Security Section and the VWU, Counsel should establish, according to the specific characteristics of the case, the most appropriate way to interact with witnesses.

As seen in Chapter 17, Counsel is responsible for ensuring the physical safety and psychological well-being of anyone his team interacts with.

As far as possible, Counsel must be very alert and proactive in minimizing security risks to witnesses. Behaviour that could compromise witnesses' security or result in third party disclosure of their identity should be avoided. Counsel should always bear in mind - and remind everyone in the team - that any mistake or thoughtlessness could easily result in dramatic consequences for a witness, including death.

In order to benefit from witnesses' assistance during an investigation, whilst scrupulously avoiding jeopardizing their security, the Defence must instil a "security culture". This involves developing and applying best practices on a day-to-day basis, thereby ensuring the safety of witnesses at all stages of the proceedings.

### **A. Confidentiality of witness related information**

In order to afford better protection to witnesses, their identity must remain confidential. Consequently, holding and protecting such information is of the utmost importance, especially when dealing with protected witnesses.

During investigations, Defence Counsel are responsible for the conduct of team members and others persons under their supervision. (See Chapter 17). As such,

Counsel should take positive steps to safeguard the confidentiality of witness information.

First, Counsel should remind all team members, investigators and intermediaries, if any, of their duty of confidentiality. This is designed to prevent information relating to a witness's identity - whether a Prosecution or a Defence witness - being revealed inadvertently, including information provided by a witness to a third party or a party to the proceedings. For instance, it is worth reminding the team that witnesses should not be informed of the identity of other witnesses nor - and this is of particular importance - the nature and content of their statements.

Investigators will usually sign a statement imposing a duty of confidentiality upon them with the relevant ICT. If not, Counsel should have an investigator sign such an undertaking. In addition, if any protocol or professional code regulating investigators is in force, Counsel should make the investigator aware of them and ensure that he or she complies with their contents.

Similarly, intermediaries should also sign such an undertaking, even when the relevant applicable rules and regulations are silent in that regard.

In general, Counsel should where possible make himself aware of the conduct of any person under his supervision.

Counsel shall also protect the confidentiality of the information he collects, uses, transports and retains in the course of its investigations, in keeping with the applicable Codes of Conduct. Chapters 6 and 17 provide more information about this crucial area.

## **B. Use of pseudonyms**

As soon as someone is identified as a witness, a pseudonym should be assigned to him and used by Counsel and his team.

In order to avoid inadvertent disclosure of the witness's identity, Counsel and his team, whether orally or in writing, should always use that pseudonym, both for internal communication and when liaising with the relevant ICT representative. This rule also applies if Counsel and his team are referring to a Prosecution witness.

If the safety of a non-witness (but someone who is nevertheless providing information to the Defence) could be at risk due to his interaction with the Defence team, a pseudonym can also be assigned to him.

### **C. Communication or contact with witnesses**

Counsel should, on a case-by-case basis, identify for each witness, the best way to establish and maintain contact. Many methods are open to Counsel. These include emails, phone communication, in-person interaction, communication through an investigator, a local resource person, a trusted third party (relative or friend of the witness, with the prior consent of the witness), local authorities (to use with great caution) or through an intermediary (see point D, below).

To identify the optimum means of communication, Counsel should analyse the witness' particular circumstances, his location, his access to a phone or internet and evaluate any potential security concern. The witness should, if possible, be consulted on safety and security matters.

Regardless of the means of communication, Counsel should ensure that any contact remains confidential.

Counsel should assume that phone and email communication is not secure and likely to breach confidentiality. They should therefore avoid discussing the reason for any contact with the witness as well as the content of his statement, if any.

### **D. Use of intermediaries**

International Defence team members tend to attract attention and be observed while in the field. A visit by any foreign Defence team member, particularly to small villages, will not go unnoticed. Consequently, one member of the Defence team, preferably the investigator or the local resource person must be able to blend in with the local population as much as possible. Budget permitting, when an investigator is too well known in a region, employing an intermediary may prove both useful and necessary to establish contact with witnesses and/or arrange their relocation to attend an interview with Counsel.

The use of intermediaries may prove essential if, for example, local communities do not trust the investigator due to his/her ethnicity. Counsel should select intermediaries with great care and only share information with them on a need-to-know basis. (See Chapter 3).

### **E. Safe location and transport**

Before an interview, Counsel should identify a safe location to meet with witnesses. Counsel will usually delegate this task to the local resource person or the investigator, who will have a better knowledge of the local environment.

The location must enable Counsel to safeguard the confidentiality of the interview. Counsel should check that the chosen location is not under electronic surveillance, since this could compromise witness safety (e.g. a third party camera in the interview facility). The location should also enable Counsel to conduct interviews professionally in a comfortable setting.

Unless there is no other safe alternative, Counsel should avoid using premises associated with the ICT, such as a field office, as this could reveal the relevant person's interaction with the ICT.

Counsel should ensure that a member of his team visits the site prior to the interview in order to confirm its suitability.

Depending on the personal circumstances of a witness, Counsel may need to provide transportation to the interview location. Sometimes, it is more prudent for the witness to come by his own means. In other circumstances, an investigator, a local resource person or an intermediary should pick up the witness at a pre-determined location and bring him to the interview location. In the latter case, investigators and intermediaries should receive specific instructions as to how to relocate a witness for interview. There are eyes everywhere, particularly in small villages. The witness should already have prepared a story explaining his departure from the village.

In any case, it is preferable to use unmarked vehicles and avoid using any vehicle easily identifiable as belonging to, or associated with, the UN.

When meeting witnesses, Defence team members must adapt to the given set of circumstances; investigators could meet witnesses in secrecy or, conversely, decide to operate openly, speaking to everyone so as not to make it apparent if and when any particular individual becomes key to the case. However, when, in the course of general discussions with members of local communities, the Defence discovers key witnesses, the international Defence team members will often rely on their local investigator to locate them and bring them to a discrete place elsewhere for interview.



## **F. Information to provide to Defence witnesses**

Counsel is duty bound to inform witnesses of the risks inherent in their interaction with the Defence, as well as measures that can be put in place to mitigate such risks. Counsel should also provide information to witnesses on what precautions to take and on what to do when in danger.

The following issues should, at a minimum, be addressed by Counsel:

### *i. Informing the witness that his identity may be disclosed to other parties and the Chamber*

Counsel should inform the witness that, if called to testify, his identity and the content of his statement will be disclosed to the ICT's Prosecutor and possibly to the Chamber, the Registry and the Legal Representative of Victims of the ICT, prior to his testimony. Counsel should be familiar with the applicable rules of disclosure and explain them to the witness. Transparency with the witness from the outset is key.

### *ii. Informing the witness of available protective measures*

In theory, Defence witnesses are entitled to the same protective measures as Prosecution witnesses. Where a witness has a genuine fear for his safety and security, grounded on an objective basis, the Defence may apply to the Court for protective measures.

If the situation so requires, Counsel should inform the witness in detail of the protective measures available at the ICT. This involves explaining to the witness the type of operational and procedural measures that may be available to them, as well as the basic features of the procedure for granting such measures.

Depending on the case, implementing protective measures in the field may be necessary as early as the Defence team's initial contact with the witness. These measures can range from an emergency telephone number to relocation to another area altogether. These protective measures are provided by the ICT, after a formal referral to the VWU. Counsel should explain to the witness the protection available, and should make it clear that whether it is appropriate to grant these or other protective measures is a determination to be made by the ICT, and not by the Defence.

Other witnesses may only need protective measures when they testify in court. These will be implemented upon an order from the Chamber, after hearing the parties and participants, and receiving VWU recommendations.

It is not up to the Defence, or even the VWU, to make the ultimate decision on in-court protective measures. It is important that the witness understands this from the outset. It cannot be overstated that Defence Counsel should be mindful not to make any promises they cannot keep. Nor should a witness be left with the impression that he or she has the final say in whether the adoption of in-court protective measures is appropriate.

*iii. Informing the witnesses of precautionary measures that s/he should take*

All witnesses should be informed of the risks, if any, involved in agreeing to cooperate with the Defence. They should also be reminded that they are responsible of their own safety and security. They should be told to keep their cooperation with the Defence confidential and not reveal anything discussed to anyone, not even to close friends or relatives. News in small villages spreads fast. It is often witnesses themselves who reveal their witness status, entailing possible implications for their safety and security. Witnesses should be protected from themselves and receive clear instructions to that end.

In case of emergency, each witness should be given the the contact details of the investigators or local resource person. Witnesses should also be reminded to inform the team if their contact details change.

*iv. Informing the witness of the rationale behind a public trial*

Whilst the protection of witnesses is a fundamental part of international justice, a balance has to be struck with the publicity of trials. Such publicity is a right of the accused and exists in the public interest. The public nature of proceedings is crucial to ensuring that the evidence can be challenged transparently, that the voice of the Defence is heard publicly and that the public's perception of the case is not limited to the case offered by the Prosecution.

Public proceedings may also convince other people from the region to come forward and testify. It is less threatening to any witness to testify publicly if a public trial is the rule, and not the exception. It may further encourage witnesses to tell the truth, as they will be aware in advance that they will be exposed to public scrutiny.

Defence Counsel are encouraged to stress the importance of public trials to their witnesses and to ensure that only witnesses who really need protection seek in-court protective measures.

### 3. BEST PRACTICES TO IMPLEMENT AFTER INTERACTING WITH A WITNESS

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#### A. Continuous monitoring

In the days immediately following a meeting with the witness, Counsel, his investigator or his resource person, must ensure that the meeting did not cause him particular concern and that he was able to resume his normal life without questions or suspicions being raised as to his potential collaboration with Defence.

Counsel should also ensure that regular contact is maintained with a witness in order to:

- receive updates on the witness's security situation;
- update the witness on the progress of the proceedings and his/her expected date of testimony; and,
- check on the witness's overall welfare.

#### B. Facilitating contact with the VWU

If a potential witness has not yet been entrusted to the VWU in anticipation of his testimony, or has not been accepted into the Unit's protection programme, the primary focal point of the witness remains the Defence.

Only when the Defence has handed over the witness to the VWU for his foreshadowed testimony, or when the witness has entered the protection programme, does the VWU become the witness's focal point. Counsel should therefore inform the VWU at the earliest opportunity of any perceived security risks for Defence witnesses. Once in touch with the Unit, witnesses will be able to approach VWU directly, which is potentially necessary when no Defence team member is on the ground.

It is also useful for witnesses to have an emergency telephone number that they can call when they feel vulnerable. If the need for protection is recognized at an early stage, witnesses at risk may be provided with a telephone and phone credits to facilitate contact. Consequently, Defence team members may make this and other suggestions to the Unit.

However, while it is important to liaise with the VWU, if witnesses associate the Defence with the ICT there is also the risk they will not cooperate with the Defence. In certain areas, close collaboration with ICT staff members can be perceived nega-

tively by witnesses. Disclosure of information about Defence witnesses to the VWU should therefore not be made without their consent.

Finally, Counsel should observe a certain professional distance with the witness and his/her testimony, and not accept any account of purported security threats at face value. Indeed, such accounts could either be false or exaggerated. It is therefore recommended that Counsel scrutinize the witness on any security claim before any referral for protective measures to the VWU and/or making any application to the Chamber.

### **C. Requesting protective measures for in-court testimony**

When Counsel decides to call a witness - whose identity should remain confidential - to testify viva voce before the ICT or to tender his written statement as evidence, he must formally request the Chamber to order in-court protective measures.

Counsel should, in advance, familiarize himself with the procedure and conditions for granting in-court protective measures, as they may vary considerably from one ICT to the next.

In-court protective measures ordered by a Chamber may consist of pseudonyms and/or face or voice distortion while the witness is on the stand. In order to protect the witness's identity, Judges can also conduct part of, or, in exceptional circumstances, an entire hearing in private or closed session.

### **D. Post-testimony monitoring**

As mentioned above, threats can also arise after a witness has testified. It is therefore important to maintain contact with Defence witnesses after their testimony either directly, or through the investigator and/or the Victims and Witnesses Unit.

Any post-testimony threat to a Defence witness should be immediately reported to the Unit. Counsel may also make an application for protective measures to the ICT.

## NOTES

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# WITNESS INTERVIEWS



# WITNESS INTERVIEWS

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## 1. INTRODUCTION

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### A. Importance of witness testimony in international trials

ICTs rely heavily on witness testimony. Proficiency in interviewing witnesses is therefore essential to ensure the accuracy of the evidence to be presented in court and to prevent any surprises at trial.

However, interviewing is a skilled task requiring training, practice and judgment. Counsel should not hesitate to seek guidance and advice from experienced Counsel and investigators. If Counsel has little or no experience of witness interviews, it is highly recommended that he sit with an experienced interviewer before setting off on his own.



Counsel must also bear in mind that during an interview he may himself be affected by the pain experienced by a witness

### B. Taking into consideration the witness's potential trauma

People with information relevant to international criminal cases have usually endured and witnessed traumatic events. Although necessary for their work, Counsel must always remember that asking someone to provide a detailed account of a traumatic event necessarily involves re-living those events. Counsel must bear this in mind when interacting with witnesses and adapt his behaviour accordingly. Counsel must treat witnesses with professionalism, respect, courtesy, empathy and sensitivity. (See Chapter 17).

### C. Addressing the witness's concerns

Witnesses may be reluctant to meet Defence Counsel or investigators or even to testify in court for many reasons. These may include concerns for their own safety (or that of their family), a fear of retaliation, a fear of being associated with the accused, or a fear of having to re-live traumatic experiences. Sometimes their concerns can be of a more practical nature, such as not being able to take time off work or leaving their children at home while travelling abroad.

Counsel should anticipate these concerns and be ready to address them. This may involve ensuring that the necessary protective measures and logistical assistance are put in place. (See Chapter 7).

#### **D. Interviews should be conducted in-person**

It is essential, whenever possible, to conduct interviews in person for safety, security and confidentiality reasons: when on the phone, Counsel can never be entirely certain as to the identity of the person with whom he is speaking, and cannot be sure that the witness is alone and free to speak. Moreover, phones can be tapped and conversations with the witness can be intercepted.

Finally, observing first hand a witness' demeanour and "body language" first hand is crucial to assess his/her credibility.

#### **E. One witness per interview**

Generally speaking, it is best practice to interview each witness individually, in the absence of any other person. This will help prevent any form of pressure or memory contamination; it is also important for reasons of confidentiality.

However, in some specific circumstances (for example, if the witness is a young child, a disabled person or a victim of sexual violence) it might be useful to have a support person to reduce the witness's anxiety and help the witness understand what is expected from him or her.

## **2. PLANNING AND PREPARING THE INTERVIEW**

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Good preparation and planning is the key to successful interviews.

#### **A. Initial contact with the witness**

Before going on mission, it is preferable to initiate contact with a potential witness to verify their identity, the importance of their testimony, and to confirm their willingness to be interviewed. The date, time and location of the interview should be agreed and contact phone numbers exchanged, if telephone contact can be made. (See Chapter 4). Transport and travelling arrangements may be needed to unobtrusively bring the witness to and from the interview location. (See Chapter 7). Counsel should also check whether there may be any language issues (local dialect etc.) or whether the witness has disabilities.



Care should be taken when making contact with witnesses, particularly if confidentiality might be an issue. Messages must never be left with family members or colleagues, on voicemail or on emails sent from or to his/her place of work without the witness's unambiguous consent. There may also be circumstances where contacting a person on his home phone is not advisable. (See Chapter 7).

The potential witness should be asked if he has given any other interviews, or has been approached to give an interview. If so, by whom, and whether he made a statement. It should also be clarified whether the witness is a victim and whether he has applied for victim status before the ICT.

Finally, it is important to discuss with the witness if he is able to read and write. This information should be communicated to the VWU, to the Chamber and to the Prosecutor should the witness be called to testify in court, in order to avoid embarrassment for the witness.

## **B. Understanding the purpose of the interview**

Counsel must have a precise understanding of the purpose of the interview by:

### *i. Analysing all the available evidence:*

Prosecution witness statements and exhibits, documents and testimony collected by the team on a particular event, as well as those related to the interviewee. (See Chapter 1).

### *ii. Setting the objectives of the interview:*

What information is this witness expected to provide? How is this essential to the Defence case? What questions need to be asked? (See Chapter 5).

## **C. Preparing an interview plan**

In addition to the general investigative plan, Counsel should have a mission plan providing a list of witnesses that will met, as well as the order in which they will be seen. The plan will also list the topics to be covered and outline of the questions Counsel or his/her investigator will ask. (See Chapter 5).

A specific interview plan for each witness should also be produced and include:

- The witness' basic ID and contact information: name, nickname and alias, address, phone number, email address, occupation, military rank, picture, passport or ID card number (if any), name of mother and father;

- The pseudonym allocated to the witness by the Defence team (and/or the witness protection unit);
- Name (and relevant testimony or statement) of the person who provided the witness's name;
- The nature of the relationship (if any) with the accused or other witnesses;
- The type of witness (victim, accomplice, eye-witness, character witness, government official);
- An exhaustive list of documents expected to be obtained from the witness;
- An exhaustive list of all documents Counsel intends to show the witness;
- An exhaustive list of questions, organized by topic, that Counsel or the investigator will ask; and
- The witness's ability to travel: passport or national ID number, any infirmity or condition that may affect his/her travelling, dependents, etc.

#### **D. Ensuring that the team has reviewed the investigative plan and interview plan**

It is essential to prepare the mission and interview plans sufficiently in advance to allow all other members of the Defence team – including those not participating in the mission or interview to review the list of witnesses to be met, the questions to be asked and the documents to be collected. It could be that, unknown to Counsel, another team member has vital information about this particular witness.

#### **E. Planning interview conditions**

Counsel must establish in advance, in consultation with his investigator and local resource person, where the interview will take place, how long it will last, who will attend and what questions will be asked.

Counsel must also ensure that he has a proper understanding of the witness's cultural background. These cultural considerations should be discussed with the Defence team's interpreter or local resource person (or any team members from the country in question). These may include simple things, such as the appropriateness of shaking hands or making eye contact, and how Counsel should address the witness.

Counsel must also have an understanding of the witness's emotional and physical state (and, where possible, of his/her personality) as these factors might have an impact on the interview preparation.

## **F. Finding the right interview location**

Counsel should ensure that the interview is held in the most suitable location possible. This can be a challenge. It may be difficult to find a secure room, or indeed the requisite level privacy. The most important consideration is the witness's safety.

Counsel must ensure that they arrive sufficiently in advance of the interview so as to that everything is conducive to a private and comfortable interview environment.

## **G. Equipment preparation**

Counsel should prepare any equipment to be used. They must ensure that both the computer and the audio or video recording equipment are in good working order and have been sufficiently charged. (Counsel might want to take two audio recorders and a set of batteries, in the event that one malfunctions). Counsel must also have communications aids such as coloured pens and paper: this will assist the witness in drawing sketches and marking plans, maps and/or pictures, where necessary.

# **3. INTERVIEW CONDITIONS**

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## **A. The interview environment**

The environment in which the interview takes place will have a significant impact on the witness's level of cooperation and therefore on the outcome of the interview itself. The interview environment not only includes the room or location per se, but anything that makes the witness feel comfortable and safe (or which does not).

### *i. Choice of appropriate suitable location*

Counsel must choose a location which is both private and safe. The location chosen should also be one where any noise and distractions are kept to a minimum, alleviating as far as possible any anxiety on the part of the witness. Once the location has been chosen, it may prove helpful to seek the witness's opinion as to its suitability.

It is generally not advised to choose a location where the witness lives or works, in order to avoid him/her being identified as working with the Defence. Although interviewing the witness at his/her home or office is sometimes unavoidable, this also increases the risk of being disturbed during the interview by ringing telephones, family members or unexpected visitors, as well as any security considerations that this may entail. (See Chapter 7).

### *ii. Layout of the room*

Counsel must create, as far as possible, a comfortable environment, setting the right temperature (using air conditioning or heaters), and arranging the lighting and furniture. In preparing the room to ensure that it is comfortable and the witness feels at ease there, Counsel should consider the witness's cultural background (for example, the amount of space between the interviewer and the witness may vary from one culture to the next). Counsel should also ensure that there are refreshments and tissues available. Sometimes a witness may arrive with a baby or child and arrangements must be made to cater for this.

### *iii. Avoiding distractions and interruptions*

Counsel should ensure that the radio and TV in the room are turned off and that all participants' phones are on silent mode. Counsel and the investigation team should not accept any calls or visitors during the interview and, if in a hotel, the "Do not disturb" sign should be displayed on the door.

## **B. Adopting behaviour that makes the witness comfortable**

Counsel should also be mindful of their own behaviour during the interview, including tone of voice, the distance between Counsel and the witness, as well as any physical barriers between them, such as a laptop, desk or table.

Counsel must behave professionally and use his voice so as to put the witness at ease.

Finally, Counsel should make the interview process as comfortable as possible, providing water, coffee or food and taking regular breaks, as appropriate.

## **C. Number of interviewers**

While one-to-one interviews often make a witness more comfortable (because it gives the impression of an informal conversation), whenever possible, two interviewers (Counsel and an investigator or interpreter) should conduct the interview. Two interviewers, each with separate roles, will ensure the accuracy of the notes taken, and enable the interviewers to adapt to the interviewee (especially if the two interviewers are of a different gender). Additionally, in the event of any dispute as to the interview conditions, the second interviewer can also always act as a direct witness to the fact.

If the witness is not comfortable speaking one of the languages spoken and understood by the interviewers, it may also be necessary to use an interpreter.

Special care should be taken when dealing with vulnerable witnesses – such as a child or a minor, a witness who has suffered a traumatic event or a sexual assault, or a witness with learning or other communication difficulties. It may be necessary to provide for the presence of a parent, ‘friend’ or helper. (See Chapter 10).

When there are two interviewers, the role of each should be determined in advance.

Counsel should: (1) introduce the interviewers; (2) state the purpose of the interview; (3) set the tone and the parameters of the interview; (4) ask the first series of questions.

The other interviewer should: (1) take notes and be responsible for the video/audio recording of the interview; (2) observe the witness’s body language; (3) ensure Counsel covers all the pre-selected topics; (4) ask the appropriate follow-up questions.

Interviewers should never interrupt each other but may switch roles either if topics change or if such a change would facilitate the process.

#### 4. INTERVIEW STRUCTURE

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An interview is usually divided into several phases or segments, each with its own purpose. It includes (1) an introduction; (2) questions; (3) a summary of the interview, in the interests of accuracy; and (4) a conclusion. (See Chapter 9).

##### A. Greetings and introduction

###### *i. Greetings*

Counsel should greet the witness in an appropriate manner, showing respect for local customs (Counsel can be briefed by his local resource person on how to show respect towards the witness). Counsel can ask the witness how s/he feels, if he/she needs anything.

**//** In identifying family members by pointing my finger at them, I upset the witness and his relatives. The investigator alerted me to the fact that it is the local way of counting the cows and that it was perceived as an insult in this context”.

**A legal assistant**

## *ii. Counsel introduces himself and identifies his role*

Counsel must introduce himself and clearly state his client's name and the ICT he works for. He should clearly explain the purpose of the interview and its potential use before an ICT (sometimes witnesses have already told their story to the media or to NGOs and they must understand the consequences of their testimony in a judicial context). Counsel must remind the witness that his sole objective is to discover the truth and that he expects nothing but the truth from the witness.

## *iii. Witness identity and contact details*

To satisfy himself that he is interviewing the right person, Counsel should ask the witness for his/her name and contact details, double-checked against his/her ID. He can make a copy of the ID and photograph the witness for the case management record; this will also help him recognize the witness at a later date, as this is often more difficult with just a name.

## *iv. Overview and anticipated interview duration*

While Counsel can give the witness a brief outline of the interview, he should avoid influencing the statement by revealing too much information. Counsel should also indicate to the witness the approximate length of the interview and ensure that he/she is available for the duration and, in case the interview runs over, that he/she has no commitments shortly after the interview. Counsel must ask the witness if he/she minds being audio or video recorded. They should inform the witness that he/she can stop the interview at any moment to go to the bathroom, to have something to eat or drink or simply to have a break.

## *v. Distinction between first-hand account and hearsay*

Counsel should clearly explain to the witness the difference between a first-hand experience of an event and having simply been told about it.

# **B. Questioning the witness**

Ideally, the interviewer should let the witness speak freely and provide a raw recollection of the event before he intervenes to ask more targeted questions.

In general, an interview contains three types of questions, in the following sequence:

(i) free narrative questions; (ii) direct questions; (iii) closed questions.

### *i. Free narration*

At the beginning of the interview, Counsel should ask the witness to provide a free recollection of the event, providing as much detail as possible. Counsel should not at this point ask any specific questions, but ask the interviewee to give his full account. If insufficient details are provided, Counsel can then ask the witness to expand on what he has said.

**Example:** Can you describe in as much detail as possible what you saw during the events in question? / Tell me about the attack you witnessed? Could you explain in detail what happened? Tell me more about ...

### *ii. Direct questions*

Direct questions usually follow the free narrative testimony. They are straightforward and are usually used to fill in the gaps in the interviewee's account or to provide other details. They seek specific information. They are open questions.

**Example:** When was it? What time? How many people? Where were you?

### *iii. Closed questions (similar to cross-examination)*

These questions should be used sparingly (and with even greater caution with a vulnerable witness). Their sole purpose is to determine how full an account the testimony is, to resolve vague or conflicting information or facts, to establish whether the witness is being evasive or to test the veracity of his/her answers (if there is any doubt about his/her credibility).

**Example:** You just said you saw him at 09.00 in the morning. But earlier you said you saw him at 12.00. When did you actually see him?"

With each question, Counsel should also always bear in mind the following advice:

- Let the witness tell his/her story with minimal interruption;
- Ask one question at a time;
- Use Who, What, When, Where, Why, and How questions;
- Use simple language and avoid using acronyms;
- Sequence the questions from general to more specific; and
- Clarify any inherent inconsistency or contradiction.

When an answer is given, Counsel could paraphrase the witness's responses to show they are listening and satisfy themselves they correctly understood the answer before moving to another question or topic.

Counsel should ask at each step of the interview the witness's basis of knowledge, i.e. how the witness knows what he does. This will help to secure an accurate statement.

Counsel should not suggest an answer to the witness. Counsel should exercise great care so as not to reveal any information during the interview. He should also avoid asking questions in such a way that they might influence the witness's testimony. Some witnesses might understand from the Counsel's question, or suggestion, that that is the answer Counsel wants or expects from them. This can particularly be the case with closed questions.

### **C. Summary of the testimony**

After questioning the witness, Counsel should summarize to the witness the salient parts of the interview; this serves to satisfy himself that he has understood the witness's testimony.

Counsel should:

- Review their notes with the witness to ensure their accuracy; and
- Give the opportunity to the second interviewer (investigator, legal assistant) to comment or ask questions.

### **D. Assessing the reliability of the evidence - Evaluation of the testimony**

At the end of the interview, Counsel should compare the accuracy of the testimony with the evidence in their possession going to the relevant event or topic (both Prosecution and Defence's materials).

Counsel should address any difference or inconsistency with the witness, offering him/her the opportunity to provide an explanation. If needed, Counsel may use cross-examination questions to assess the reliability of the answers. However, Counsel should remember that this is a potential Defence witness and even if they do conduct a "cross-examination" of the witness at this stage, they should always remain polite and courteous and never be aggressive. However, Counsel should ensure that this practice has not been prohibited by the Chamber.

**//** In one case, the Accused himself denounced several false witnesses to us who had given us statements, however, which provided him with a solid alibi for a number of charges. Without his collaboration, it would not have been possible for me to establish the fallacy of their testimonies, as I had no means by which to accurately verify precisely that information that was reported."

***A Defence investigator***



If Counsel uses other evidence to address an inconsistency or a contradiction, he must be extremely careful not to disclose any confidential material or influence the witness.

### **E. Closing the interview**

When concluding an interview, Counsel should:

- Ask the witness if there is anything that has not been covered during the interview;
- Ask the witness if there is anyone else that could provide relevant testimony and if so, how to contact him/her;
- Ask the witness if there is any other relevant evidence that should be gathered;
- Confirm with the witness how he/she wishes to be contacted, if Counsel needs additional information;
- Thank the witness for his/her time and cooperation;
- Confirm with the witness that he/she is willing to testify;
- Remind the witness not to discuss his/her testimony with anyone, as it may affect their own independent recollection and may also alert people to their being a witness; and
- Give the witness his contact details and invite him/her to immediately contact the Defence team if he/she wishes to correct or change anything, if he/she remembers more information, or if he/she wants to talk about something or is worried.

Additionally, although at that point the official interview is over Counsel should still be alert to what the witness says. After the interview is concluded, a witness can often say something new and important either because he/she did not think it relevant, or because he/she feels more relaxed. Counsel should bear in mind that it is always important to let the witness talk as much as possible, including after the questioning.

## **5. OTHER IMPORTANT TIPS**

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### **A. Safeguarding the confidentiality of information provided (or “source”)**

Witnesses will often want to know where the Defence team obtained their information. Unless the source has specifically agreed that his/her name can be disclosed, Counsel should not reveal their source. Counsel should tell the witness that they

receive names of persons of interest from a great many sources (including witnesses, governments, or NGOs) as well as through their own investigations. Counsel should also explain to the witness that they cannot reveal their source(s) for confidentiality reasons and stress that Counsel will apply similar caution to what the witness has said, namely, that any details that they provided – including the identities of other potential witnesses – will also be treated as strictly confidential.

### **B. Points to cover when collecting information about a person of interest**

It is important for Defence Counsel to obtain as much information as possible when the witness is talking about key persons of interest in the Defence's case, for example the accused (for an alibi defence), or another potential suspect (for an alternative theory). These details will significantly increase the credibility of the witness's testimony. When questioning a witness about another individual Counsel should cover the following topics:

- Physical description and attributes: age, height, build, skin colour, hair colour, eye colour, distinguishing physical features, accent, the way the person spoke, walked or behaved, something which may help in an identification process;
- Description of the uniform or clothing worn: colour of trousers, colour of shirt, colour and type of jacket, colour of shoes, type and colour of hat, identifying insignia, markings of rank, name or other handwritten script, type of uniform, if known (for example, local police uniform, Air Force uniform, fatigues, camouflage);
- Name: if known or heard; if not, nickname or alias used;
- Prior knowledge of the person: had the witness ever seen the person before; if so, in what context and how often; how long has the witness known the person; when was the last time he/she saw him/her; has the person's appearance changed; and
- Context in which the person was seen: the time period during which the person could be observed; distance between the witness and the person; visibility (time of day, weather, light); any obstructions in the field of vision.

# ANNEXES



# Checklist for protection of sources and witnesses

*(To be combined with the checklists on Vulnerable Witnesses)*

## 1. PRELIMINARY STEPS - PRIOR TO THE FIRST MEETING WITH DEFENCE WITNESSES AND / OR SOURCES

- ☐ Become familiar with political and social environment
- ☐ Contact the Victims and Witnesses Unit to adopt best practice
- ☐ Conduct exploratory mission(s) (can be done by resource person, intermediary or investigators)
- ☐ Identify potential threats and/or other security concerns (type of threats and/or security concern; method used, source of threats and/or security concerns; individual or group where the threats originate)
- ☐ Identify potential Defence witnesses and / or sources
- ☐ Determine the best way to contact and meet witnesses and, in particular:
  - ☐ Assume that communicating by phone or internet is not secure
  - ☐ Use encrypted communication devices to discuss or send confidential information
  - ☐ Determine whether witnesses can be seen with the Defence
  - ☐ Consider asking the victim/witness to meet at a neutral location
  - ☐ Assess whether Defence can go directly to see certain witnesses.
  - ☐ Evaluate whether a third party should be used to contact certain witnesses.
- ☐ Discuss general security management with Defence witnesses prior to their initial meeting with the Defence team
- ☐ Use a pseudonym for the witness if necessary
- ☐ Monitor Defence witnesses' security situation prior to their initial meeting with the Defence team
- ☐ If interpretation is needed, use the services of a trusted person

## 2. CONCRETE STEPS WHEN MEETING A DEFENCE WITNESSES

- ☐ Use a safe location to meet with the witnesses and/or sources
  - ☐ Location is secure
  - ☐ Location is inconspicuous

- Location is free of any electronic surveillance/interception by a third party or hostile element
- Access to location can be monitored
- ☐ Organize safe transportation for the witnesses to and from the interview location
- ☐ Keep a low profile about the reasons of your presence in the area

### **3. CONCRETE STEPS DURING THE INTERVIEW**

- ☐ Inform the witnesses about confidentiality of information discussed during the interview
- ☐ Have the witnesses sign a confidentiality undertaking
- ☐ Discuss with the witnesses any safety and security concerns they may have
- ☐ Remind witnesses that they are responsible for their own safety and security
- ☐ Inform the witnesses of any precautionary measures they can take to mitigate risk, including not revealing they have met with the Defence or that they may be called as witnesses
- ☐ Facilitate contact between the Victims and Witness Unit and the witnesses
- ☐ Provide witnesses with the Defence team's contact details
- ☐ If applicable, provide witnesses with contact numbers they can call in case of emergency
- ☐ Inform the witnesses about the limitations of protective measures
- ☐ Inform the witnesses that if they agree to give evidence, their details will be communicated to the Judges, the parties, the participants, if applicable, and the relevant sections of the Court.
- ☐ If the witnesses request a copy of their signed written statements, inform the witnesses about the risks of theft or loss

### **4. CONCRETE STEPS AFTER THE INTERVIEW**

- ☐ Take measures to ensure that the personal information of the witness is kept confidential
- ☐ Evaluate the necessity and appropriateness of requesting protective measures for the witnesses
- ☐ Apply for protective measures with Victims and Witness Unit
- ☐ Follow up on the situation of Defence witnesses after their meeting with the Defence team

# Checklist for Witness Interviews

## 1. PRELIMINARY MATTERS TO ADDRESS WITH WITNESS

### A. Greetings and introduction

- ☐ Greet the witness
- ☐ Inquire about the well-being of the witness
- ☐ Introduce yourself and all members of the Defence team present
- ☐ If applicable, introduce the interpreter and explain the reason for his/her presence; ensure that the witness understands the language spoken by the interpreter
- ☐ Describe role in the organization, including profession, the name of the accused represented, the Court, the charges against the accused and the purpose of the Defence investigation
- ☐ Inform the witness that Defence is only looking for the truth, and ask witness to refrain from embellishing the truth to please the Defence
- ☐ Note down the contact details of the witness
- ☐ Verify the witness's identity by asking to see his/her ID card
- ☐ Give an overview and expected duration of the interview
- ☐ Ask the witness if the interview can be audio/video recorded
- ☐ Explain to the witness that notes will be taken for future reference
- ☐ Explain to the witness the difference between first-hand experience of an event and having only been told about it

### B. Confidentiality of the interview

- ☐ Inform the witness about confidentiality of information discussed during the interview
- ☐ Have the witness sign a confidentiality undertaking
- ☐ Inform the witness that the Defence will keep the information given during the interview confidential. Inform him also that while it will only share it on a need-to-know basis, it will be shared with the accused it represents

## **2. FINAL MATTERS TO BE ADDRESSED WITH WITNESS**

### **A. Closing of the interview**

- ☐ Ask the witness if there is anything that he/she wishes to add
- ☐ Ask the witness if there is anyone else that could provide relevant information, and if so, how to contact him/her
- ☐ Ask the witness if there is any other relevant evidence that should be gathered
- ☐ Confirm with the witness how he/she can be contacted should you require additional information
- ☐ Thank the witness for his/her time and cooperation

### **B. Conditions governing in-court oral evidence**

- ☐ Inquire about the witness's willingness to testify
- ☐ Explain to the witness that the trial is public
- ☐ If the witness expresses concerns about testifying in public, explain to the witness that the Trial Chamber can, in particular circumstances, require that certain proceedings be held in closed session, or that the identity of the witness be protected
- ☐ Explain to the witness that if he/she decides to testify his/her identity will be disclosed to the Judges, Prosecutor and Legal Representatives of Participating Victims, if applicable, and even to other sections of the Court
- ☐ Explain briefly to the witness the procedure applicable if he/she agrees to provide oral evidence, i.e. that he/she may be questioned by the Defence, the Prosecutor, the Judge and the Legal Representatives of Participating Victims, if applicable
- ☐ Inform the witness that he/she may have to travel in order to testify at the seat of the ICT

### **C. Witness safety**

- ☐ Remind the witness not to discuss his/her testimony with anyone
- ☐ Remind the witness not to reveal that s/he has met the Defence
- ☐ Ask the witness if s/he has any security concerns

- ☐ If applicable, discuss with the witness any security concerns s/he might have and the procedure to be follow if deciding to apply for protective measures with the Victims and Witness Unit
- ☐ Give the witness your contact details and invite him/her to immediately contact the Defence if he/she wishes to correct or alter anything, if s/he recalls more information, if s/he wants to discuss anything, or if s/he wants is worried about anything



## **List of protective measures (non-exhaustive)**

*This list is included here for information purposes only; the available measures may vary depending on the Court*

### **1. IN-COURT PROTECTIVE MEASURES**

- A. Conduct parts of hearings in private or closed session, when necessary
- B. Voice distortion during testimony
- C. Image distortion during testimony
- D. Use of pseudonym during the trial phase
- E. Use of video-link testimony
- F. Restrictions on the dissemination of the image
- G. Use of a “curtain” to shield the witness from the accused
- H. Orders prohibiting the media and third parties who may have learned the witness’s identity from disclosing such information

### **2. LOCAL PROTECTIVE MEASURES**

- A. Inform witness about best practices
- B. Use of safe-house
- C. Increase the security at the witness’s home
- D. Increase police patrols
- E. Make an initial response system available to the witness
- F. Resettle the witness internally
- G. In extreme cases, relocate the witness to a third country

# WITNESS STATEMENTS



## WITNESS STATEMENTS

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Before ICTs, evidence usually takes the form of oral testimony. Written statements are collected by the Prosecution in the course of its investigations and disclosed to the Defence as material supporting the indictment. In contrast, Defence Counsel are not obliged to collect written statements and generally disclose their “case” only at the end of the Prosecution case.

However, written statements have become more common in recent proceedings before ICTs. Without changing the principle of orality, international criminal procedure has increasingly admitted documents as evidence before ICTs, including written statements and transcripts in lieu of oral testimony.

Consequently, although it is not always advisable for the Defence to produce signed written statements, it is essential that Defence Counsel familiarize themselves with the modalities of collecting written statements. Indeed, the rules of procedure of the Court may oblige them to do so as there may be a court order to that effect, or the circumstances of the case and the Defence strategy require it.

### 1. DEFINITION OF “WITNESS STATEMENT”

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A witness statement is a signed document recording the evidence (account of an event) given by an individual. By signing the statement, the witness confirms that the content of the statement is true.

It is usually drafted by Counsel and his team following an interview with a witness. However, it could be drafted by the witness himself, and will reflect his anticipated testimony. Before certain tribunals, witness statements may be admitted into evidence in lieu of oral testimony provided they meet specific conditions laid down by the applicable rules of procedure and evidence.

Formal written witness statements must be distinguished from written notes taken by Counsel or his team during the witness interview.

## 2. CULTURAL CONSIDERATIONS TO BE TAKEN INTO CONSIDERATION WHEN COLLECTING WITNESS STATEMENTS

In domestic cases, witness statements may be taken by the relevant authorities shortly after the commission of a crime when a witness's memory is still fresh. Those taking the statement will probably be from the same country as the witness; they will speak the same language and have a common understanding of the social, political and cultural environment in which they live.

In contrast, in cases before ICTs, witness statements may be taken by Defence Counsel years after the commission of the crime. Due to the passage of time, witnesses may be unable to recall critical details. Additionally, Defence Counsel and the witness may not share the same language or culture. They may not fully comprehend the nuances underpinning both what is said and what is not said.

Additionally, during the interview, Counsel and witness may be speaking through an interpreter, something which may further complicate the communication process.

Defence Counsel should be aware of all these factors and take the necessary measures to ensure that the process of taking a witness statement proceeds as smoothly as possible.

// A negative question is untranslatable in Kinyarwanda, and when it is translated it often causes the person questioned to say the opposite to what they want and believe they say to you. I encountered several misunderstandings until I took that into account in the way I phrased my questions to the witnesses."

*A Defence Investigator*

## 3. POINTS TO CONSIDER WHEN DECIDING WHETHER TO TAKE A WRITTEN STATEMENT

Unlike the Prosecution, the Defence is not usually required to take written statements before ICTs.

Consequently, Counsel will have to decide whether he should collect a signed statement from a particular witness he intends to call to testify or whether, during the interview, he prefers to simply take informal written notes of the witness's account.

In deciding whether or not to collect a signed statement, Counsel will generally consider the importance of the testimony and the risk that the witness recants or becomes unavailable.

If it is felt that there is no such risk, it is often best not to obtain a signed statement as this may then become disclosable to the Prosecution.

### **A. Importance of the testimony**

By signing his statement, the witness attests to the veracity of the information contained therein.

If the testimony is essential for the Defence case and there is a risk that the witness may recant, prudence perhaps dictates drafting a written statement, or at least recording the interview with the witness. That way, if the witness were to substantially alter his testimony or become “hostile” to the Defence, Counsel would have an important tool to question the witness and confront him with his previous statements.

Counsel could also contemplate collecting a formal written statement if he foresees the risk of the witness’s unavailability to testify orally in court. The witness could ultimately be unavailable due to death, disappearance or illness. In such cases, the relevant rules of procedure and evidence typically allow the party to tender the written statement, provided there is a showing of proof that the witness is unavailable and that the statement meets certain conditions.

Lastly, in some instances the Defence could envisage tendering a witness written statement in lieu of oral testimony, if, for example, the witness is expected to testify on a very limited aspect of the case. This could be also useful if the Defence can only call a limited number of witnesses.

### **B. Disclosure obligations**

Defence disclosure obligations vary from Court to Court and even from Chamber to Chamber. While some Chambers require the Defence to collect and disclose signed written statements, most will impose no such burden.

If the Defence is not required to provide written statements for its witnesses, pre-testimony disclosure usually takes the form of a short summary of the anticipated witness testimony (called a “will-say” in some jurisdictions), prepared by the Defence.

If Counsel decides to take a signed statement from the witness, he must bear in mind that the Trial Chamber may subsequently decide to order the disclosure of

*// I never have my witness sign any written statement if I am not obliged to. I simply note what he or she says and ask them to repeat it to be sure that I have correctly understood their testimony.”*

*A Defence Counsel*

those statements to the Prosecutor. This disclosure will provide the Prosecution with detailed advance notice of the expected testimony and additional material with which to challenge the witness during cross-examination, using inconsistencies in or changes to his previous statement, if any.

In contrast, if no signed written statement has been prepared, the notes made by the Counsel or the other members of its team in connection with the interview will be considered “internal work product”. As such, they should, in principle, never be subject to a disclosure order. Counsel should bear this in mind when interviewing a witness and refrain from making the witness sign his statement. In so doing, Counsel prevents any Prosecution scope for turning the witness’s evidence to its own advantage.

Additionally, as described below, taking a formal statement will take time and resources which are not always available to the Defence.

## 4. PREPARATION

### A. Conduct a search of all the evidentiary material

Taking a good witness statement requires preparation. Before the interview, Defence Counsel should collect as much information as practicable about the witness. He should conduct a search of the evidentiary material in his/her possession for all information concerning the witness.

### B. Preparation of an interview plan

Having gathered every item of information about the witness, Defence Counsel should prepare an interview plan. The interview plan should map out the logical progression of the interview, from beginning to end. In instances where Defence Counsel will be speaking to the witness through an interpreter, it may be helpful to prepare a list of questions. This list, together with other relevant documents, should be provided to the interpreter beforehand in order to facilitate a smooth interview. That is not to say that the inter-

// In Kinyarwanda, the letters L and R are similar. When looking for all the information I had in my case about a particular witness, I would always ask my team to conduct a search (Ctrl + F) of the witness’s first name, last name and aliases replacing the letter L with a R and vice versa. We often discovered significant information about the witness might otherwise have gone unseen because the name of the witness was not spelt consistently.”

*A Defence Counsel*

view should be conducted in scrupulous conformity with the interview plan or list of questions. Rather, Defence Counsel should adapt his/her questioning to the answers s/he receives as well as the disposition of the witness.

The guidelines provided in Chapters 4, 5 and 8 are instructive in the taking of a good witness statement.

## 5. LEGAL CONSIDERATIONS

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### A. Rules governing the form of the written statement

When collecting a signed written statement, Counsel will have to consider what use he intends for the statement (for example if he intends to use it in lieu of oral testimony) and if the form of the statement is governed by specific provisions of the rules of procedure and evidence, practice directions, guidelines or jurisprudence.

These formalities are usually aimed at ensuring that a witness statement has the necessary indicia of reliability required to admit it as evidence, especially when it is admitted without the author being subjected to cross-examination.

Failure to comply with any required formalities may result in the inadmissibility of the statement. In deciding whether to admit a statement containing a formal defect or irregularity, the Trial Chamber will assess the extent to which such failure affects the statement's reliability. For instance, while failure to list a former occupation or a place of birth may not have an important impact on the statement's reliability, failure to adhere to some of the more fundamental formal requirements, such as those concerning the witness's identity

#### **1 2 3** The statement must contain the following

- ❖ The sequence of events, in chronological order;
- ❖ A comprehensive description of all the activities of the accused;
- ❖ The identification details of the accused or all persons of interest (POI);
- ❖ A description of the crimes or events of interest;
- ❖ A description of the scene of the crime or site of interest;
- ❖ Actual words spoken by the accused, and other POI;
- ❖ The ability of the witness to see or hear the things mentioned in the statement (for example, how many metres away from the scene was the witness at the time, what were the lighting conditions and visibility);
- ❖ Anything else of relevance which may assist a court in determining how credible the evidence is. For example, how the witness knows the information provided.

or acknowledging the statement's veracity may result in the non-admission of the statement.

Even if a Court nonetheless admits the written statement, its non-compliance with a formal requirement may have a negative impact on its weight and probative value.

Both of these outcomes could be detrimental to the rights and interests of an accused and Counsel should therefore pay particular attention to these formal considerations.

### **B. Relevance**

The witness statement should focus on the relevant issues in the case. Irrelevant information that a witness provides during the interview should be excluded from the witness statement.

As relevance is a pre-condition to the admission of evidence in ICTs, if Counsel intends to request the admission of the statement, it must be able to show how the content of the statement relates to a material issue.

## **6. STRUCTURE AND CONTENT**

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A witness statement template has been provided in the [annex](#) to this Chapter. The structure may vary from one Court to another, but should generally conform to this model.

### **A. First page**

In general, the first page of the witness statement should be a witness information sheet containing the witness's personal details: surname, first name, father's and mother's names, nickname (if any), date and place of birth, language(s) spoken and written, languages used in interview, current and former occupations, date, time and place of interview, name of interviewer(s), name of interpreter(s), and names of other persons present during the interview(s).

### **B. Evidence of the witness**

The witness statement should reproduce accurately and comprehensively the account of the events as recollected by the witness.

It must be structured, easy to understand and free of ambiguity.



### *i. Chronological account of the event*

Where the witness evidence concerns a series of events, the witness statement should recount them in a chronological fashion; even if during the interview the witness jumped from one event to another chronologically unconnected one.

### *ii. First person*

All witness statements should be taken in the first person, in the witness's own words.

For example: “**I went**” rather than “**the witness went**”.

Further, since it was the witness – and not Counsel – that witnessed the events in question, the witness's account of those events should be in his/her own words and not those of Counsel.

Counsel should also resist the temptation to replace a witness's language with his/her own. This is all the more important if Counsel interviews multiple witnesses and rephrases their statements with his own words. If five witnesses described a single event using the exact same words and expressions, it may cast aspersions on their credibility. It may even be argued that they colluded to give the evidence or even that they were coached to say the same thing. Evidently, this would be detrimental to the rights and interests of the accused.

Counsel should also ask the witness, when speaking about what someone else told him, to recall as much as possible the words that that person used. For instance, if a witness says during the interview that ‘John insulted me’, Defence Counsel should ask the witness the exact words John used to insult him, which should be recorded in the witness statement, regardless of how repugnant they may be.

### *iii. Clear distinction between first hand evidence and hearsay*

Counsel should ensure that what the witness personally observed is distinguished from what the witness did not personally observe but learned from other individuals or other sources, such as the internet or the media. Counsel may wish, by virtue of his questioning, to limit the witness's evidence in the statement to what the witness personally observed.

However, where the witness obtained information from another source, the full particulars of that source and the circumstances under which the witness obtained the information should be recorded, in the statement or in the Counsel's notes, in as much detail as possible to allow Counsel to identify the source and verify the information.

Counsel can also decide to include the hearsay evidence in the statement. However, the statement must clearly distinguish first-hand evidence from hearsay.

For example: “I did not witness this event myself but I was told by *(name of person who told him/her)*, that *(information provided)*.”

#### **iv. No opinion or comment of the interviewer**

It should be phrased in an objective manner and should not contain any opinion or comment of the interviewer.

### **C. Acknowledgements**

At the end of the interview, before signing the statement, the witness should read the entire statement or the interviewer should read the entire statement back to the witness (or ask the interpreter to do so). Before doing so, the interviewer should inform the witness to interrupt the reading at any time if he sees any mistake or wants to make any change.

When the witness has acknowledged that the statement is comprehensive and accurate, he should sign the bottom of each page as well as the formal acknowledgment.

The witness statement will end with a formal acknowledgement by the witness that the content of the statement is true and correct to the best of his/her knowledge and recollection, that s/he gave the statement voluntarily and that s/he is aware that if s/he knowingly and wilfully makes a statement which s/he knows is false and which s/he knows may be used as evidence in proceedings before the ICTs, there may be criminal consequences.

There should also be an acknowledgement by the witness that s/he has read the statement, or that it has been read back to him/her in a language that s/he understands.

Where interpretation has been used, there should be certification by the interpreter stating which language has been translated, that s/he has translated the statement in the presence of the witness and that the witness appears to have understood the translation.

### **D. Signature of the statement**

Each page of the statement should be signed or initialled by the interviewer, the witness who is questioned, by the interpreter (if any) and by the witness's Counsel (if any).

## 7. OTHER DOCUMENTS

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### **A. Documents attached to the statement**

During the interview, the witness may provide Counsel with documents relevant to his evidence. Conversely, Defence Counsel may present documents to the witness during the interview – for instance his previous witness statements, or pictures of people that the witness may recognize.

Counsel should ensure that these documents are properly identified within the witness statement, and that their relevance is properly explained in the statement. All documents tendered with the statement should be marked as annexes and signed and dated by the witness and the interviewer.

If the interviewer makes a copy of the original document, he should clearly indicate on the reverse side that this is a faithful copy of the original document and ensure that it is signed by both the witness and the interviewer.

### **B. Additional statement**

Where it is necessary to take another statement from the same witness, it must be recorded by taking a new statement, and not by amending a previous one. The additional statement should refer precisely (date, time and place) to the previous statement. If the additional statement is taken to correct or complete information comprised in a previous statement, this should be clearly stated.

# ANNEX



## **WITNESS STATEMENT**

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### **WITNESS INFORMATION**

Surname (family name):

First name(s) :

Nickname (if any)

Father's name :

Mother's name :

Date of birth :

Place of birth :

---

Language(s) spoken :

Language(s) written (if different from spoken) :

Language(s) used during interview:

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Current occupation :

Former occupation :

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Date(s), time and place of interview :

Interviewer(s) :

Interpreter(s) :

Names of other persons present during the interview:

## WITNESS STATEMENT

1. I am giving this statement voluntarily and I will describe everything I know to the best of my knowledge and recollection. I will make it clear when I am talking about things that I have personally experienced, observed and/or heard as opposed to things that I learned from others.
2. I have not been threatened or forced to give this statement, nor have I been offered any promises or inducements to do so.
3. I am aware that my statement may be used in legal proceedings before the [Name of the tribunal] and that I may be called to give evidence in such legal proceedings.
4. Whether or not this statement is used in legal proceedings before the [Name of the tribunal], I understand that I may be liable to prosecution by the [Name of the tribunal] for contempt for interfering with its administration of justice or for giving false testimony if, in this statement, I say anything which I know to be false or do not believe to be true.
5. My name is \_\_\_\_\_ [*Name of the Witness*]  
and I am a \_\_\_\_\_ [*profession*].
6. Commence narrative statement

[Statement]

7. This statement has been read over to me in [*language*] and is true to the best of my knowledge and recollection.

Date: \_\_\_\_\_

Signature of the witness: \_\_\_\_\_

## NOTES

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# VULNERABLE WITNESSES





## VULNERABLE WITNESSES

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It is extremely important to identify any vulnerability of potential Defence witnesses as soon as possible. This analysis will enable Counsel to gather the most relevant evidence (and assess its quality) and to take appropriate measures to allow for an interview and, if necessary, testimony in court.

The situation of each witness should be assessed to determine:

- any measures to be taken in the interviews with the witness and, if necessary, the measures to be taken if the witness testifies;
- the credibility/reliability of his story; and
- the balance between the weight to be given to his testimony and the risks associated with the witness's ability to testify.

The fundamental rule is to avoid, to the maximum extent possible, causing vulnerable witnesses any harm (“do no harm”). Article 29 of the Code of Professional Conduct for Counsel of the International Criminal Court illustrates this rule, by obligating Counsel to refrain from subjecting witnesses or victims to “disproportionate or unnecessary pressure” and requiring them to have “particular consideration for victims of torture or of physical, psychological or sexual violence, or children, the elderly or the disabled”.

Measures taken before, during and after the interviews will effectively ensure the well-being of vulnerable witnesses and help reduce the risk of any harm, in particular, re-traumatisation.

### 1. IDENTIFICATION OF VULNERABLE WITNESSES

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#### A. What is a vulnerable witness?

A witness is considered “vulnerable” when there is an increased risk that he/she:

- suffers from psychological harm as a result of their statement or testimony; and/or
- faces psychosocial or physical problems which affect their ability to give evidence.

## **B. When is a vulnerable witness identified?**

The assessment of the actual vulnerability of a witness should be done on a case-by-case basis as soon as possible. A preliminary assessment can be made on the basis of information collected during investigations and subsequently by an initial meeting with the witness. It will be at this first meeting with the witness that their behaviour can be evaluated and, if necessary, their ability to provide testimony, without going into details of their narrative.

As soon as a vulnerable witness has been selected for interview, Counsel must check whether they are represented by Counsel, especially in the case of a minor or a victim participating in the proceedings. Where required, Defence Counsel will have to take the necessary measures to ensure the correct procedure is followed prior to contacting the person and/or interviewing them.

## **C. Who can identify vulnerable witnesses?**

Defence team members can identify vulnerable witnesses. Some of the team members might be trained to recognize signs of emotional or physical distress. It can also be useful to refer to the Victims and Witnesses Unit in order to carry out an assessment regarding the situation of certain witnesses (see below on referring to Victims and Witnesses Unit).

## **D. How is a vulnerable witness identified?**

The vulnerability of a witness can be determined on the basis of various factors relating to the individual and the nature of the crimes or to other specific circumstances.

### *i. Factors relating to the individual:*

- Age (child/older person). Children come into a specific category of vulnerable witnesses;
- Physical disability (including cognitive disorders and deafness) or serious disease;
- Mental illness;
- Learning difficulties; attention deficit hyperactivity disorder; and
- Psychosocial difficulties (problems linked to trauma or lack of social support).

### *ii. Factors relating to the nature of the crime:*

- Victims of sexual or gender-based violence;

- Child victims of crime(s); and
- Torture victims or other crimes involving excessive violence.

*iii. Specific factors:*

- Fear or anxiety relating to the fact of having to give evidence;
- Stress or anxiety relating to relocation; and
- Fear of reprisals and/or links with the accused and/or other persons involved in the case.

*iv. Observing mood, language and attention span and tell-tale factors which could indicate emotional trauma:*

- High levels of anxiety (e.g. panic attacks);
- Staring blankly;
- Inability to answer questions or react to comments;
- Difficulty in remaining focused;
- Appearing confused and the witness reiterates what is said to them; and
- Inability to understand everyday expressions.

**E. How is the ability of a vulnerable witness to give evidence determined?**

The following factors can be used to determine the ability of a vulnerable witness to give evidence:

- Is the vulnerability of the witness likely to affect their ability to give the best evidence possible (complete, consistent and precise testimony)?
- Is the vulnerability of the witness likely to cause them anxiety or excessive stress during the interview and/or before giving evidence in court?
- Is the vulnerability of the witness likely to affect their willingness to give evidence in court?
- How does the witness perceive their own situation – does the witness consider him/herself vulnerable?
- What measures should be considered to alleviate these difficulties, including that of informing the person concerned?

When the witness is a child, their age, family and school situation will have an influence on their ability to be questioned and/or appear in court. Children do not communicate in the same way as adults. The recollection of a child should not however be considered as being less reliable than that of an adult. On the other hand, depending on the child's age and profile, their mode of communication will need to

be adapted, in particular to distinguish reality from fantasy arising from the child's imagination.

## 2. ABILITY OF THE DEFENCE TEAM TO HANDLE VULNERABLE WITNESSES

### A. Building the team to conduct interviews with vulnerable witnesses

The composition of the team is particularly important in order to facilitate meetings with vulnerable witnesses. Generally, witnesses tend to feel more comfortable speaking with people who are similar to them in terms of age, gender and culture. Female victims, particularly victims of sexual crimes, will often prefer to be interviewed by a female Counsel. It is also essential to ensure that no team member (including the interpreter) comes from an ethnic group or community that due to contextual circumstances could result in certain reluctance on the part of the vulnerable witness to talk. Ideally, Counsel should therefore build a “mixed” investigation team, which includes:

- men and women;
- age groups close to that of the potential witnesses; and
- one or more members of national or ethnic origin close to that of the potential witnesses.

### B. Training and supervising team members

Investigators and interpreters can be exposed to extremely distressing narratives and/or to persons in difficult situations because of the interview. It is essential they receive prior training so they can manage this kind of situation both with regard to the witness, for the conduct of the interview, and also for their own situation. Counsel must ensure that investigators and interpreters are:



#### Child witnesses - key element

- ❖ Check the child's family situation, in particular determine whether the child is supported by the family and/or the child's role within the family (for example, the child actually performs the role of parent and is responsible for his/her brothers and sisters; the child has been abandoned by his/her parents or is an orphan)
- ❖ Check the school situation and/or the child's level of education
- ❖ In the case of child-victims, (for example, a child soldier), first conduct an accurate assessment of the impact of trauma
- ❖ Ensure the assistance of a professional to meet and interview the child

- apprised of the local context (including particular linguistic aspects) and of the profile of vulnerable witnesses who will be interviewed;
- able to listen to painful details during the interview;
- able to recognize the witness's symptoms of distress and/or the risk of re-traumatisation; and
- able to react appropriately to a witness in distress.

The interview questions should also be prepared in advance, as should the overall conduct of the interview (identify the potentially more problematic moments of the interview).

### **C. Psychological support for team members**

To the extent possible, Counsel should consider the possibility of psychological support or counselling services for those team members directly exposed to particularly distressing narratives.

## **3. INTERVIEWS WITH VULNERABLE WITNESSES**

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### **A. The “do no harm” principle**

The rules applicable to witness interviews apply here.

Vulnerable witnesses however, require particular care tailored to their situation and needs. The fundamental rule in this respect is to avoid, to the maximum extent possible, causing the witness any harm (“do no harm”).

Asking a person to provide a detailed account of a traumatic event implies that they will necessarily re-live these experiences and thus that they could suffer a new trauma because of the interview (or because of the testimony). Investigators and interpreters must bear this in mind when interacting with witnesses and should adapt their behaviour accordingly. They must ensure the well-being of the witness and pay attention to any sign of distress or re-traumatisation of the witness (see also *supra*, training team members). They must be prepared to adapt the interview according to the state of the witness and be extremely patient in their conduct of the interview. This could require planning more than one interview with the vulnerable witness. It is also perhaps even more important to advise the witness that he/she might be called to appear in court to give evidence.

Counsel interviewing vulnerable witnesses should, in any event, act in accordance with the following principles:

*i. Attitude of the investigator and interpreter*

- Treat the witness with respect, courtesy, empathy and sensitivity;
- Use appropriate body language (taking into account the local context);
- Explicitly acknowledge that the subject matter might be difficult to recount and that the witness should not feel embarrassed or ashamed;
- Explain the importance of the narrative and thus the necessity for the investigators to understand the narrative in its entirety; and
- Plan for the possibility of more than one interview.

*ii. Formulation of the questions*

- Ask simple and comprehensible questions;
- Question the witness gradually, starting with more general and/or indirect questions;
- Ask open-ended questions which allow the witness to relate their narrative at their own pace;
- Avoid untimely interruptions; and
- Seek necessary clarifications/ask follow-up questions.

*iii. Well-being of the witness*

- Be alert for any signs of distress the witness might display and/or any risk of re-traumatisation: vocal expressions; the witness's body language; tone of voice; posture or hand gestures;
- Take appropriate measures in case the witness becomes distressed and/or there is a risk of re-traumatisation: temporary suspension of the interview; change the order of questions and/or their content (more general or less distressing questions); suggest psychosocial support during or following the interview;
- If required, provide for a support person (psychological or other);
- Provide for an assessment of the well-being of the witness following the interview(s) (preferably conducted by a professional counsellor);
- If required, inform, advise and direct the witness to local medical and counselling services; and
- Inform the witness of any follow-up to the interview (future contact, the possibility of having to give evidence).

## B. Prior knowledge of the witness's cultural background and local customs

It is important that, before the interview, Counsel and their team have an understanding of the context, including the prevailing local customs and sensibilities where the witness lives. In this way, the witness can be placed in a comfortable situation so as to optimize the interview and reduce the likelihood of any harm arising from the interview itself. This is particularly so for victims of sexual or gender-based crimes where the socio-cultural context can be extremely delicate. In some societies, these victims can be rejected by their families and/or their communities, with significant emotional and economic consequences (such as a wife abandoned by her husband and disowned by her family). For these types of victims, it is paramount that any information concerning their circumstances remains strictly confidential. Local custom might also dictate, for example, that any interview with a woman be carried out in the presence of her husband and/or a family member. It might be that in the witness's language there are no specific words to describe certain acts (such as "rape"), often because discussion of the issue remains strictly taboo.

// In Rwanda, I was questioning a rape victim and I was assisting the person accused of the rape. After the hearing I understood that my client had not committed the rape because the victim came to talk to me. Her position was essentially that the individual himself was not important and that it was the extended family who had committed the crime. In other words, I understood that the notion of individual responsibility does not have the same cultural and moral significance in all cultures. If I had understood that point, I would have undoubtedly asked my questions differently."

*A Defence counsel*

Counsel must, in particular, follow the recommendations set out below in order to ensure respect for the local culture and traditions:

- Choose the appropriate type of clothing to meet the witness;
- Understand and use the basic rules to greet someone, introduce oneself, thank someone, depending on age and gender;
- Use an appropriate verbal attitude and body language (including the investigator and interpreter);
- Determine whether the witness should be interviewed in the presence or with the authorization of a third person and if so, decide on possible alternatives (for instance, for a rape victim, ask her husband to wait in a separate room and/or request the presence of another woman);

- Determine whether certain themes relevant for the interview are taboo (for example, talking about the role of “witch-doctors” in some African societies might be perceived as dangerous for the witness);
- Become familiar with the vocabulary the witness might use to describe certain behaviours (for example, in rape cases); and
- Become familiar with any medical or social services available in the area to which the witness can be directed, if required.

### **C. Location and time of interview**

Interviews must be held in an environment that allows the witness to feel at ease and secure. The choice of location (and time) of the interview must also be made by taking into account the witness’s professional and family obligations. In certain cases, other measures might be required in light of any distinctive aspect of the witness’s profile. It is advisable to avoid public places and the victim’s workplace and to choose a calm and comfortable place; somewhere behind closed doors and without any possibility that third parties might overhear what is being said, with water and possibly food available for the witness and the team. If the witness brings a child with them to the interview, Counsel should provide for a separate room where the child can play without overhearing the parent’s narrative.

### **D. Protective measures and/or psychosocial support**

It is important to recall that the witness must be consulted on any proposed protective measure. For more information, see Chapter 7.

## **4. REFERRING TO THE VICTIMS AND WITNESSES UNIT**

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Counsel should not hesitate to consult the Victims and Witnesses Unit. Its support can be useful, including for the appearance of the witness in court.

The Victims and Witnesses Unit of the ICT can provide the following assistance to Defence teams:

### **A. Training the team**

Counsel can seek training for their team members so they that can identify vulnerable witnesses and the measures needed to respond to their specific requirements.



## **B. Resources**

In the absence of a psychologist/psychiatrist within the team, Counsel may request the assistance of the Victims and Witnesses Unit to designate a resource person in anticipation of certain interviews, particularly when a specific assessment of a witness needs to be made (vulnerability, ability to give evidence, measures required for the interview, the witness statement and/or testimony) or to provide psychological support to team members, if necessary.

## **C. Preparing the witness to appear in court**

If the Defence intends to have a vulnerable witness appear in court, it must alert the Victims and Witnesses Unit to inform them of the witness's vulnerable situation and allow for the preparation of the witness's appearance in court.

# ANNEXES

# Identification of vulnerable witnesses

*(At the planning of investigations stage)*

## 1. PRELIMINARY IDENTIFICATION

*Based on initial field information on potential witnesses, identify :*

- ☐ Victim(s) of sexual crimes
- ☐ Child(ren) victim(s) at the time of the events
- ☐ Victim(s) of particularly violent crimes (torture)
- ☐ Child(ren) witness(es)
- ☐ Witness(es), particularly elderly witnesses
- ☐ Witness(es) with a disability (mental or physical), or with a serious illness
- ☐ Witness(es) that are the subject of or fear reprisals
- ☐ Relocated witness(es)
- ☐ Other (indicate reasons for vulnerability)

## 2. PRELIMINARY ASSESSMENT OF THE IMPACT OF VULNERABILITY AND POSSIBLE MEASURES

*For each of the vulnerable witnesses identified at the preliminary stage*

- ☐ Level of difficulty of the interview: increased risk of high anxiety or re-traumatization?
- ☐ Special measures in the conduct of interview: need of several short interviews; particularly short and simple questions; psycho-social support; specific environment for interview?
- ☐ Presence of a legal representative (if child or incapable)?
- ☐ Presence of a lawyer (if victim is represented)?
- ☐ Presence of another family member / of a close relative (spouse, relative, friend)?
- ☐ If relocated witness, potential impact of relocation?
- ☐ If child witness, family situation and school? Impact on interview and statement? Presence of a professional to interview the child?
- ☐ Potential impact of vulnerability on the quality of evidence (narrative consistency, credibility, reliability)?

# Interview with a vulnerable witness

*To combine with check list concerning examination of a witness*

## 1. PREPARATIONS

### A. Team :

- ☐ Appropriate composition of the team (age / sex / origin, psychologist / psychiatrist)
- ☐ Knowledge of the local context and the vulnerability of the witness
- ☐ Writing questions / overall conduct of the interview; identify sensitive issues
- ☐ Ability to identify symptoms of distress / re-traumatization of the witness; and to respond appropriately
- ☐ Knowledge of relevant local social / medical services
- ☐ Adequate clothing; knowledge of courtesy formulas

### B. Timing and place:

- ☐ Check professional / family constraints of the witness
- ☐ Discreet, comfortable, safe and secure location
- ☐ Provide child care (depending on witness)
- ☐ Water / Food

### C. Other :

- ☐ If required, ensure the presence of the legal representative (minor); lawyer (represented victim) or other third party (spouse, relative or friend)

## 2. CONDUCT OF THE INTERVIEW

- ☐ Courtesy, respect, empathy (admit that the story can be difficult to tell)
- ☐ Question the witness gradually (start with general questions)
- ☐ Simple, short and open questions
- ☐ Allow the witness to tell her story; avoid interruptions
- ☐ Request clarification / ask follow-up questions (nota in relation to vocabulary used)

- ☐ Identify any signs of distress or re-traumatization (physical / verbal signs) promptly and take all appropriate measures (suspending the interview, assistance from a support person)
- ☐ At the end of the interview: explain what will happen next in the proceedings / the next steps
- ☐ At the end of the interview: assess the welfare of the witness and inform, advise and refer him / her to local counselling or medical services

### **3. FOLLOW-UP TO INTERVIEW**

- ☐ Assessment of the impact of the witness's vulnerability on the quality of the evidence (consistency, credibility, reliability)
- ☐ Assessment of the impact of the witness's vulnerability on his/her ability to be questioned, give evidence or testify
  - ☐ High level of anxiety (including panic attacks)
  - ☐ Fixed eyes
  - ☐ Inability to answer questions or respond to comments
  - ☐ Difficulty staying focused
  - ☐ Appears confused because he or she says or repeats what he/she is told
  - ☐ Does not understand everyday expressions
  - ☐ High fear of retaliation
  - ☐ Refusal to testify/increased anxiety in case of testimony in court
- ☐ Balancing the quality of the testimony with the risks related to the ability of the witness to testify (including re-traumatization)
- ☐ Assessment and identification of measures necessary to allow the witness to give evidence or testify (including contacting the Witness and Victim Protection Service)
- ☐ If necessary, provide psychological support to the team members who interviewed the witness

# COLLECTION OF PHYSICAL EVIDENCE



## COLLECTION OF PHYSICAL EVIDENCE

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Once the investigation plan has been established, evidence collection of evidence can begin. Physical evidence forms the basis of any successful Defence, even more so than testimonial evidence, which is susceptible to the fallibility of human memory, and the vicissitudes of witnesses' lives or corruption. Physical evidence, because of its often incontrovertible nature, can be determinative of issues at trial. It underpins and provides corroboration of the Accused's and Defence witnesses' narratives, and forms a strong basis for an effective cross-examination.

The collection of physical evidence should proceed in an ordered and proactive fashion. Defence Counsel and their investigators should be aware of the information that is needed, the most reliable sources, and the most efficient way to collect it. Importantly, they should have an intimate knowledge of the laws and rules of procedure and evidence that govern the collection of evidence, as well as the techniques to ensure the integrity of the evidence collected. Whenever possible, Counsel should seek the assistance - or at the very minimum, guidance - of a relevant expert when collecting physical evidence.

### 1. TYPES OF PHYSICAL EVIDENCE

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There are many types of physical evidence, for example, written documents, photographs, videos, sound recordings, DNA, clothes fibres, footprints, fingerprints, explosives residue, firearms cartridges, gunshot residue, telecommunication data, and data obtained from electronic devices (i.e. computer or phone). (See Chapter 12).


New evidence arises all the time, in lock-step with advances in technology and the increasing prevalence of internet and smartphone-based criminal activity.

### 2. DATA COLLECTION PLAN (DCP)

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To conduct an efficient investigation, the Defence team should compile a Data Collection Plan (DCP). A DCP should include the following information:

- the evidence targeted for collection;
- the probative value of the evidence;
- the assumed or known location of the evidence;

- 
- the person who will collect it (the evidence may be collected by Defence Counsel, a Defence investigator or by a third party on Defence Counsel's behalf, e.g. an expert);
  - how they will go about collecting it; and
  - the risks and dangers to Defence personnel associated with its collection.

The DCP should be structured in order of investigative priority.

The DCP could be included in the Investigative plan (see Chapter 5) or presented as a separate reference document.

### 3. CHAIN OF CUSTODY

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Physical evidence should be collected, handled, and stored in a way that guarantees its integrity. This is most effectively done by keeping a written record of the collection and handling of evidence, called a 'chain of custody'.

An unbroken chain of custody is essential for the physical evidence that Counsel have collected to be admitted by an ICT, and for it to be given the weight it deserves in the final judgment. The chain of custody establishes that what is produced in court is the same item recovered from an investigation location, and it serves to undermine any claims of substitution, accidental or deliberate tampering, or contamination. Subsequent examination and analysis of an item can be compromised if its chain of custody is not properly initiated at its collection and maintained throughout possession.

Further, personnel working at an investigation location may be called upon to recount certain details and demonstrate actions taken during the evidence collection process. Memory cannot be relied on for this. Taking witness statements from the persons who stored, collected, transported and registered the evidence also helps to ensure chain of custody. This should be done as early as possible after the event, by a Defence investigator or by Counsel. The statement should document the initial status of an investigation location and what was done, when, how and by whom. It should detail meticulously all the steps the person took in relation to the evidence (and why), and their observations.

Chain of custody is best recorded in a table attached to each item of evidence. An example is presented in the [Annex](#).



#### 4. GUIDING PRINCIPLES OF PHYSICAL COLLECTION

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The following are some guiding principles to keep in mind when collecting (primarily physical) evidence. Counsel should:

- Protect the evidence at an investigation location from contamination. Inadvertent contamination of evidence is possible if Counsel do not take proper precautions. For example, Counsel should wear gloves, shoe-covers and hairnets to prevent Counsel's DNA becoming mixed up with any evidence intended for collection. Current DNA technology allows for very small amounts of sample to be analysed, so care must be taken;
- Document the investigation location with notes, diagrams/sketches, and photographs. Counsel should take witness statements documenting on-site investigation processes if necessary. These tools create a detailed record and provide a basis for an investigator's recollection;
- Make careful decisions about what to collect, with reference to the DCP. Selecting relevant evidence is most efficiently and effectively done in the field, where the evidence exists in the context in which it was produced. Under difficult conditions or time-compressed situations, it may be preferable to recover more evidence and triage at a later stage of the investigation (this should be done as soon as practicable). At the same time, Counsel should be alive to the risk of over-collection. Indiscriminate evidence recovery may overburden the forensic and analytical capabilities of the Defence team at the office, and thus slow down an investigation;
- Document the chain of custody;
- Use packaging that is appropriate for the type of evidence collected. Different types of packaging include paper bags, envelopes, plastic bags, cardboard boxes, or metal cans. All evidence should be packaged separately. All packaging should be clean and unused. Counsel should select an appropriate packaging size: too small and the packaging may fail over time; too large and the evidence may be dispersed throughout the container and be difficult to recover. See the "Equipment" section, below, for a list of important equipment that should be taken to the field;
- Package all collected evidence separately. Counsel should mark the packaging clearly with a description, the collector's signature, and the date. This helps ensure its chain of custody, and therefore it can be easily identified in the future;

- Seal the package to ensure that it is not accessed, altered, compromised, or lost during storage or transportation. The investigator should initial the seal; and
- Register evidence as soon as possible upon returning from the field.

## 5. COLLECTION OF WRITTEN DOCUMENTS

Written documents often constitute the majority of physical evidence collected by Defence during their investigations. If possible, Counsel should retrieve the cache of documents, triage them in the field for relevance, transport them back to the office, scan them and preserve the originals in a safe location (e.g., an evidence vault). The quality of the evidence to be presented in court is paramount. This method permits Counsel to achieve the best digital rendering of the document, and to have the originals at hand in case of any future dispute.

If Counsel decides to transport the document to the headquarters, he should sign an acknowledgement of receipt of the original item (see [Annex](#)), and ensure that at the conclusion of the case the original is returned to its owner or caretaker.

If this is not possible, Counsel should:

- take a portable scanner to the field to scan the documents;
- take photos of the original repository of the written documents and of the process of sorting them for relevance;
- scan the documents;
- enter the details of each document collected into an Excel spreadsheet, with headings including storage folder name, document reference number (if an official document), date of document, type of document, number of pages, and case relevance;
- put the original documents back into the repository in the order in which they were found;
- obtain a witness statement of any relevant team member to verify chain of custody;
- write a note detailing the collection process (see below,

// During a mission to Rwanda, in the town hall archives we discovered a register that could lead to our client's acquittal. There was no photocopier present and nothing that could authenticate it. During the following mission we took some photocopies with the help of a local NGO and had a "certified true copy" stamp made in the local village. The Chamber took that document into account for its decision on acquittal."

*A Defence counsel*

“Documenting the evidence-collection process”) which can be included in the mission report;

- obtain a guarantee from the caretaker of the documents that they will not be disturbed and that the Defence will be able to return to access them; and
- after further analysis at the office, obtain a witness statement from the authors of the critical documents to verify their authorship and provide context, in order to bolster their authenticity and probative value.

Several of the above recommendations will also apply if Counsel is able to take away the original documents.

## 6. DOCUMENTING THE EVIDENCE-COLLECTION PROCESS

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In addition to recording chain of custody and taking witness statements, Defence Counsel and investigators should keep detailed notes of their own involvement in the evidence collection process. These notes should indicate:

- the date, time and location of evidence collection;
- the name and title of the person collecting the evidence;
- any observations, processing techniques and results of the examination of the investigation location;
- reference to the evidence collection logs (chain of custody forms);
- the photographs or videos of the evidence; and
- the signature of the evidence collector.

These notes should include facts, not opinions. They should record events chronologically. They should be recorded contemporaneously or as soon as possible afterwards; the greater the delay in recording, the less reliable the note will be considered. They should be detailed, clear and as concise as possible. If necessary, they should recommend a course of action.

## 7. VIDEO OR PHOTOGRAPHIC RECORDING OF AN INVESTIGATION LOCATION

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If no site visit is planned by the Judges, it may be in the Defence’s interest to give the Judges a visual feel of an investigation location. A video recording of a site is an ideal tool that will give the Judges a general overview of the location. In addition, close-up, detailed records can be made via photographs taken with a digital camera or a smartphone. This issue is discussed in Chapter 13.



## 8. EQUIPMENT

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Counsel should take all necessary equipment with him from the office to the field. This enables the provenance and cleanliness of the equipment to be verified. Equipment necessary to collect evidence in the field could include, for example, plastic and paper evidence bags, envelopes, gloves, hard-helmets, shoe-covers and hairnets.

## 9. OTHER VALUABLE SOURCES OF EVIDENCE

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Probative physical or electronic evidence may, on occasion, be available for collection by the Defence team other than in the locations where the crimes occurred.

For example, if similar cases have already been heard in the same court, in other ICTs, or in domestic courts, there may be a substantial body of relevant physical and electronic evidence readily available. The evidence may already have been admitted into a trial record and considered in a final judgment. Although locating, accessing and analysing this evidence may require significant resources, the investment can be worth it. Often, the probative value of the evidence has already been assessed by a fellow Counsel or a Chamber, which cannot serve as a substitute for Counsel's own team's analysis but may serve as a springboard for future investigation and analysis. Maintaining close cooperation and open communication lines with other Defence Counsel will help facilitate this process.

As discussed in Chapter 1, another valuable evidential vein is Prosecution disclosure. Although Defence teams are often overwhelmed by the large volume of evidence disclosed by the Prosecution, it is critical to review it as much as possible and as early as possible to determine if there is any available physical or electronic evidence to collect in the case, and where.

## 10. KNOWLEDGE OF THE RULES OF PROCEDURE AND EVIDENCE

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Critical for any successful investigation is for Defence Counsel and investigators to have an intimate knowledge of, and to be in compliance with, the laws and rules of procedure and evidence, as well as any other regulations, practice directions, protocols or codes of conduct that govern the collection of evidence. This is crucial to facilitate the collection of the evidence in the field. Each country will have local laws, rules and regulations that govern the process of evidence recovery at the investigation location, for example, obtaining authority to enter an investigation location. Engaging local investigators with a police or legal background can help add valuable local knowledge to the team.

# ANNEXES

## Chain of Custody Form

Case name and no:

Phase:

Counsel:

Chain of custody form #	
Mission #	
Date, time and place of collection	Date: Time: Place:
Name of item(s) collector	
Name of item(s) source	
Number of item(s) collected	
Description of item(s) collected	
Specific processing requirements	
Forensic examination required	Yes / No
Security classification of item(s) collected	
Additional comments (i.e. any specific conditions of receipt of item(s))	
Collector signature and date	Signature: Date:
Chain of custody of item(s) collected	Name: Date of receipt: Time: Place: Signature

# Acknowledgement of Receipt of Original Item(s) Form

Case name:

Case number:

<b>Lead Counsel contact details and signature</b>	<p><i>By signing the present form, Lead Counsel acknowledges receipt of the item(s) listed below and confirms that each item received shall be used solely in the context of the proceedings and returned to the depositor, owner or guardian of the item(s) immediately upon closing of the proceedings.</i></p> <p><i>By signing this form, Lead Counsel also confirms that he or any person under his supervision shall not reproduce, copy or disseminate to any third party, information contained in any confidential item(s) listed below.</i></p> <p>Name: _____ Defence team: _____</p> <p>Phone number: _____ E-mail Address: _____</p> <p>Signature (mandatory): _____ Date: _____</p>
<b>Recipient details and signature</b>	<p><i>If different from Lead Counsel.</i></p> <p>Name: _____ Phone number: _____</p> <p>Functional title: _____ E-mail Address: _____</p> <p>Recipient signature: _____ Date: _____</p>
<b>Total number of original items received</b>	

<b>Description of original item(s) received</b>	<p><i>Please provide below the title or other information about the original items received.</i></p> <p>Item 1:</p> <p>Item 2:</p> <p>Item 3:</p> <p>Item 4:</p> <p>Item 5:</p>
<b>Security classification of original item (s) received</b>	<p>Please provide below the security classification of each item listed above.</p> <p>Item 1:</p> <p>Item 2:</p> <p>Item 3:</p> <p>Item 4:</p> <p>Item 5:</p>
<b>Additional comments</b>	<p><i>Please provide below any additional comments below about the item(s) received.</i></p>
<b>Depositor, owner or guardian details and signature</b>	<p><i>By signing this form, the person authorized to make decisions about the item(s), consents that the item(s) listed above be used by Lead Counsel in the context of the proceedings until the closing of the case.</i></p> <p>Name: _____ Functional title _____</p> <p>Office (if applicable) : _____</p> <p>Phone number: _____ E-mail Address: _____</p> <p>Signature : _____ Date: _____</p>



DETAILED LOGBOOK OF CONFIDENTIAL INFORMATION DISCLOSED TO THIRD PARTIES

Name and contact information of the person to whom the information was disclosed	Date and place of disclosure	Confidential information disclosed	Name of the person who disclosed the information	Reference of document containing the confidential information disclosed	Basis of confidentiality (order / decision / text, etc.), references and date	Grounds for the disclosure of confidential information

CONFIDENTIAL

# COLLECTION OF DIGITAL EVIDENCE



## COLLECTION OF DIGITAL EVIDENCE

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Future cases before the ICTs are likely to include a significant amount of digital evidence and Counsel and their assistants will have to familiarize themselves with such evidence. The evidence sought by Defence Counsel will most probably be found in the digital environment. It will be important to know where to find such evidence and how to use it.

### 1. TYPES OF DIGITAL EVIDENCE

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Digital evidence can take a wide variety of forms: internet sites, digital documents, (Word, Excel), digital photographs and videos, emails, telephone or banking data and so forth. With the advance of modern technology, new types of evidence regularly appear before both national and international courts. Without intending to be exhaustive, the list below provides some interesting investigative leads that Defence Counsel may find useful.

#### **A. Free access documents and reports on the Internet**

A significant volume of information which is readily available and freely accessible on the Internet, either on websites or social networking sites can assist Counsel in their investigations.

##### *i. Press reports, NGO reports and investigation commissions reports*

Press articles, NGO or investigation commissions reports (national or international) often contain relevant information regarding the conflict or event which is the subject of the investigation.

This is the case with reports of the International Independent Investigation Commission (UNIIC), which contain interesting investigative leads for Defence teams at the STL, or of the Mapping project of MONUSCO (which describes 617 violent incidents which took place between March 1993 and June 2003 in the DRC), which also contains relevant information for Defence investigations.

Although Counsel should treat these sources with the utmost caution (in particular with regard to their reliability), they are, nevertheless, an important source of information for Defence investigations, both for identifying potential witnesses (who

could confirm orally the content of the report), and for corroborating the testimonies that have already been gathered.

### *ii. Social networking sites*

The extensive databases of social networking sites (such as Facebook, Twitter, Instagram and LinkedIn) can be used to identify potential witnesses. These databases also represent a major source of information for verifying the credibility of Prosecution witnesses.

With the advanced search option on social networking sites, Counsel for example can combine criteria such as places, dates, individuals or a particular subject matter in order to narrow down their searches. Therefore, it does not take long to find on Facebook whether two witnesses know each other, to search for all of a company's employees at any given time on LinkedIn or to locate all those persons who were in an area at a given time discussing a specific matter on Twitter.



Internet sites such as <http://researchclinic.net/> offer search tools for social networking sites which are extremely useful for investigator

By using specific codes on social networking sites and search engines, investigators can also refine their online searches and obtain precise and swift results. As such, the code “/photos-in” or “/videos-of” on Facebook will immediately show all the photographs taken at a specific place or all the videos taken by a particular individual. There are numerous ways in which to refine online searches and they provide Counsel with effective investigative leads and do not require major resources.

## **B. Digital photographs and videos**

Digital photographs and videos which can, for example, be found on social networking sites, on mobile telephones, or even on hard drives, contain a wealth of valuable information for Defence investigators.

The metadata of photographs (the EXIF specification embedded in each photograph) is easily retrieved and contains a large volume of valuable information for Defence investigations: GPS coordinates of the location where the photograph was taken (when shot with a mobile phone or a modern camera), date and time of the photograph, type of device or telephone used, or even in some circumstances its author.

Metadata is essential information for Defence investigations, enabling the authenticity of a document to be quickly verified prior to any possible tendering of the document into evidence. Using various software or free sites such as <http://gbimg.org>, this data can be easily readable so that it can be analysed (for example, to determine exactly where the photograph in question was taken).

### **C. Emails and other electronic data**

#### *i. Hard drives*

A meticulous study of the contents of computer hard drives and other removable media (USB keys, external hard drives), whether seized by the Prosecution in the context of its investigations, can also allow investigators to find valuable information.

#### *ii. Emails*

The metadata embedded emails can also represent a source of vital information for investigators. Such metadata contains a large amount of usable information: including the date and time (with information on the time zone) at which the email was sent and received by the recipient, the sender's email address, the sender's IP address.

A quick search on websites such as [www.ip-address.com](http://www.ip-address.com) or <http://fr.geoipview.com/> makes it possible to pinpoint the precise location and name of the person (natural or legal) behind the IP address and identify the author of the email.

### **D. Telephone data**

#### *i. Information contained in the mobile phones*

Undoubtedly modern mobile phones are a wealth of information for any investigator: contacts, text messages, photographs, videos, emails, data, Internet history, GPS data and so forth. Smartphones are very much viewed as real "spies", as everything is recorded.

When Counsel meet potential witnesses, they should not hesitate to check with them whether they have any relevant information of any kind on their mobile phones (photographs, videos and suchlike), which could confirm their narrative or provide the Defence with additional useful evidence.

#### *ii. Telephone data*

The metadata of each telephone number contains information relating to the calls and text messages emanating from that phone. From that metadata, the identity of

the telephone user, the time, the duration and the recipients of the call, its location and the location of the recipient and so forth can be identified with a certain degree of precision.

This information which is collected on an ongoing basis by telecommunication service providers is normally used for billing purposes. Although the metadata does not usually reveal the content of communications, it does provide the details surrounding those communications allowing the Defence to conduct its analysis and investigations regarding any person of interest.

### **E. Other modes of electronic evidence**

Counsel must be innovative in their search for evidence and bear in mind that, even during international conflicts, technology is omnipresent and offers immense investigative opportunities and possibilities.

Experience has shown that the analysis of electronic data such as bank statements, ATM receipts, CCTV recordings, GPS history integrated into vehicles, or readings from electronic access cards to high security buildings can sometimes serve to strengthen an alibi or challenge the testimony of a witness.

## **2. BEST PRACTICES FOR COLLECTING DIGITAL EVIDENCE**

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It should be stated that all the information and recommendations relating to the collection of physical evidence (particularly regarding the Data Collection Plan and the chain of custody also apply to the collection of digital evidence. (See Chapter 11).

However, the collection of digital evidence obligates Counsel to adopt additional methods and practices so as to ensure the proper conduct of their investigations regarding electronic evidence.

### **A. Remaining anonymous while investigating on the Internet**

Throughout all their investigations on the Internet and in order to safeguard confidentiality, Counsel and their investigators must use software to secure their anonymity (such as Tor).

This type of free software, which can be downloaded online, conceals the location and usage of an Internet user from anyone who is monitoring the network or analysing the traffic generated on a website. This includes websites and public profiles on

social networking platforms the user has visited, information published online and instant messages, as well as other modes of communication.

### **B. Ensuring the integrity of digital evidence**

As with physical evidence, any digital evidence collected will probably be tendered as evidence before the ICT. To that end, the person who processed the digital evidence must be able to explain to the Chamber the methodology employed to collect the evidence and guarantee its integrity.

It goes without saying that Counsel and their investigators must absolutely refrain from modifying or altering in any way the content of any item of electronic evidence (for instance, deletion or addition of information in an email, or a database). Not only would that modification render the evidence inadmissible, but it could be perceived as fabricating evidence, which could be subject to disciplinary and/or criminal sanctions.

Investigators must also exercise the utmost caution while collecting any electronic evidence so as not to alter its reliability. For example, a simply opened Word document might possibly be marked as “modified” on the day it was opened and would render that item of evidence unusable before an ICT.

### **C. Ensuring the transparency and traceability of the analysis of the electronic evidence**

After collecting electronic evidence, Counsel or those assisting them will need to analyze it.

The principle is the same as with any item of evidence that is subject to scientific analysis. Each action undertaken by Counsel or the person assisting them (expert, investigator) must be clearly documented.

The underlying idea is that an expert or analyst must be able to repeat all the actions undertaken by the Defence and obtain the same result.

Therefore, when electronic evidence is taken from a computer, it is highly recommended that screenshots showing each phase of the collection process are taken.

If the evidence has been collected from the Internet, the investigator must likewise take a screenshot of each action undertaken (for example, the opening of a web page) and clearly indicate the IP address of the computer which was used to recover the data and information found on the website in question. The computer or server’s

clock should also be set to the local time zone. This information should be recorded for future reference.

#### **D. Assistance of an expert**

As with physical evidence, the assistance of an expert is required in most cases in order to ensure the reliability and traceability of the digital evidence collected.

Each time Counsel or their investigator do not feel sufficiently competent to collect an item of digital evidence (for example on account of it being too voluminous, too complex or because its reliability could be challenged by the Prosecution), it is advisable for Counsel, budget permitting, to seek the assistance of an expert in that particular field. In such a case, should doubts arise regarding the reliability of the digital evidence collected, the expert could be called to give evidence on the collection process and on their qualifications to undertake such a task.

Furthermore, it might be wise to have the expert sign a written statement describing the collection process and the chain of custody, and to also obtain a detailed curriculum vitae describing their relevant qualifications with regard to the collection and/or analysis of digital evidence. This will be useful in the event of any dispute regarding the admission into evidence of the digital evidence.

The instructions given to the experts must be worded as clearly and precisely as possible and set out the information being sought, the timelines within which it must be obtained, and the anticipated results in as much detail as possible (delivery of information, drafting the report, etc.).



## NOTES

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# ON-SITE VISITS



## ON-SITE VISITS

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If security conditions allow, Counsel will have to carry out one or more visits to the sites where the events referred to in the indictment took place. These visits are generally conducted in parallel with the investigations in the field.

A first visit should be made as soon as possible following the appointment of Counsel in order to facilitate their understanding of the case file, and before the relevant sites undergo any significant changes.

These on-site visits enable Counsel to:

- Familiarize themselves with the region where the facts with which the accused is charged unfolded;
- Render their work more tangible insofar as they acquire a personal understanding of the sites;
- Place events in their geographical and spatial context;
- Observe certain characteristics specific to the site referred to in the charges, such as distances, visibility and geographical features;
- Measure the distance between two locations;
- Note the existence of any constructions (such as roads, fences and buildings), topographical features of significance (rivers, hills, etc.) or natural obstacles (trees, rocks, etc.);
- Facilitate the work of Counsel with the investigators and with the client by sharing common references;
- Collect evidence to be used during the trial, such as photographs, videos and sketches;
- Locate witnesses who, for example, live in the vicinity of the sites;
- Verify the credibility and reliability of the Prosecution and the Defence evidence;
- Examine sites in the presence of potential witnesses; and
- Assess whether it would be appropriate to request the Judges to conduct a visit to certain sites, in the presence of the parties and the participants, in order to make their own findings, as well as verify the various testimonies.

## 1. PREPARATION OF THE VISIT

### A. Safety and security

The safety of the Defence team must be a priority. Therefore, prior to any planning for the team to travel and conduct an on-site visit, Counsel must ensure that the physical safety of the team members will not be put at risk.

Counsel will have to ensure in advance, if necessary employing the assistance of the Security and Safety Section, that:

- the local security situation is such as to permit an on-site visit (e.g. no ongoing armed conflict or any active militia on the territory);
- the site involves no risk for the physical safety of the team members (e.g. no anti-personnel mines, unexploded ordnance (UXO) or explosive remnants of war); and
- the site is accessible (e.g. ascertain that the roads are open, whether the area is public or private), and that there is no requirement to obtain specific authorization to gain access (e.g. a military base).

### B. Analysis of evidence from the case file relating to the sites

Any on-site visit must be preceded by an in-depth analysis of the evidence from the case file relating to the site in question.

#### *i. Analysis of the description of the sites in the testimonies*

During this analysis, the Defence shall take note, from each of the witnesses' statements, of all the information which will have to be physically verified in the field (for instance, the position of certain objects or buildings, distances, the time required to travel along a route, the geography of the sites, and so forth).

#### *ii. Compilation of maps, photos and videos*

The Defence should identify all the maps, satellite images, photographs and videos of the sites in the case file, and such material should be analysed prior to departure. Those documents must be taken on the mission to enable the Defence to compare them, *in situ*, with their own findings.

#### *iii. Determination of evidence excluded from the case file*

Lastly, Defence shall take note of all the relevant evidence which has not been included in the case file and which will have to be investigated in more detail in

the field. During their on-site visit, Counsel can make their own findings and, if required, collect any necessary evidence in support of their case.

### **C. Consultation of documents in the public domain**

Prior to departure and for reference purposes, Counsel can consult documents in the public domain such as geographical maps, satellite images, videos and photographs.

## **2. COLLECTING AND RECORDING INFORMATION GATHERED DURING THE VISIT**

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Each on-site visit carried out by a Defence team member creates an opportunity to collect relevant information for the case file.

This information is extremely useful as it helps to develop and refine the Defence's theory and strategy and assists in the preparation of the cross-examinations of the Prosecution witnesses and victims.

The materials collected can also be filed as evidence by the Defence. If that is the case, Counsel will have to follow with due diligence the recommendations set out at Chapter 11 when collecting information and evidentiary materials.

In certain cases, the sites might become inaccessible during the visit. Therefore, it is very important that a thorough on-site visit is carried out at the earliest opportunity and that Counsel collects the maximum amount of information during that visit.

Depending on the case, a visit to a specific site at the same period or time corresponding to that of the facts with which the accused is charged might be necessary to ensure that the information collected and the analyses carried out are as relevant as possible. For example, if the facts took place in the evening during the rainy season, an on-site visit under similar circumstances might be necessary in order to observe, for example, any impassable roads or any lack of visibility.

In order to collect and record relevant information at the site, the following methods can be used:

### **A. Note-taking**

It is essential that team members take precise notes of all the evidence they observe at the sites. Those notes could be incorporated into the mission report, which will be drafted at a later stage. (See Chapter 14)

Those notes must provide details of each of the actions undertaken by team members to collect evidence, by stating the specific site, the date, the time and the information collected. That information could be used for the preparation of the cross-examination of Prosecution witnesses and the examination of Defence witnesses. The notes must therefore be precise, without any error.

Some of the templates provided in the Annexes are designed to assist team members in recording all the relevant information, such as the documents for the chain of custody and the inventory of photographs.

### **B. Site sketches**

For reference purposes, a sketch of the sites visited can be made. This needs to be drawn as an aerial view and should reproduce as accurately as possible the site geography. If possible, the sketch should include the orientation (cardinal points), the scale, the distances recorded and the GPS coordinates.

Furthermore, if photographs or video images are taken during the on-site visit, it is important to indicate on the sketch the exact location of the person who took the photographs or videos and their orientation.

The sketch might be the subject of discussion in the courtroom, or even filed as evidence. With this in mind, the sketch must be dated and signed by the author and a copy should be included in the mission report.

### **C. Taking photographs and making video recordings**




Any photographs and video recordings produced during visits in the field provide information that can assist the Defence in their analysis of the Prosecution evidence or corroborate evidence filed by the Defence.

While photographs are clearer and more precise, video recordings provide a more comprehensive perspective of the environment surrounding the video operator.

Counsel should bear in mind that recorded video images will generally be unfocused and are a less accurate representation of reality (distances and/or dimensions of the sites might be distorted). In addition, it is often easier for photographs to be marked by the witness in the courtroom.

It is recommended that Counsel combine the videos taken of all the sites in question with the photographs of each location which are relevant for the case file.

Given that photographs and video recordings can be used to contradict a Prosecution witness or support a Defence witness, such material can be tendered by the Defence as evidence.

**1**  **In order to ensure that these items will be admitted into evidence and have**  
**2**  **sufficient probative value, the photographer/video operator should in particular**  
**3**  **follow the recommendations below:**

- ❖ The video operator should ensure that there is sufficient light and that no background noise interferes with the recording (including conversations);
- ❖ The video operator may, depending on how it will be used, add commentary to the images s/he is recording;
- ❖ The date and time each photograph and each video recording was taken should be documented. For this purpose, it might be useful to program the camera for the date and time to appear on the screen and if possible, on the recording or printed photograph;
- ❖ The exact location of the photographer/video operator and the position of the device must be noted down for reference purposes;
- ❖ If the recording or photograph was taken with a device using a memory card, that card will be considered the original and treated as evidence. A document recording the chain of custody must also be created; and
- ❖ Where possible, the photographer/video operator should check the video and photographs prior to leaving the site so as to ensure there are no technical errors and to verify that the important items have been recorded and photographed.

In conclusion, Counsel should always bear in mind that if the visit takes place several months, or even years, after the events, the site might have changed significantly. For example, new buildings might have been constructed or others destroyed, and the vegetation might have grown or been cleared. For the purposes of comparison, it will therefore be pertinent and useful to try and find photographs and video recordings dating from the time of the facts. Likewise, geographical maps from the time of the facts might be useful. They could be compared to current geographical maps or satellite images.

#### **D. Judicial visit or on-site inspection**

In the context of the proceedings, the parties can request the Judges for an inspection of a specific site, in the presence of the parties and participants, so that their own findings as well as the various testimonies can be validated. The parties may request that this visit be recorded (in a report or a detailed record or by video) in order to refer to it during the trial.

The conditions for the on-site inspection by the Judges must be clearly stated, and the sites selected according to the evidence admitted into the case file.

The Defence must submit a detailed list to the Chamber, prepared on the basis of an analysis of the evidence admitted into the case file, and the materials to be found on-site for each of the sites to be inspected. For example, if the Defence challenges the testimony of a Prosecution witness on the distance between two points and the time required to travel between them, the Chamber should be requested to make the same journey.

The modalities of the visit (itinerary, duration, participants, rules of conduct with which the parties and the participants must comply) and, likewise, any other legal, logistical, organizational and material matter must be examined and discussed in the presence of both parties (preferably during a status conference held for that purpose) prior to the on-site visit.



## NOTES

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# MISSION REPORT



## MISSION REPORT

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At the end of each mission, Defence investigators must produce a full report of the investigative activities they have carried out. This will usually be in the form of a written and confidential report which will be distributed to all team members and the client. The report will enable the reader to quickly familiarize themselves with the conduct of the mission and with the evidence collected. The report, read in combination with the investigative plan, therefore enables the team members to have a clear idea of the work carried out and of the tasks which remain to be completed in accordance with the pre-established strategy.

The aim of this chapter is to define best practices for preparing reports on investigative missions. The recommendations which follow are general in nature and should be adapted according to the specific characteristics of each case.



To assist in the reading of this chapter, we have used the term “investigator” to refer to any individual participating in the investigative mission, whether an investigator of the team, Counsel or support staff.

As discussed in Chapter 5, Counsel will decide who will lead the investigative mission and which team members will participate. One of the team members who took part in the mission will be assigned the task of drafting the investigation report.

### 1. OBJECTIVES OF THE REPORT

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The investigative mission report is an essential working tool for Defence team members. The objectives of the report are:

- To provide a precise and detailed record of the evidence and the testimonies gathered;
- To describe the locations visited by the investigators;
- To take note of the contact details of the sources and witnesses who were interviewed;
- To describe any difficulties encountered (being unable to meet certain witnesses, security issues regarding the team and the witnesses, etc.);

- To record the thoughts and impressions of the investigators regarding the evidence gathered, in particular, the reliability and credibility of the witnesses, and the authenticity of the documents;
- To take note of any new investigative leads (often discovered in the course of the mission);
- To take note of further steps and actions to be taken on returning from the investigative mission; and lastly
- To transmit the preliminary findings of the investigators on the basis of the evidence gathered and provide recommendations regarding the work which still needs to be carried out.

The mission report therefore serves to record all the information collected during the mission in question. It provides, at the same time, those team members who did not participate in the mission, and the client, with immediate access to the outcome of the mission and, where appropriate, the measures which must be implemented for subsequent investigations.

## 2. CHARACTERISTICS OF THE REPORT

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### A. Diligence

The mission report must be disclosed to the Defence team members and to the client as soon as possible following the return of the mission so that the necessary analysis can be carried out. In this way, firstly the team can be promptly informed of its content and, secondly, it will also enable them to take any steps

deemed necessary as a result of that mission in a timely manner, including the security situation of the witnesses, the transmission of disclosure requests to the Office of the Prosecutor, the following up of investigative leads, and so forth. Counsel can also use this opportunity to decide whether or not they have all the necessary evidence to prepare the defence of the accused and to assess whether it would be appropriate to conduct further investigations.



#### **It is advisable to**

Compile and store the full contact details of any person deemed relevant to the Defence. However, this is highly confidential information and Counsel must take measures to protect such information.

It is advisable to start drafting the report during the mission. It will be easier for the investigators to accurately recall the information they receive and their impressions if they are recorded immediately.

### **B. Completeness**

The report must include all the relevant information gathered during the investigative mission, any difficulties encountered and any analyses carried out. All available information concerning the mission must be documented in the report, so that those members of the team who did not participate in the mission, and the client, are fully informed of the investigation.

### **C. Accuracy**

Investigators must ensure that the facts provided by the witnesses are transcribed accurately and objectively. Investigators' comments regarding the witnesses and other evidentiary material collected must be presented separately in the report and be clearly identified as such.

It is important to ensure that dates, numbers, locations, names and contact details are transcribed with accuracy. The contact details of witnesses and sources are essential as this information allows the Defence to maintain contact with them throughout the proceedings, and they should therefore be regularly updated. It might be useful to make a digital copy (using a scanner or a camera) of the witness's identity card, and to take a photograph of the witness so that each person interviewed can be readily recalled. These copies and photos can also be incorporated into the report.

### **D. Concision and clarity**

Although the report must be complete, it also has to be concise and clear so as to facilitate reading. Therefore, the authors must use a simple, clear style. This will involve using precise terminology and short sentences. Abbreviations, unless used regularly by the team, should be avoided, as should complex turns of phrase and unduly complicated vocabulary.

### **E. Presentation and structure**

The report must be structured so that it is easy to read and understand. The information in the report must also be easy to find. It can be structured chronologically, by

day for example, or by subject matter, or even by type of evidence gathered (testimonies, documents, etc.).

In addition, the use of photographs, geographical maps, tables and diagrams can assist the reader in understanding the material.

## F. Confidentiality

By its very nature, the report is strictly confidential and is not subject to any disclosure obligation. Investigators can therefore freely describe their impressions, thoughts and opinions concerning the witness statements and the evidentiary materials that have been collected. Furthermore, investigators can note in the report any incriminating information they have received so that it can be examined by the Defence.

Counsel must ensure that they give clear instructions to the investigators on the precautions to be taken in terms of confidentiality, with particular regard to the following points:

- Using passwords to protect the digital version;
- Writing the word “confidential” on the report;
- Using secure printing and transmission of the report to other team members;
- Using encrypted hardware and software; and
- Identifying the intended users of the report.

For that purpose, Counsel can consult the Security and Safety Section of the ICT (and Information Security) to obtain instructions regarding the most efficient methods for protecting the information collected and recorded in the report during and after the investigation.

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2  
3

Attributes of an excellent investigation report

- ❖ Les noms ou les descriptions des Exhaustive
- ❖ Precise
- ❖ Concise
- ❖ Clear and structured
- ❖ Rapidly accessible

## 3. CONTENT AND STRUCTURE OF THE REPORT

### A. Table of contents

A table of contents provides readers of the report with a quick overview of its content and, in some instances, directs readers to those parts they consider more relevant.

## **B. Summary**

In certain cases, the mission report will be quite lengthy, especially when the investigative mission took place over several days or weeks. In such circumstances, it can be useful to add a summary at the beginning of the report so that team members and the client can immediately understand at a glance the content of the report and its key points. In addition, considering that the team is likely to carry out more than one investigative mission, these summaries make it easier to find information contained within various different reports.

In some cases, there is no need for a summary, and a table of contents alone may serve the purpose.

Counsel, in consultation with other team members, should establish a glossary of terms to be used in order to standardize the drafting of all the reports that the Defence team will produce, and to facilitate the finding of information by using keywords.

## **C. Information relating to the case**

It is essential to summarize the specific context in which the report is drafted since the report might concern only some of the allegations laid against an accused. That is the case, in particular, when Counsel has given instructions to an investigator to confine their investigation to certain specific events pertaining to the case.

## **D. Information relating to the mission**

The report must also clearly identify the name(s) of the team members who conducted the mission, the date and place of the mission, the number of days of the mission, the persons who were met in chronological order, the locations visited, and the documents obtained. It should also list any unsuccessful attempts by the investigators to meet with witnesses or obtain documents.

Furthermore, it should identify any other individuals assisting the Defence team during the mission, namely drivers, translators, interpreters, security officers, etc.

## **E. Testimonies collected**

The report must contain a record of each of the statements obtained during the mission, ordered either chronologically or by subject matter. The approach chosen by Counsel to transcribe the statements of the individuals who were met as part of

the investigation will determine the way in which the testimonies obtained will be documented in the investigation report.

The record must be complete and structured and include in particular:

- The names of the individuals who conducted the interview;
- The names of the individuals who were present during the interview;
- The name of the person interviewed and their role in the investigation (victim, potential suspect, witness establishing an alibi, person whose testimony undermines the credibility of a prosecution witness), their job and their contact details;
- The place, date and time of the interview;
- The language(s) used during the interview;
- The name of the interpreter, when required;
- A verbatim record of the witness statement or, where required, a summary;
- The names of all the persons cited by the witness who could corroborate their version of the facts and their contact details (this is essential when doubts exist as to credibility);
- Photographs of the witness, with their consent; this will help team members to recall that witness when the report is read months, indeed years, later; and
- A copy of the witness's identity card should also be annexed to the report where possible.

// When I was practising before the ECCC, I realised that it was useful to specify what language was used during the interview, because according to the language used, a number of terms employed by the person being interviewed might have several meanings once translated. To give an example, in Khmer, there is no difference between singular and plural, or between masculine and feminine. According to the person translating and if clarifications are not sought, it can completely change the meaning of a testimony."

*A Defence counsel*

The record of the testimony must be as exhaustive as possible and reiterate, to the extent possible, the exact words used by the witness (verbatim). If the record is unduly long, a summary of the record should be incorporated into the report and the transcription of the meeting annexed to the report.

If Counsel considers it appropriate to draft a written statement, signed by the witness, this should also be annexed to the report.



## **F. Protective measures taken**

The mission report must also contain an analysis of the security situation of the witnesses, including a detailed description of any concerns the witnesses might have raised or of any threats they might have received. The report should also mention whether the various protective measures available to the witnesses (aimed at protecting their identity) were discussed with the witness.

In addition, the report should indicate what measures were taken by the investigator to guarantee the protection of the witnesses and the confidentiality of the statements obtained.

Any incident or event likely to jeopardize the confidentiality of the testimonies obtained or the identity of potential Defence witnesses must also be included in the investigation report.

## **G. Documentary evidence collected**

The parties and participants must normally disclose, for each item of evidence they intend to produce at trial, in addition to the evidence itself, the chain of custody of that item of evidence. The investigators must therefore record the necessary information in the report.

The mission report must thus contain an exhaustive list of all the documents or exhibits collected, providing details, in particular, of the type of evidence (video, photo, computer file, biological, etc.); the date and place where the evidence was collected; the name and title of the person who collected the evidence; the person who submitted the evidence to the investigator; the individuals who were present at the time; the means implemented to safeguard the integrity of the evidence in question; the place the evidence was stored; and so forth. For reference purposes, the document in which information relating to the chain of custody is recorded can also be specifically identified as such in the mission report.

## **H. Investigators' notes**

The investigation report must also include the thoughts and impressions of the investigator with regard to the cred-

// In my opinion a good mission report should acknowledge the weaknesses in the witness' potential evidence, including any inconsistencies with other evidence collected. It should contain a complete record of contact details and identification information (including photo) and an agreement on the part of the witness for continued contact."

A Defence counsel

ibility of the testimonies gathered and all the factors justifying such impressions (for example, any hesitant tone of voice the witness might have or any repeated contradictions the witness might make). The investigators can also record in it any impressions they might have regarding the evidence obtained.

### **I. Conclusions and recommendations**

The investigation report ends with the investigator's conclusions regarding the mission and recommendations for subsequent missions or for actions to be undertaken by the team or by Counsel in light of the findings of the mission and the evidence collected.

# ANNEX

# MISSION REPORT

*(To be completed after consulting Chapter 14 - Mission Report)*

## 1. SUMMARY

*[Brief overview of the content of the report]*

## 2. INFORMATION CONCERNING THE CASE

[Summary of business information necessary for the proper understanding of the mission]

- A. Context
- B. Charges against the accused
- C. Specific allegations to be investigated

## 3. INFORMATION ON THE MISSION

*[The mission must be clearly identified. A full picture of the evidence sought and collected must be presented. The report must also describe in detail any attempts to collect evidence or meet witnesses that might have failed.]*

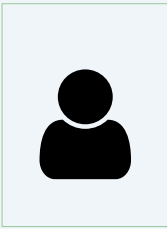
- A. Date and duration of the mission
- B. Composition of the fact-finding mission
  - i. Members of the team
  - ii. Other external collaborators
- C. Places visited
- D. People met
- E. Documents collected

## 4. TESTIMONY GATHERED

*[Records of each of the depositions collected, chronologically, by subject or alphabetically]*

- A. Day 1
  - i. Witness A

*[The following formula should be used for each witness:]*



Name:

Date and place of birth:

Occupation:

Contact details:

Notes:

Name of persons present:

Date, time and place of the interview:

Languages used:

Interpreter, if applicable:

Document ID given:

Statement:

*[Verbatim or summary if the writing of the verbatim is not possible]*

ii. Witness B

iii. [...]

B. Day 2

i. Witness A

ii. Witness B

iii. [...]

C. [...]

## **5. PROTECTIVE MEASURES PUT IN PLACE**

*[Analysis of the security situation]*

A. General security context

B. Concerns about the Defence team

C. Concerns about the witnesses

D. Concerns relating to the material evidence

## **6. DOCUMENTARY EVIDENCE AND/OR MATERIAL EVIDENCE COLLECTED**

*[For each document or piece of evidence collected, the report must provide a description of the document or item in question, including the circumstances in which the document or item was collected, including the place, date and the people involved]*

*[The following formula should be used for each document or material element:]*

A. Item 1

## **7. INVESTIGATOR'S NOTES**

[Full description of all impressions and feelings of the investigation team regarding the evidence and evidence gathered]

## **8. FINDINGS AND RECOMMENDATIONS**

- A. Mission findings
- B. Recommendations for any on-going investigations
- C. Actions to be taken

## **9. ANNEXES**

- A. List of photographs taken and video footage made during mission
- B. Others

## REGISTRATION OF PHOTOGRAPHS AND VIDEO FOOTAGE PRODUCED DURING MISSION

(To be completed after consulting Chapter 11 - Material Collection  
and Chapter 14 - Mission Report)

[illegible]

# STATE COOPERATION





## STATE COOPERATION

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Securing State cooperation is a vital component of Defence investigations.

Counsel will usually seek the cooperation of a State in two situations: when it cannot or has failed to obtain the piece of evidence directly from its custodian (the source), or when it has an interest in formalizing the request and the response.

In order to facilitate Defence investigations, Defence cooperation requests usually pass through the competent organ of the Court - the Defence Office or the Registry - who are responsible for sending notes verbales and Requests for Assistance (“RFAs”) to the various State authorities.

If requests for cooperation prove unsuccessful, Defence Counsel can seize the relevant Chamber with a written filing to seek cooperation of the State.

### 1. COOPERATION FRAMEWORK

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Not all States or entities are under an obligation to cooperate with the Court, including with the Defence.

Therefore, when seeking the assistance of a State or entity in the course of his investigations, it is essential for Counsel to have a precise understanding of the cooperation framework of the ICT.

When considering the legal framework of the cooperation, Counsel should bear in mind that bilateral agreements, or the internal legal provisions of a particular State, may compel the State to assist the Defence in a specific manner. For example, at the STL, the Defence Office concluded a Memorandum of Understanding with the Government of Lebanon setting out the modalities of Lebanon’s cooperation with Defence teams.

#### **A. States’ obligation to cooperate**

State cooperation obligations vary from Court to Court.

In general, when an international Court is established by a UN Security Council (UNSC) resolution pursuant to Chapter VII of the UN Charter (such as the ICTY, ICTR and MICT), all UN Member States are under an obligation to cooperate with that Court, including with the Defence.

The ICC, as a treaty-based Court, requires the cooperation of the signatory States to the Rome Statute. Unlike the ad hoc tribunals, there is no blanket cooperation obligation placed on all UN members if they are not parties to the Rome Statute. However, even when a State is not a signatory to the Rome Statute, it may otherwise have an obligation to cooperate in specific circumstances under the provisions of the Statute.

At the STL, only the State of Lebanon is bound to cooperate with the Tribunal. Third States do not have any obligation to cooperate with the STL. Their cooperation depends exclusively on their goodwill.

Likewise, other hybrid tribunals, such as the SCSL and the ECCC, have agreements between the United Nations and, in this case, Sierra Leone and Cambodia, thereby creating an obligation on the State to assist.

## **B. Other entities' obligation to cooperate**

### *i. International organizations*

International organizations, such as the UN and NATO, may be under an obligation to cooperate depending on the Court requesting assistance and the agreement that the Court might have signed with the organization in question.

### *ii. Public or private entities*

The information or material sought by the Defence may be in the possession of a public or a private entity.

Where this is the case, the Court will seek the assistance of the State in order to obtain the requested information or material from the public or private entity.

In this respect, any cooperation will depend on the State's obligation to cooperate. Cooperation will therefore

#### **1 2 3 Some organizations which have been requested to assist the Defence have included**

- ❖ AU (African Union): Requested to assist an ICC Defence team in a UN-referred case, provided the request meets the requisite criteria for a cooperation request;
- ❖ NATO (North Atlantic Treaty Organization): Requested, along with certain States, to produce and then remit intercepted communications to the Defence in a case before the ICTY;
- ❖ ECMM (European Community Monitoring Mission): Requested, along with certain States, to disclose certain documents to the Defence in a case before the ICTY;
- ❖ UNMIK (the United Nations Mission in Kosovo): Requested to assist ICTY Defence in missions to Kosovo pursuant to an obligation arising out of UNSC Resolution 1244.olitique, culturel et historique ;

be extremely difficult to secure from States which are not bound by any duty to cooperate with the Court. Even when the State has such a duty, the capacity of the State to enforce cooperation from a private entity will depend on applicable rules under national law.

## **2. CONSIDERATIONS BEFORE SEEKING COOPERATION**

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Before resorting to State cooperation, Counsel must determine if it is the appropriate channel, given the circumstances of the case.

### **A. Preliminary considerations**

At the outset, Counsel should take into consideration the legal relationship of the State with the Court

Questions to be considered, in this regard, may include:

- Does the country have an obligation to cooperate with the Court?
- Is there any particular Memorandum of Understanding (“MoU”) in place? If so, does that MoU specifically cover Defence Counsel? Does it cover all Defence team members?
- What documentation is required if no MoU is in place? What is the process to have the Court issue such documentation?
- What has been the legacy response to (Defence) investigations in that area?

Setbacks and potential diplomatic incidents can be avoided by seeking answers to these questions well in advance of mission-planning.

Counsel is usually not required to go through the Court to seek assistance from a State. However, going through the relevant organ (Defence Office, Registry) might sometimes be useful and might be even required before certain Courts or in certain circumstances. There are therefore certain provisions which must be known and adhered to. These regulations, protocols or procedures will vary depending on the institution (and possibly on the Chamber) and should be known by the Defence team at the earliest possible stage.

### **B. Advantages and disadvantages of seeking State cooperation**

Before deciding whether or not to seek cooperation from a State, Counsel should evaluate the considerations for and against making such a request.

*i. Advantages of seeking State cooperation*

**- Economy of resources**

RFAs to States are an efficient means of collecting evidence while saving resources. Defence teams will simply send their request and receive the document or information without having to travel to the country to obtain the required authorizations and to meet the individuals from whom the information or document is requested.

**- Obtaining certified documents**

RFAs can be an optimal means to accessing documents certified by governmental authorities, the authenticity of which will be difficult to challenge. Documents obtained through official channels are often given more probative value by Judges than documents obtained directly by the Defence.

**- Accessing otherwise unavailable documents**

State cooperation can be an effective and efficient way to access documents or information not otherwise available to Counsel, such as police reports, medical files, intercepts of telephone communications and call data records, financial documents (banks, tax), and travel records.

*ii. Disadvantages of seeking cooperation*

The main concerns for Counsel in seeking the cooperation of a State relates to both the security of the ongoing Defence investigations, generally, and to specifically protecting witnesses, victims, team members and even the accused.

**- Confidentiality of the Defence investigation**

Although RFAs are in principle confidential, the Defence team can reveal to the State both its strategy and line of investigation by requesting its cooperation. Once the request has been sent, Counsel has no control over the disclosure of such information to third parties.

When the Registry is the organ responsible for transmitting the request, several of its sections may be informed of the content of the Defence request; this may jeopardize the confidentiality of Defence investigations.

Before making such requests, Counsel should balance the risks to its investigations and strategy flowing from disclosure of this information to third parties against the need to obtain the evidence requested.

### - Safety issues for Defence witnesses

Counsel must exercise caution in providing information, so as not to put any person in danger. Under an RFA, information provided to the Court itself, while remaining confidential, may be disclosed to State actors from whom cooperation is sought. If these State actors have access to the names of potential Defence witnesses, this may place those witnesses at risk and expose them to threats or retaliation.

Defence requests must be carefully considered and formulated if there is any fear of potential retaliation by the State itself.

### - Delays

In some instances, the handling of cooperation requests may take time. Several steps are required and the request will pass through different organs and individuals, whether within the Court or the requested State.

Thereafter, it is uncertain when the Defence will obtain a response to its request. When the response is received, more delays may ensue if the document or the information received does not correspond to those requested or because the answer is negative and other avenues have to be explored. It is therefore advised to always set a specific deadline in the RFA for the State's response.

// During a 3-day official mission to collect important official documents relating to my client, I was sent from one place in town to another for the authorisations from different ministries. After three days, I realised that the authorities had used excessive bureaucracy to hamper our requests."

A legal assistant

## 3. THE SCOPE OF POTENTIAL STATE ASSISTANCE

Counsel may seek the assistance of States (and other entities) on a wide range of subjects including (A) access to the State's territory or receiving physical protection while on national territory; (B) remittance of certain documents or information in the State's possession; (C) interviewing certain witnesses.

RFAs should be sent as early as possible in the proceedings.

For the sake of expediency and efficiency, RFAs should be as precise and comprehensive as possible.

**A. Request to enter the State or to obtain the State's protection while on its national territory**

*i. Considerations for making RFAs to cross the State's borders or to benefit from its protection while on its territory*

The first type of cooperation that can be sought from a State relates to the ability for the Defence team to enter the State and to conduct investigations safely on its national territory.

Although there are clear provisions concerning Defence Counsel privileges and immunities, Counsel practising before international courts remain vulnerable when conducting investigative missions. Often, their status as external members of their international Court prevents them from being perceived as part of that institution. This, in turn, may yield them less State support, cooperation and protection.

Nevertheless, Counsel can seek State assistance, via the relevant organ of the ICT, i.e. the Registry or the Defence Office, in order to obtain the necessary entry documentation (i.e. visa) or any specific protective measures that are sought (e.g. armed State escorts).

It is worth noting that the STL has adopted provisions that specifically provide for the safety of Counsel while investigating on Lebanese territory. The Memorandum of Understanding between the Lebanese government and the Defence Office places an obligation on the Lebanese government to take all necessary steps to ensure the safety of Defence teams while operating on its territory.

*ii. Content of RFA to enter the relevant State or to benefit from that State's protection while on its territory*

In seeking entry to the State, Counsel should specify, at the very least:

- the person/body to whom it is addressed;
- anticipated dates and duration of the mission;
- names of all members of the investigation team;
- if possible (and provided they are not confidential), the places to be visited; and
- point of entry (airport, border, etc.).

If Counsel is requesting security measures for the full mission duration, he should specify, at the very least:

- anticipated dates and duration of the mission;

- places that to be visited where security measures are warranted;
- security measures requested;
- the reasons for seeking security measures; and
- any identifiable safety and security concerns.

## **B. Request seeking transfer of evidence or information in the State's custody or obtainable with its assistance**

### *i. Considerations for making RFAs seeking evidence or information held by the State or obtainable with its assistance*

Counsel will generally seek the assistance of a State to obtain a piece of evidence or information that is not available by other means either because it will come from the State itself (for example, official documents in the State's possession, such as military IDs, passports, tax reports, licences, registers and records, or because state intervention will be helpful in obtaining the material sought from other entities (for example, phone data records, bank records or insurance documents).

### *ii. Content of RFAs seeking evidence or information in the State's custody or with its assistance*

In seeking assistance to obtain documentary or physical evidence, Counsel provide as much detail in terms of information and instructions as possible, and specify:

- the person/body to whom it is addressed;
- a description of the documentation sought;
- the potential archive or collection from where it may be obtained (if known);
- the reason for seeking such a document (i.e. the Court and case name, as well as any other supporting details that can be properly shared); and
- that the State is the only known source. Due diligence can be shown by first checking all open source documentation and other reasonable avenues. It is also prudent to be aware of any legal formalities that may be imposed by the specific State, as well as any relevant rules, regulations or protocols in force for the specific case before the Court.

## **C. State cooperation in relation to witness interviews**

### *i. Considerations for making RFAs to interview witnesses*

State cooperation may be needed, for instance, when the potential witness is an official or a detained person.

To be interviewed, current – or even former – state employees (e.g. prosecutors, ministers, military or police officers) may require a specific waiver from the State. The State may also specify which topics are permissible to discuss with the potential witness or require that any testimony is given in private or closed session.

Moreover, those serving as active members of the armed forces may require 1) authorization to be interviewed; and 2) a “*feuille de route*” to leave their post and travel to the interview site.

Some questions to be considered are:

- Do I need the State’s authorization to meet a specific witness?
- What limits may be placed on topics broached during interview??
- What facilities are available – in particular, the ability to record, notarize or certify a statement?
- Is specific permission required for each witness?

To obtain any authorization, the Defence team will usually need to liaise with the relevant Defence or Registry body and send a “*Note Verbale*” or an RFA requesting that authorization be given. As this process can often take months, it is advisable to meet with the relevant body as soon as a potential list of interviewees starts to take shape.

// I have met detained persons several times. When that is the case, the Lead Counsel sends the request to the Public Prosecutor who then re-directs it to the Director General of Prisons, who gives us a visit permit and sends a copy to the director of the prison concerned.”

Counsel for the Defence

Where applicable, the Defence team may wish to inform potential interviewees that their names will be provided to their superiors. This is important because some persons may not wish to be interviewed under those conditions.

## ii. Content of RFAs to interview witnesses

When entering a request to interview a person through the relevant State, Counsel should identify, at the very least:

- the name, title, function and home address of the prospective interviewee(s);
- the terms of the interview (proposed time, duration, location and format); and
- if not confidential or protected, the general relevance of the interviewee to the case.



Also:

- Reference could be made to the fact that a statement will be taken;
- Any wish to video or audio record the interview should be included in the request, providing reasons and how the material will be used;
- If the Defence team has no objection to a state representative attending the interview – insofar as it would not be in breach of confidentiality or otherwise compromise Defence investigations – the request should invite a State representative to attend; and
- It may also become necessary, especially if the foreshadowed interview is met with resistance, to forward a list of topics or questions in advance of the interview. However, this may not be possible if it constitutes a breach of Counsel's ethical duties or compromises an individual or the investigations as a whole.

#### 4. JUDICIAL INTERVENTION IN COOPERATION MATTERS

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When facing unreasonable delays, unjustified or systematic refusals, or constant reference to national security interests from a State refusing to cooperate, the Defence may seek the intervention of a Chamber.

The Chambers have played a significant role in issuing orders to preserve the right of the accused to examine or have examined inculpatory witnesses and to obtain evidence with adequate time and facilities to do so.

The specificity and language of every request sent to the State must be such that it can potentially be relied upon at a later stage of the proceedings. Furthermore, a detailed log of contacts with the requested State – outlining the dates of communication, the Defence team member making the inquiry, the State representative contacted and any response – should be carefully recorded in order to facilitate its retrieval when making a case for judicial intervention.

To this end, requests should be made promptly. Even if a Chamber finds that the State was slow to respond to an RFA, the timing of the Defence request will also form part of the judicial determination.

Most ICTs demand, as a bare minimum, that requests for investigative assistance be:

- Specific;
- Relevant; and
- Necessary.

When, despite under an obligation to cooperate, a State fails to do so, the matter can be brought before the Chamber hearing the case so as to determine whether further action should be taken. It is essential however that Counsel first exhausts all reasonable avenues to obtain the information sought before raising the matter before the Chamber.

Additionally, if the document is not forthcoming from a State and is likely to be among the Prosecution's holdings, the Chamber may order the Defence to first make its request to the Prosecution, before serving a request upon the State or another body, or ordering the Registry to issue a RFA.

Importantly, the only real recourse for non-compliance is adjudication by the relevant Chamber with referral to the relevant body/bodies for further action, i.e. the United Nations Security Council or the Assembly of State Parties. Therefore, in order to ensure that any non-compliance is actually remedied in the context of the proceedings and does not impact upon the right of an accused to a fair trial, an RFA - especially those related to accessing national territory or the ability to conduct investigations - may be accompanied by a motion for a stay of proceedings.

## NOTES

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# FOLLOW UP



## FOLLOW UP

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While sometimes neglected, there are various post-investigation duties which should be followed up on by the Defence team.

### 1. RECORDING AND ANALYSING EVIDENCE GATHERED

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Information management should be established by Counsel early on in the investigation process to facilitate the proper inventory and security of evidentiary material.

In the past, Defence teams have used folders and Excel charts to manage the information collected during their investigations. However, investigations often yield a large amount of both information and evidence and the importance and utility of a good information management system cannot be overstated.

#### **A. Information management system and technologies**

Every investigation requires an efficient and robust information or case management system, with clear procedures for the handling, processing and storage of evidentiary material.

The information management system allows the Defence investigator and/or case manager to create a master inventory to record and index all information or evidentiary material collected during the investigation and facilitates its searching and retrieval by members of the team.

Such a system also assists in tracking the progress or evolution of the evidentiary material from investigation to any court proceedings and in meeting chain of custody requirements, avoiding duplication of material, and facilitating future Defence disclosure obligations. It can also assist with the analysis of the evidence.

The information or case management system should also facilitate the management of material disclosed to the Defence team by the Prosecution, from supporting material of the indictment to exculpatory material.

The information management system selected by the Counsel must be flexible enough to accommodate various types of digital evidence and unique file formats derived from new technologies.

An efficient information management system must include the following functionalities:

- Store and control access to collected information and evidentiary material - including metadata and substantive content of the document; a unique reference number assigned to the evidentiary material; and notes regarding provenance and authenticity of the material as sourcing, as important from both an analytical and legal perspective;
- Generate reports on the material stored within the system;
- Provide functionality to categorize evidentiary material by theme, and to allow for the linking or creation of relationships between these items and “entities” (i.e. place, object, organization or person of interest) (“Case Management”); and
- Record potential witnesses and their relevant information (“Witness Management”).

There is an array of information management systems or databases available to Defence teams ranging from Microsoft Access and Excel, to “in house” developed management systems (e.g. Legal Workflow or Ringtail software used in some tribunals) or specialized, licensed investigation and analysis software (e.g. iBase, Analyst Notebook and CaseMap).

## **B. Translation**

Due to the nature of international criminal trials, it is likely that during the course of the investigation, evidentiary material may require translation. It may be necessary to translate such material into one or more of the official languages of the court and/or working language(s) of the Defence team. This will allow Defence Counsel to review and identify relevant pieces of evidentiary material which could be used during a Defence case or cross-examination of Prosecution witnesses.

Every ICT has a Language Services Section which can provide this service to Defence teams.

## **C. Chain of Custody**

For issues of admissibility, authenticity and weight before a Judge or Chamber, chain of custody for certain types of evidence is essential. Chain of custody is simply a record of the collection, custody, handling and transfer of the piece of evidentiary material from the time it was received during the investigation process to its admis-

sion at trial. It must be shown that the item was correctly secured and stored to prevent accidental or deliberate tampering or contamination.

When the property or physical item is seized during the investigation, it must be secured in a suitable container and sealed. The item should be assigned a unique identity number and labelled with the details of the date, location and description of the item included on it.

In some cases, it could be useful to keep a certified copy of the document placed under seal. (See Chapter 11).

#### D. Analysis

Once the evidence is collected, it is necessary to analyse the evidence and discuss it further with the accused to re-assess your case strategy and prepare for trial.

This should flow from the analysis already conducted on the material disclosed by the Prosecution and from the accused's position on the case. Analysis

of the evidence can be facilitated by implementing an efficient database or evidence management system as described above, which also includes the capability to create and update the necessary analytical workflows (i.e. issues, persons of interest, key documents, linking of material, entities and timelines).

As Defence team members review the material gathered during the investigation, they then can utilize these functionalities to analyse and annotate the evidence, to identify further areas for investigation and to run reports on information contained therein (e.g. list of potential witnesses or categories and associated evidentiary material).

All evidence obtained must be sorted by category and by the witness the Defence plans to tender it through. Efficient management of the evidence will also ultimately assist with the timely drafting of the final submissions.

// Upon return from mission, the team meets quickly for a debriefing in order to consolidate the information gathered, put it into perspective with other information gathered previously and determine what further information to collect in order to continue the investigation."

Counsel for the Defence

## E. Defence disclosures

At the end of the Prosecution case and should a Defence team elect to present a Defence case, the Defence has an obligation to disclose material to the Prosecution which it intends to present and tender during its case. This can include witness statements of all the witnesses the Defence intends to call and an indication of whether the witness will testify *viva voce* or if the Defence team will seek admission of the witness statement in lieu of oral testimony.

In order to ensure that this disclosure process is as streamlined as possible, and is completed in a timely manner, it is important that Defence teams have an efficient information management and analysis system in place, as discussed above. This will allow Counsel to easily identify the material to be disclosed or made available for inspection, to identify the witnesses whose identity is to be disclosed, and the provision of the applicable texts pursuant to which this will take place.

Such analysis and selection can therefore be part of an ongoing process by the Defence team, with the information being captured in an easily accessible manner. It will ultimately save the Counsel valuable time at the end of the Prosecution case when having to prepare for the presentation of its Defence case in what could be a relatively short time-frame.

## 2. MAINTAINING CONTACT WITH WITNESSES

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Post-investigation, it is necessary to maintain contact with witnesses for a variety of reasons, from arranging follow-up meetings when Defence team members return to the region, to providing information about the trial process, to witness management issues and potentially scheduling their witness testimony before the court (sometimes in coordination with the Victims and Witnesses Unit).

The assistance of a translator or a member of the Defence team with the necessary language skills may be necessary to ensure that all information is communicated to witnesses in a clear and understandable manner, in a language in which they are comfortable.

A safe and secure system of communication must be utilized when contacting witnesses (e.g. facilities that offer encrypted communication) in order to minimize the potential for endangering the witness or risking public exposure of the fact that they are cooperating with a Defence team at an international criminal trial. All informa-



tion regarding a potential witness must be handled with confidentiality and sensitivity as detailed in Chapter 7.

In order to secure the cooperation of potential witnesses, it is critical to ensure that they are informed about the proceedings before the court and apprised of any matter pertaining to their potential testimony at trial. It is also necessary to maintain contact with witnesses to determine or assess what their support or welfare needs are and to take the necessary steps to address them, e.g. logistical, security, etc. The issue of witness proofing or preparation, if allowed by the Chamber, may also require communication between the Defence team and the witness. (See Chapters 8 to 10) .

From a practical perspective, a Defence team should have a Witness Management System incorporated into its overall Information Management system, which records all metadata related to potential witnesses, notes on how to contact them, information about the specific situation of each potential witness, and the details of each time the Defence team contacts them.

### **3. MANAGING THE SECURITY SITUATION OF POTENTIAL WITNESSES**

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As international criminal trials are often broadcast on the internet, and in some countries, reported on extensively in the media, many witnesses often express concern about their identity becoming known to the public. What arrangements need to be made to ensure the safety and security of witnesses and information?

#### **A. Protective Measures**

Counsel should refer to the best practices listed in Chapter 7 in relation to the protection of witnesses and, in particular, the practices to be adopted after having been in contact with a potential witness. In particular, Counsel must ensure that his team systematically monitors the status of witnesses contacted; that it liaises with VWU if necessary; that it prepares and submits any requests for necessary protective measures in advance of the appearance of the witnesses before the ICT; and that it monitors the security situation of the witnesses after their testimony.

#### **B. Video-link testimony**

The rules of procedure and evidence of the various ICTs contain provisions which allow for testimony via video-conference link. Video-conference link testimony offers an additional level of security, which may help further allay witness concerns

regarding testifying. When deciding on the appropriateness of using video-conference link testimony instead of viva voce testimony, Defence Counsel need to balance witness protection and witness availability against the accused's interest and rights to a fair trial.

#### 4. FOLLOWING UP WITH PENDING REQUESTS

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It is important to continue to follow up on pending Defence requests for cooperation and assistance to States or international organizations, and where necessary, to seek the assistance of the ICT. (See Chapter 15).

## NOTES

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# ETHICAL STANDARDS



## ETHICAL STANDARDS

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Defence Counsel are put in a highly vulnerable position during their investigations: they carry out their investigations in the field with limited resources, in an unstable or even hostile environment and with significant time constraints. In addition to safeguarding their own security and that of their team members, Counsel must conduct themselves in an irreproachable manner.

Counsel must behave in a manner which is ethically beyond reproach, in order to avoid compromising the credibility, reliability or admissibility of the evidence collected. They must be vigilant with respect to any person they come into contact with as part of their investigations and, in particular, with potential witnesses or any information sources, representatives of local authorities and even their own colleagues.

Lastly, as Counsel are responsible for the actions taken by their team members during the investigation, they must ensure that their team members are fully apprised of the acceptable practices and ethical rules applicable to investigations.



### A word of warning

The purpose of this Chapter is not to provide an exhaustive list of the ethical issues which might arise during Defence investigations, nor to offer a definitive response to those issues. The objective is to give a number of examples of ethical issues or dilemmas to which the Defence teams may be exposed during their investigations and to discuss solutions which have been borne out by previous experience.

In any event, Counsel must be guided by the general principles of professional conduct. If necessary, they may also check with colleagues they trust, or their own association or bar (national or international) and, depending of the situation, the appropriate section or organ within the court (the Defence Office, the Chamber seised of the case, the VWU) to determine what conduct is compliant with the ethical regulations to which they are bound and the applicable law.

## 1. SOURCES AND SCOPE OF THE ETHICAL OBLIGATIONS OF DEFENCE TEAM MEMBERS IN TERMS OF INVESTIGATIONS

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### A. Sources of ethical obligations

The starting point for applicable investigatory ethical standards is the Codes of Professional Conduct adopted by each of the ICTs. Although they set out the basic principles that Counsel and their teams must be conversant with and abide by, they

do not in themselves cover the range of situations that could arise during Defence investigations.

This shortcoming was addressed, to a certain extent, by the Chambers of the ICTs, which adopted decisions and protocols applicable to Defence investigations. This is the case at the ICC where, by adopting the Protocols, the Chambers preside over matters such as contact with both witnesses of the other party and witness-victims or the disclosure of confidential information to third parties.

Even without such decisions in a given case, Counsel may always use them as a guide for interpreting their own professional obligations and those of the individuals assisting them in their investigations. Specific rules on investigations were also established at the ICC in order to regulate the work of investigators and intermediaries; consulting with them will necessarily be useful.

The decisions of the Disciplinary Committees of the ICTs can likewise contain relevant information to assist Counsel in interpreting their ethical obligations, but they are rarely open-source and accessible. Lastly, in extreme cases, ICTs have brought proceedings against Defence Counsel or those assisting them for contempt or obstructing the administration of justice. It is also pertinent to examine the decisions rendered in this regard.

### **B. Conflict between national and international ethical obligations**

In the event of any conflict between the obligations of the ICT before which Counsel is practising and the provisions of their national code of ethics, the principle is that primacy is given to the code of ethics of the international Court.

This principle of primacy can present a challenge for Counsel who could find themselves in a situation whereby their international obligations expose them to possible sanctions before their national professional body. Were such difficulties to arise, there would have to be a dialogue between the relevant persons at the ICT and the national bar.

### **C. Scope of ethical obligations**

Compliance with the relevant ethical and professional rules is not limited to Defence Counsel. Rather it extends to all members of the Defence team, including investigators and local resource persons.

Lead Counsel is required to ensure that all his team members are apprised of and comply with the applicable investigatory ethical standards. To this end, he must train team members on best practice to be adopted during the investigation. (Chapter 6).

Counsel can be held responsible for acts committed in violation of the applicable code by other Defence team members (including co-Counsel), either because such acts were committed at Counsel's request or with his approval, or on account of his role as supervisor.

#### **D. Sanctions for non-compliance with professional obligations**

Any failure by Defence Counsel and their team members to comply with the relevant ethical and professional rules can render them liable to disciplinary proceedings against them or even criminal proceedings for contempt and obstruction of justice.

Bad practice during investigations does not perforce lead to disciplinary or criminal sanctions. However, more often than not, it does adversely affect the credibility of the Defence team's work (or even the Defence as a whole), and the reliability of the evidence collected, and therefore impacts negatively upon the interests of the represented accused.

## **2. GENERAL PROFESSIONAL OBLIGATIONS RELEVANT TO INVESTIGATIONS**

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### **A. Fundamental principles regarding the independence, integrity, probity and honesty of Counsel**

Every action that Counsel take during their investigations and similarly throughout the entire proceedings, must be guided by the fundamental principles of independence, integrity, probity and honesty.

Prior to taking any decision during the investigation, Counsel should exercise judgment in a professional and independent manner and avoid being influenced by external pressure, in whatever form, including pressure from their client and his close associates.

### **B. Independence of Counsel vis-à-vis their client**

Clients can provide Counsel with a considerable amount of useful information for their investigations and therefore must be involved in the planning and execution of

the investigation. Equally, they can also prove a considerable cause for concern for Counsel.

Should Counsel find that his client's instructions would require breaching an ethical obligation, or that they are induced or encouraged to do so, Counsel should inform the client that such conduct is prohibited. If, notwithstanding this warning, the client maintains his request, Counsel must take the appropriate steps and, in extreme cases, withdraw from the case.

Experience has shown that, in exceptional cases, some clients attempt to influence the investigation by demanding, for example, that one of their close friends or associates be appointed investigator or local resource person. This is motivated by a desire to place an informer in the team or through that person, to influence the testimony of potential witnesses. Consequently, from the moment he assembles the team, Counsel should be at pains to safeguard the independence and professionalism of all his assistants. Counsel should bear in mind that they can be held liable for their team members' conduct and must convince the client that it is in his/her interest to have the best possible team.

// Some months after having recruited my investigator on the recommendation of my client, I discovered that the investigator was making monthly payments from his salary to the client's family. I lost trust in the independence and probity of my investigator and I let them go. However my client found it very hard to accept that decision."

Counsel for the Defence

Irrespective of their relationship with the client, Counsel should engage in proper and appropriate conduct; they should know that any form of intimidation, or any exercise of improper influence in their relationship with the client, is prohibited.

### C. Diligence

Defence Counsel, just as the Prosecutor, must act with due diligence in the conduct of their investigations. That obligation is not to be taken lightly, since any deficiency in the conduct of the investigation not only deprives the Defence of the evidence necessary for the defence of the accused at the trial stage, but might also, should Counsel obtain such evidence at a later stage, lead the Chamber to dismiss its admission on appeal or following a request for review.

Under certain specific circumstances, in order to persuade the Chamber to grant certain applications, Counsel shall have to demonstrate its investigatory due diligence.



This can be the case if Counsel seeks the reopening of the case or offers new evidence on appeal.

Counsel is considered to be acting with all necessary diligence if, in particular, his methodical and systematic approach yields all potential sources of evidence collected as appropriate and in a timely manner.

#### **D. Irreproachable conduct during missions**

Despite the difficult conditions in which Counsel have to conduct their investigations, they should at all times behave in a manner which is beyond reproach and, at the earliest opportunity, take the necessary steps to ensure that the professional integrity of both themselves and their team members cannot be called into question should a difficulty arise during the course of the investigation.

Preventive measures might include, for instance, audio or video recording an interview with a potential witness (in full or in part), or requiring other team members to be present.

If ethical issues become a significant problem during the course of the investigative mission, Counsel should, to the extent possible, suspend the mission or the meeting with the witness, commit to paper a detailed account of the events in question and, depending on the case, report the problem to the Defence Office or Section, the Chamber, the Prosecution or any other relevant ICT section, or even to their national bar.

Furthermore, it goes without saying that it is strictly forbidden to enter into any conduct which could be considered inappropriate, insulting, threatening or discriminatory towards any person and, in particular, towards team members, witnesses or potential witnesses, members of the ICT or any other person encountered during an investigation.

Counsel and their team members must not under any circumstance take part in any illegal activity or fraudulent practice or engage in conduct that could cause harm or distress, be it physical, sexual or psychological.

During their investigative mission, Counsel, just as their team members, must refrain from any personal conduct that could bring the profession or the court in which they practise into disrepute.

They must likewise refrain from receiving or offering, either directly or indirectly, gifts, favours, incentives or services which might compromise the integrity of the investigation.

### 3. RESPONSIBILITIES AND OBLIGATIONS OF COUNSEL VIS-À-VIS THEIR TEAM MEMBERS

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#### A. Team management

Counsel appearing before the ICTs are as much legal professionals as managers. Indeed, their managerial function is equally important as their legal one: when delegating, by necessity, a significant part of Defence work, they are also responsible for the conduct of everyone they supervise.

Experience has shown however that Counsel are often inadequately prepared and lack training to deal with the many managerial difficulties which may arise during trial. Poor organization or a conflict between several team members can have disastrous consequences on the preparation of the Defence and, by extension, on the outcome of the trial.

#### B. Professional conduct vis-à-vis their team members

Investigations in the field can be a source of stress for Counsel, as well as for all their team members. During investigative missions Counsel often work long days, in close proximity with their associates, and therefore it is important that they all conduct themselves in a manner that is beyond reproach in order that the investigation may take place under the best possible conditions.

In particular, Counsel must not abuse their authority or behave in such a way as to amount to sexual or psychological harassment.

### 4. PROTECTING CONFIDENTIALITY, SOURCES AND WITNESSES

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#### A. Obligation to maintain the confidentiality of information

Counsel must ensure that information classified as confidential by the ICT remains as such, in particular the identity of protected witnesses. As far as possible, throughout the entire investigation, Counsel must endeavour to minimize the risk of disclosing confidential information to third parties. As a corollary, they must only

and disclose such information to those under an ethical or contractual obligation to safeguard its confidentiality, in most cases their team members.

Generally, Counsel can reveal confidential information within the context of their investigations only according to certain conditions set out in Orders and Decisions from the Pre-Trial Chamber and the Trial Chamber.

These decisions generally provide that confidential information and documents cannot be disclosed to third parties unless such disclosure is directly and specifically necessary for the investigations and for the preparation and presentation of the case.

Furthermore, only those sections directly and specifically necessary for the preparation and presentation of the Defence case may be disclosed to third parties.

When such information is disclosed, Counsel must ensure that the third parties have clearly understood the confidential nature of the information or document. Counsel must also ensure that it will not be reproduced or disclosed to others. In addition, unless specifically authorized to do so by a Chamber, Counsel must never leave with the third party a copy of the confidential document shown to him.

Even where a Chamber has not ordered such measures, Counsel may usually keep a detailed list of material and information disclosed to third parties, their contact details and job titles, as well as the date of disclosure. Although, given the considerable volume of documents involved in international trials, this could prove burdensome if done on a daily basis, it may prove extremely useful if a dispute arises over any unauthorized disclosure.

### **B. Verification of the content of a protected witness's statement**

One of the difficulties more commonly encountered by Defence Counsel is that of checking the veracity of the testimony of a Prosecution witness who has been granted protective measures.



In a decision of the Disciplinary Committee of the ICC, the Committee sentenced Counsel to a three-month suspension from practising for having failed to fulfil his confidential obligations by allowing a person external to the Defence team access to confidential documents.

*ICC, Decision of the Disciplinary Committee dated 18 June 2012*

// Obviously it is inappropriate to say that the person we are gathering information about is a Prosecution witness, but there have been times when I have asked my witnesses questions about the Prosecution witnesses by using techniques... for example, by asking my witness to tell me if they know the circumstances in which the Prosecution witness was killed."

*A Defence investigator*

It should be noted however, that it is forbidden in those circumstances to present the witness as such to a third party. Generally, there is nothing to prevent Defence Counsel from verifying the veracity of their statement - including mentioning their name or the content of their testimony - provided that such information does not make it possible to identify the person as being a Prosecution witness.

### **C. Obligation of Counsel to safeguard the security of witnesses**

Counsel and all their team members have a responsibility to ensure the physical and psychological safety of all persons they encounter. They must obtain the most complete and specific information possible on the risks faced by potential witnesses to be met by the Defence or to give evidence at trial. They should also abstain from any conduct that might compromise witnesses' safety or result in the disclosure of their identity to third parties.

Counsel and their team members must follow the witness protection protocols, recommendations and best practices, certain key features of which are described in Chapters 7 and 10 of this Handbook. From the very start of the investigation, it is advisable, for example, to assign a pseudonym to the witness and thereafter refer only to that pseudonym for all internal and external communications.

## **5. PROFESSIONAL OBLIGATIONS VIS-À-VIS WITNESSES**

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### **A. Obligation to identify oneself as a Defence lawyer**

Prior to any contact with a potential witness, Defence Counsel must clearly identify themselves as such and state both the name of the accused they represent and the court before which they exercise their mandate.

Every team member present during the meeting with the witness must likewise introduce themselves so that there is no ambiguity regarding the witness's willingness to cooperate with the Defence.

### **B. Relationship with witnesses**

Counsel must treat witnesses (and victims) with courtesy and respect and take care not to influence their testimony.

The ICT's codes contain provisions which, although worded differently, all prohibit any act of intimidation, coercion, humiliation and pressure on the part of Counsel

vis-à-vis witnesses (including witness-victims), be they Prosecution or Defence witnesses.

Furthermore, the ICC Code requires Counsel to have particular consideration for victims of physical, psychological or sexual violence, and children, the elderly and the disabled.

### **C. Contact with witnesses of the opposing party**

The Chamber or Judge seised of a case usually sets out the conditions to be met by a party wishing to make contact with one or more witnesses of the opposing party. Those conditions vary considerably depending on the ICT before which Counsel practises.

At the STL for example, the Pre-Trial Judge ruled that contacts with witnesses of the opposing party are permitted, without any requirement to inform the latter or the Victims and Witnesses Unit, unless the witness has been identified by the Prosecution as being at risk. In that case, Counsel will have to inform the Prosecution and the VWU, who will organize such contact after having obtained the witness's consent.

By contrast, at the ICC, Counsel must inform the Prosecution of their wish to meet one of its witnesses. If the witness agrees, the interview is then organized through the Victims and Witnesses Unit: both a VWU representative and a representative from the Office of the Prosecutor (OTP) may be present during the meeting.

The decision as to whether or not to meet a Prosecution witness prior to their oral evidence at trial remains essentially a strategic one.

Counsel should immediately ask any potential witness they meet in the context of their investigations whether or not they have already met with OTP investigators. They should ask, in general terms, whether they have already given a statement to investigators or representatives of an NGO or to police officers at national level. This will allow Counsel to verify two things. Firstly, that the individual is not a witness for the opposing party and, secondly, whether there are any existing statements given by the witness. These should be requested for disclosure.

If, during the interview, Counsel discovers that the person he is meeting is indeed a witness for the opposing party, he must take the appropriate measures before the ICT concerned. It is recommended that Counsel immediately audio or video record the meeting so as to avoid any future allegation of corruptly influencing a witness.

In cases where it is the witness who first establishes contact with the Defence, Counsel must exercise additional caution and ensure compliance with the applicable orders and decisions.

#### **D. Meeting a witness represented by a lawyer**

When Counsel meets a potential witness who they know is already represented by a lawyer, whether a victim participating in the proceedings or a detained witness, they must obtain the prior consent of the Counsel in question and inform them, in particular, of the time and place of the interview.

#### **E. Meeting a “witness/suspect”**

It may be that, in the context of their defence strategy, Counsel suspect an individual in particular of being the perpetrator or accomplice of the crime for which their client stands accused and that they intend to collect the testimony of that individual and have them give evidence in court.

In these circumstances the lawyer must inform the witness/suspect that their statement could be used against them and that they therefore have the right to remain silent and be assisted by a lawyer during the interview. Although that precaution might deprive the Defence of a valuable witness, the Defence is always able, should the witness refuse to cooperate, to apply for a summons from the competent Chamber.

#### **F. Question of reimbursement of witnesses’ expenses**

Counsel may not pay witnesses or potential witnesses in order to unduly influence or encourage them to testify.

Indeed, Defence team members investigating in the field are often confronted with a dilemma: how to avoid creating any financial hardship for the witness while ensuring that any financial compensation is not considered as remuneration for having given evidence.

The principle is straightforward: Counsel may reimburse the witness for any

**//** When I hand over money to a witness to reimburse expenses, I systematically have them sign a receipt on which I specify not only the total sum but also the relevant details (e.g. X for motorcycle from A to B, X for bus from B to C, X meals). A scanned copy is sent to the Legal Aid Unit for reimbursement and I keep the originals.”

*A Defence investigator*

travel costs, but must not pay the witness for having given evidence. Any amount that does not correspond clearly with the actual expenses of the witness is tantamount to procuring a person to give false evidence.

In all cases, Counsel must ensure that a receipt is obtained for any payment made. An example of a printable receipt can be found in the [Annex](#) to this Handbook.

If the amount involved is considerable, it may be appropriate for Counsel to first inform the Chamber *ex parte* of the amount, providing a relevant explanation.

Practice has shown that the Prosecution could attempt to demonstrate that the Defence witness received money in exchange for their testimony. Counsel must be prepared to be able to prove, before the Chamber, with material evidence (a receipt) that the amount in question corresponds exactly to the reimbursement of travel and/or accommodation expenses incurred by the witness.

Lastly, there should not, in principle, be any financial relationship between Counsel and Defence witnesses once they have been identified as such; financial provision for the witnesses falls under the responsibility of the Registry (usually the Victims and Witnesses Unit). However, in the field, Counsel may face unexpected situations such as the need to settle expenses not provided for by the Registry (travel costs or reimbursement of expenses for rescheduling a meeting or any other exceptional circumstance). The principle remains the same: the Registry should therefore be immediately informed by Counsel and sent a receipt of the costs involved.

### **G. Testimony must not be altered**

Counsel and those persons participating in the investigations must refrain from exercising any influence of any kind on the witness's recollection of events.

Although that requirement seems *a priori* a simple one to comply with, practice has shown that situations are not always so straightforward and that, short of fabricating testimony, Counsel or their investigator can sometimes influence testimony unintentionally.

Consequently, sometimes, the fact of simply helping the witness clarify a distance or a specific date might indirectly result in changing his testimony. For example, suggesting a specific date to a witness while the witness only recalls the day of the week or the event itself could result in substantially changing his testimony.

## H. Witness proofing

The other matter which might arise for Counsel is that of preparing (“proofing”) witnesses. In cases where the Chamber has rendered a decision governing the rules relating to witness proofing, Counsel shall abide by the restrictions imposed. In practice, these restrictions could affect the way the meetings with the witness are conducted, including the number of meetings required before the witness travels to the seat of the court to give oral evidence. Counsel must ensure that these restrictions are adhered to by every member of the team, in particular local resource persons and investigators in the field.

For example, if a decision prohibits witness proofing, Counsel will have to approach the interview with the witness differently, by avoiding any line of questioning which could be perceived as a rehearsal for future testimony. If a decision prohibits any contact with the witness once the witness starts travelling to the headquarters of the ICT in order to give oral evidence, Counsel must ensure prior to the witness’s journey that all relevant issues have been addressed with the witness and that the credibility of his testimony has been ascertained.

## 6. PROFESSIONAL OBLIGATIONS OF COUNSEL VIS-À-VIS THE CHAMBER

### A. Protecting the integrity of the evidence

Counsel must safeguard the integrity of the evidence, written, oral or otherwise, that is presented at trial.

With regard to material evidence, Counsel must institute practices that protect the evidence during its collection, transportation and preservation. These practices must specifically include safeguarding the evidence from theft, destruction and damage, as well as recording the evidence collection process itself, including any information concerning the chain of custody. This best practice, covered elsewhere in this Handbook, enables Counsel to prove the source, the authenticity and the reliability of the evidence (See Chapters 2 and 11).

### B. Evidence that Counsel knows is false or incorrect must not be produced

Counsel must never produce any evidence which they know to be false.



Likewise, Counsel cannot knowingly allow false testimony to be given before the ICT. If during their investigation there is any doubt as to the credibility of a testimony, Counsel should resolve this doubt by verifying the information given by the potential witness and by confronting that witness with the conflicting information.

As mentioned previously, it effectively falls under the responsibility of Counsel, in the best interests of his client, to verify the credibility of the evidence to be put before a Chamber, and which will be subject to Prosecution cross-examination and questions from the Judges.

### **C. Evidence obtained by illicit means must not be produced**

Counsel may not produce evidence which they reasonably consider to have been obtained by illicit means and by means constituting a serious violation of human rights, in particular, acts of torture or cruel treatment.

Although that prohibition essentially applies to the Prosecution when cooperating with the police forces of States, it is not inconceivable in proceedings involving senior political figures that local authorities may cooperate with the Defence by collecting evidence on their behalf.

**Table of relevant provisions of the Codes of the ICTs regarding investigations**

	ICC	ICTY	MICT	STL	
	Code of professional conduct for counsel	Code of professional conduct for counsel appearing before the international tribunal	Code of professional conduct for counsel appearing before the mechanism	Code of Professional Conduct for Counsel Appearing Before the Tribunal (Common code)	Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon
<b>Fundamental principles</b>					
<b>General principle of integrity and probity</b>	Article 5 Article 6 Article 7	Article 3 Article 10 Article 11	Article 3 Article 10 Article 11	"Solemn Undertaking" Paragraph 1	
<b>Integrity of the evidence</b>	Article 25	Article 23 Article 24	Article 23 Article 24	Paragraph 1(f) Paragraph 3 Paragraph 6(f)	
<b>Responsibility of Counsel and team members</b>					
<b>Lead Counsel</b>	Article 1 Article 6 Article 7 Article 8 Article 32	Article 7 Article 23(a) Article 32 Article 33 Article 34	Article 7 Article 23(a) Article 32 Article 33 Article 34	"Scope" Paragraph 7 Paragraph 8	Article 6(A)(B)
<b>Co-Counsel</b>	Article 1 Article 27 Article 32	Article 7 Article 23 Article 32 Article 33	Article 7 Article 23 Article 32 Article 33	Paragraph 7 Paragraph 8	Article 6(A)(B)
<b>Team members</b>	Article 7(4) Article 32	Article 34	Article 34	Paragraph 7	Article 6(A)(B)

	CPI	TPIY	MICT	TSL	
Relevant provisions regarding witnesses					
Contacts with witnesses					
<i>Courteous and respectful attitude</i>	Article 7(1) Article 29(2)	Article 21 Article 28(a)	Article 21 Article 28	Paragraph 6(g) Paragraph 43	
<i>No pressure on witness</i>	Article 29(1)	Article 28(a) Article 9(a)	Article 28(a) Article 29(a)	Paragraph 3 Paragraph 6(h)	
<i>No influence on witnesses</i>	-	Article 28(b)	Article 28(b)		
<i>Persons not represented by other counsel</i>	Article 26	Article 29)	Article 29		
<i>Persons represented by other counsel</i>	Article 28	Article 27(d)	Article 27(d)	Paragraph 42	
Non-disclosure of confidential information	Article 8 <i>Article 27(2) et (3)</i>	Article 13	Article 13	Paragraph 5	Article 10(E)
Relevant provisions regarding investigations					
	-	-	-	-	Article 8(C)(ii) et (D)(iii) Article 33 A) (vi); (vii)(b) and (ix)
Conflict between tribunal code and national codes					
	Article 4	Article 4	Article 4	-	Article 4

# ANNEXES

# CONFIDENTIALITY AND NON DIVULGATION UNDERTAKING

## CONFIDENTIAL

I, [ *Full name* ], fully understand that my interview with [ *Counsel or Investigator's name* ] for the Defence team of [ *name of the accused or suspect* ] held on [ *date* ] is confidential. I understand that the information revealed during this interview, including the questions that I will be asked and the answers that I will provide shall remain confidential. I understand also that the name of any individual mentioned during the interview must remain confidential.

I, undersigned, undertake not to not to reproduce, disclose to the public or reveal the confidential information, in whole or in part, that was mentioned in the course of this interview.

I understand that any violation of this undertaking may constitute interference with the administration of justice. I have been informed of the criminal sanctions incurred in the event of breach of this undertaking.

I sign this undertaking voluntarily, without coercion or threat, and I fully understand its terms and the consequences of its breach.

Signed on \_\_\_\_/\_\_\_\_/\_\_\_\_, in \_\_\_\_\_

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Signature

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Signature of Counsel or Investigator

## INTERPRETER CERTIFICATE

I, [ *Name of the Interpreter* ], Interpreter, certify that:

1. I am duly qualified [ *if applicable, "and approved by the Registry of the (Name of the International Criminal Jurisdiction)"* ] to interpret from the [ ] language into the [ ] language and from the [ ] language into the [ ] language.
2. [ Name of witness ] has informed me that he speaks and understands [ ] and [ ] language[s].
3. I have orally translated the confidentiality undertaking from the [ ] language to the [ ] language in the presence of [ *Name of the Witness* ] who appeared to have heard and understood my translation of the confidentiality undertaking.

Signature:

Interpreter Number:

Place:

Date:

## RECEIPT

Receipt of REIMBURSEMENT OF EXPENSES INCURRED		No.:
Description of expenses	Currency	Amount
Total:		
Paid by:		Received by:
Signature :		Signature:
Date:	Supporting documents:	

CONFIDENTIAL

## NOTES

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## **Practitioner's Handbook on Defence Investigations in International Criminal Trials**

While investigations can play a decisive role in the outcome of a trial, Defence Counsel practicing before international criminal courts and tribunals rarely have expertise in this field.

With this in mind, Defence professionals, who participated in the International Defence Meetings, have entrusted the Defence Office of the Special Tribunal for Lebanon with the task of collecting and compiling the best practices in the field of international investigation.

While the intended audience of this handbook is primarily Defence Counsel practicing before international criminal courts and tribunals, and their team members, it may also provide useful and practical information to anyone whose work or mission is to gather evidence, to question witnesses, or to protect them.

*Defence Office of the Special Tribunal for Lebanon*