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Date: **25 May 2018**

PRE-TRIAL CHAMBER I

Before: **Judge Péter Kovács, Single Judge**

SITUATION IN MALI

IN THE CASE OF
THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG MAHMOUD

Public

Public redacted version of the "Prosecution's observations regarding the «*Décision relative au système de divulgation et à d'autres questions connexes* (ICC-01/12-01/18-31)", 24 May 2018, ICC-01/12-01/18-38-Conf-Exp

Source: **Office of the Prosecutor**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. As ordered by the Single Judge,[1] the Prosecution submits its observations regarding the Single Judge's proposals concerning disclosure of an updated in-depth table or chart of analysis of the incriminatory evidence ("IDAC") with every disclosure of evidence, using either the model as proposed by the Single Judge in *Prosecutor v Ongwen ("Ongwen")*,[2] or as adopted in *Prosecutor v Bemba ("Bemba")*[3]; and, a provisional calendar for exchange of evidence.[4]

2. The Prosecution acknowledges that the Single Judge has a discretion to request a tool to aid understanding of incriminatory evidence disclosed, but submits that when exercising that discretion and deciding on the most appropriate tool the Single Judge must consider the circumstances of this case and the rights of the parties to a fair and expeditious trial. A careful balancing exercise is required. Further, in exercising this discretion, the Single Judge must take into account the development of practice and jurisprudence of this Court over the past ten years and, in particular, the settled best practice for pre-trial disclosure, as codified in the Chambers' Practice Manual. Although not binding, in the interests of consistency, and the overall effectiveness and efficiency of the proceedings before the Court, the Single Judge should be slow to depart from established practices set out in the Chambers Practice Manual, and only where exceptional circumstances exist. Such exceptional circumstances are not present in this matter.

3. In this case, providing an updated IDAC in the form proposed with every disclosure batch of evidence is not necessary, notwithstanding the number of items to be disclosed, since an important part of the evidence being disclosed is relatively straightforward to assess.

[1] ICC-01/12-01/18-31.
[2] ICC-02/04-01/15-203-Anx2.
[3] ICC-01/05-01/08-232-Anx.
[4] ICC-01/12-01/18-31 para. 44, 46, 50.

4. Most importantly, neither model for an IDAC as currently proposed is appropriate, because:

- they are focused on the legal elements alone and omit the more fundamental and critical link of the material facts underlying the crimes and modes of liability;
- they would lead to overly lengthy, cumbersome documents of little use; and
- they would negatively impact on the rights of both of the parties to fair and expeditious proceedings: The proceedings would be unnecessarily and considerably delayed; indeed, the Prosecution conservatively estimates that implementing an IDAC in the form currently proposed would add several months (potentially up to one year) to the proceedings before the date of the confirmation hearing.

5. In addition, an IDAC is premature in this case, for the following reasons:

- any IDAC provided before the DCC is filed would not entirely reflect the charges, as charges and modes of liability are likely to be added during the preparation of the DCC;
- [REDACTED], any analysis of evidence in an IDAC would be in key respects preliminary and incomplete. The Prosecution can only provide a more complete assessment of the relevance and probity of individual items of evidence [REDACTED]; and,
- the information analysed in the IDAC may not necessarily correspond to the Prosecution's evidence at the confirmation hearing as its selection of evidence may change, while article 61(5) of the Rome Statute ("Statute") only requires the Prosecution to support each charge with sufficient evidence "*at the hearing*''.

6. Moreover, due to the circumstances of this case, rather than the IDAC in the form proposed, the most appropriate tool for analysing the evidence is the document in support of the Document Containing the Charges ("DCC"): it will provide a comprehensive and more up-to-date assessment of the underlying material facts, as well as legal elements, hyper-linked to the corresponding relevant evidence. In addition, although not the practice in most other cases, prior to filing the document in support of the DCC, the Parties could provide individual disclosure tables when disclosing evidence that provide a brief description of the relevance of documents including preliminary assessment of the legal issues, but this would cause delays.

7. Finally, if the Prosecution, which has limited human resources, is detracted by an IDAC [REDACTED].

8. As regards a schedule for disclosure, if no IDAC (as proposed) or any alternative disclosure table with descriptions of evidence is required, the Prosecution will disclose evidence on a rolling basis and considers that the bulk of its evidence may be disclosed by end of August 2018. If an alternative disclosure table with brief descriptions of evidence is required (see para. 6), the Prosecution estimates that the bulk of disclosure could be completed by November 2018 at the earliest. However, whilst much of the witness-related materials may be disclosed shortly, it is impossible at this stage to assess timing of disclosure for all of the witness-related materials [REDACTED].

Confidentiality

9. This filing is classified as "Confidential" and *ex parte* to the Prosecution only, under regulation 23*bis*(1) and (2) of the Regulations since it contains [REDACTED]. Redacted version will be filed.

Procedural background

10. On 4 April 2018, the Prosecution made a request for instructions from the Single Judge concerning disclosure and redactions of evidence, including adoption of the Redactions Protocol as used in the *Prosecutor v Al Mahdi* ("Request").[5] The Defence did not make any observations. On 6 April 2018, the Single Judge requested additional information regarding the nature of the evidence likely to be disclosed and the nature of the necessary redactions.[6] On 12 April 2018 and 8 May 2018, the Prosecution provided its observations ("Observations")[7] and supplementary observations ("Supplementary Observations").[8] Subsequently, on 16 May 2018, the Single Judge rendered his decision regarding disclosure, and ordering the Prosecution to file further observations regarding a proposal to order the use of an IDAC with every disclosure of incriminatory evidence and a provisional calendar for disclosure.[9]

Prosecution's submissions

A. Response to proposal to require the Prosecution to produce an IDAC

11. The Prosecution acknowledges that the Single Judge has discretion to require an aid to the disclosure process.[10]

12. However, as indicated previously by the Appeals Chamber, the Single Judge must exercise that discretion in a fair and reasonable manner, taking into account the circumstances of the individual case and the implications of this additional disclosure requirement ''*given that the imposition of an obligation to prepare and submit*

[5] ICC-01/12-01/18-15.
[6] ICC-01/12-01/18-17.
[7] ICC-01/12-01/18-18-Conf-Exp-Red2.
[8] ICC-01/12-01/18-27-Conf-Exp.
[9] ICC-01/12-01/18-31.
[10] ICC-02/04-01/15-251, para.1 and 33.

in-depth analysis charts may place a disproportionate burden on the parties and may ultimately lead to delays in the proceedings''.[11]

13. In particular, as the Appeals Chamber highlighted, there is a need for the Single Judge when considering ordering an IDAC to consider *''the work involved in the preparation of the in-depth analysis charts, the time that this would take, the potential delay this could cause to the proceedings and the corresponding impact that these circumstances would have upon the right of [the Suspect] to 'be tried without undue delay' under article 67(1)(c) of the Statute*.''[12]

14. In addition, and as it will be developed further, the IDAC has been demonstrated to be an unhelpful and overly taxing tool by this Court's own experience, and on this basis rightly rejected by the Chamber's Practice Manual. While the Chamber's Practice Manual does not divest the Single Judge of his discretion to rule on procedural matters, it is to be expected that, to the extent that it condenses the Court's best practices to date, it will indeed be followed by judges of the Court in the exercise of that discretion in order to bolster predictability and efficiency in the proceedings, unless exceptional circumstances justify departing from this practice.

15. The Prosecution submits that no such exceptional circumstances exist in this case. To the contrary, ordering an IDAC would not be a fair and reasonable exercise of the Single Judge's discretion for the reasons outlined below.

I. Use of an IDAC with every disclosure batch is unnecessary and premature

a. The nature and volume of the evidence renders use of individual IDACs unnecessary

16. When the Single Judge proposed that an IDAC should be provided with every disclosure of new evidence based on the models suggested, he referred in particular *"au nombre considérable d'éléments de preuve que le Procureur entend divulguer a la*

[11] ICC-02/04-01/15-251, para. 2 and 42.
[12] ICC-02/04-01/15-251, para. 43.

défense".[13] However, the Prosecution submits that the estimated figures provided by the Prosecution of about 2000 to 3000 potential incriminatory documents likely to be disclosed[14] include many that should be relatively straight forward to review and the proposed disclosure table attached as Annex A should provide sufficient *prima facie indicia* of relevance.

17. First, the numbers of incriminatory documents need to be understood in context:

- [REDACTED],[15] [REDACTED]. Of the approximately, 26,000 documents that still need to be reviewed,[16] the Prosecution has estimated that about 2000 to 3000 documents are likely to be disclosed as incriminatory[17];
- however, the estimated numbers of incriminatory documents provided are merely indicative and not definitive. The Prosecution provided conservative numbers that are possibly higher than the final number of incriminatory documents that will be disclosed, so that the Chamber and Defence can plan appropriately.

18. Second, the possible numbers of incriminatory documents to be disclosed are similar to numbers of incriminatory documents disclosed in other cases.

19. Third, although the incriminatory documents are a mix in terms of degree of difficulty of review, many of the incriminatory documents to be disclosed are relatively straight-forward and uncomplicated for the Defence to assess at this initial stage[18]. For example, the incriminatory evidence includes:

- [REDACTED];

[13] ICC-01/12-01/18-31, para. 44.
[14] ICC-01/12-01/18-27-Conf-Exp, para. 5.
[15] [REDACTED].
[16] See also ICC-01/12-01/18-18-Conf-Exp, para.7.
[17] ICC-01/12-01/18-27-Conf-Exp, para. 5.
[18] Even if it is not possible for the Prosecution to provide a complete assessment of all issues arising in specific items of evidence until they can be fully assessed in the context of the totality of evidence (*see*. para. 24).

- [REDACTED];
- [REDACTED];[19]
- [REDACTED];
- [REDACTED];
- [REDACTED].

b. *The Defence has a positive obligation to analyse incriminatory evidence independently*

20. Notwithstanding whether an IDAC is provided or not, the Defence has a professional and deontological obligation to assess each and every item of evidence on behalf of the Suspect, to reach its own independent view of that evidence.[20] For instance, the transcripts of the article 55(2) interview of the Suspect, and other key insiders, are due to be disclosed and will require a detailed review by both parties and are likely to touch upon most if not all of the facts and charges arising in the case against Mr Al Hassan.

21. In such a context, any IDAC (that does not provide the fundamental and critical link of the material facts underlying the crimes and modes of liability)[21] will not be a useful tool to aid the Defence in that process; and, as elaborated upon further below, Defence teams in other cases have clearly stated this.[22]

[19] The rest of these documents are disclosed under Rule 77.
[20] *See e.g.* ICC-01.05-01/13-177, para. 10: ''Whilst the Prosecutor is under a strict obligation to provide the Defence with the entirety of the materials it considers relevant, thereby making the Defence fully aware of the nature, cause and content of the charges, the Defence cannot abdicate its duty and responsibility to examine such materials, which examination is necessary for it to be in a position to decide whether to challenge the evidence or its reading by the Prosecutor, as well as to identify portions which it deems relevant for the purposes of the Chamber's determinations under article 61(7) of the Statute.
[21] See paragraphs 28-30.
[22] See paragraphs 33-34.

c. The use of IDACs for each evidence disclosure is premature

22. In addition, it would not be fair or reasonable to require IDACs at this stage, because a comprehensive analysis of the relevance of every item of evidence at the time of disclosure is premature, for the following reasons.

23. First, the IDAC and its analysis would not necessarily reflect all of the charges brought by the Prosecution under article 61(3) of the Statute because at the time when the Prosecution discloses the individual batches of incriminatory evidence the Prosecution will not yet have finalised its charging document. Accordingly, it will not know all of the final charges, and related legal requirements, which will be included in the final DCC and document in support of the DCC as filed. There is no requirement that the formulation of charges in the DCC strictly follow the factual and legal foundations of the warrant of arrest.[23] If the Prosecution deviates from the arrest warrant application filed pursuant to article 58 of the Statute - [REDACTED] - then the utility of any IDAC prepared on the basis of the arrest warrant will be obsolete in key respects.

24. Second, the Prosecution's analysis of evidence in an IDAC will necessarily be incomplete, [REDACTED]: although the Prosecution obviously has a good understanding of its own evidence, it is not possible to provide a complete view on all issues that might arise from an individual item of evidence until the Prosecution is able to review the totality of its collected evidence. The Parties and Chamber need to assess each item of evidence in the context of all the evidence, to fully and properly appreciate its significance. Accordingly, the Prosecution's final and contextual assessment of the disclosed evidence is likely to result in different assessments than those provisionally made in the updated IDACs accompanying each batch of disclosed evidence. Furthermore, because only an incomplete categorisation of the evidence would be provided with the IDAC at the time of

[23] *See e.g.* ICC-02/04-01/15-206, para. 32; ICC-01/04-01/10-465-Red, para. 88.

disclosure, this incomplete picture of the Prosecution's case and evidence could potentially interfere with the Chamber's free assessment of the evidence and the Defence's understanding of that evidence.

25. Third, the information analysed in the IDACs will not necessarily correspond to the Prosecution's evidence at the confirmation hearing. Under article 61(5) of the Statute, the Prosecution must support each charge with sufficient evidence "at the hearing". The Prosecution will select the evidence it intends to present at the hearing, not when disclosing incriminatory information to the Defence, but only when it presents its list of evidence 30 days prior to the hearing pursuant to rule 121(3). In this latter stage, after making a full and contextual assessment of the evidence, the Prosecution may decide not to rely on some of the information previously disclosed. Accordingly, prior analyses may be misleading or obsolete.

II. The IDAC in the form proposed will not serve the intended purpose and will negatively impact on the rights of the parties

26. It would not be fair or reasonable to adopt an updated IDAC, using the models suggested, because the form proposed would not serve the intended purpose intended, and would negatively impact on the rights of the parties.

a. The IDAC is not an appropriate or useful tool for analysis, as Defence teams and judges have confirmed

27. The two models of IDAC to which the Single Judge refers for consideration would not provide the appropriate and meaningful tool for analysis, and would not serve the intended purpose to provide the Defence and Chamber with an analysis of the evidence in light of the Prosecution's case.

28. Both models of analysis require the Prosecution to link the evidence in the IDAC to the 'legal elements' of the crimes and the modes of liability, in accordance with the Statute and Elements of Crimes, as opposed to the underlying facts alleged in the

DCC.[24] Accordingly, both models of the IDAC proposed are law-driven, rather than fact-driven, analysis models.

29. Using a law-driven model as a basis to analyse the evidence does not enable the parties or Chamber to better understand the Prosecution's case. In particular, the *factual* findings with respect to the material facts contained in the charging document or DCC are a pre-requisite to the Chamber's *legal* conclusions on whether the facts that survive the Chamber's evidentiary scrutiny establish each of the legal elements of the crimes and modes of liability charged by the Prosecution.[25] In contrast, a law-driven IDAC essentially omits the crucial second step in the PTC's fact-finding process (i.e. to consider the evidence in its totality) before determining if the legal elements are fulfilled.

30. When assessing the evidence to determine if there are substantial grounds to believe that Mr Al Hassan committed the crimes as charged pursuant to article 61(7), the Pre-Trial Chamber will need to undertake the usual three-stage process to assess: (i) the credibility of the evidence; (ii) whether there are substantial grounds to believe the crimes were committed; and (iii) the elements of the crimes and modes of liability. As regards the first stage, the Pre-Trial Chamber must assess the relevant evidence in its totality. Secondly, the Pre-Trial Chamber must analyse whether the relevant evidence, taken in its totality, provides substantial grounds to believe that the alleged facts are established. Third, the Pre-Trial Chamber must decide whether there are substantial grounds to believe that the elements of the charged crimes and modes of liability are established. During this three-stage approach, the PTC must first determine if there are substantial grounds to believe that the relevant facts are

[24] ICC-01/12-01/18-31, para. 44. Referring to ICC-02/04-01/15-203-Anx2 and ICC-01/05-01/08-232-Anx.
[25] *Prosecutor v. Ntagerura et al*., ICTR-99-46-A, Decision, 7 July 2006, para. 174; *Prosecutor v. Halilovic*, IT-01-48-A, Decision, 16 October 2007, para. 125; *R v. Morin* [1988] 2 S.C.R, File No.: 20449, at p. 349 (Judges Lamer and Wilson). *See also R v JMH* [2011] 3 R.C.S, para. 31, 32. The Appeals Chamber of this Court has implicitly accepted the different stages of fact-finding in its judgment ICC-01/04-02/12-271, para. 194, 227-228. See also para. 124-125, where the Appeals Chamber emphasised that the standard of proof "must be applied to establish the *facts* forming the elements of the crime or the mode of liability alleged against the accused, as well as with respect to the *facts* which are indispensable for entering a conviction" (emphasis added).

established and only then verify whether those facts are properly subsumed under one or more legal provisions. The IDAC models proposed effectively invert this logic.

31. Thus, providing an individual IDAC with each evidence disclosure batch as proposed, will not properly reflect or express the Prosecution's critical factual allegations related to the charges or its case theory, or the Prosecution's final assessment of relevance and probity of its evidence that it will present at the confirmation hearing pursuant to article 61(5) of the Statute. As such, the Chamber and the Parties could not rely on the IDAC as representing the Prosecution's final and considered analysis of its evidence, or the basis for its decision under article 61(7) of the Statute. Accordingly, using either of the IDAC models as proposed would provide a limited and incomplete analysis.[26]

32. As a matter of fact, IDACs are not particularly helpful to the Defence, as they are a preliminary, incomplete and law-driven analysis of information, which does not necessarily correspond to the evidence included in the Prosecution's final list of evidence or reflect the charges in the DCC, and does not provide proper notice to the Defence as to how the Prosecution concretely intends to prove the facts (and therefore the crimes) in the DCC.

33. Instead, as past experience from other cases has taught us, an updated IDAC ultimately leads to a redundant, extremely cumbersome, non-user friendly formatted and lengthy document of limited use. This point has been stressed by different Defence teams:

- Defence Counsel in *Ongwen* strongly objected to use of the IDAC model, which is now being suggested for use in this case, because he estimated that a consolidated version of the IDACs could amount to 26,000 pages and take about two full business years to read. Defence stated that: *"[t]his document,*

[26] See para. 23-25 above.

which is supposed to aid the Pre-Trial Chamber and Defence, would do absolutely nothing except for waste space on the ICC's server";[27] and

- Defence Counsel for Mr. Ruto, who was also counsel for Mr Katanga, referred to the similar model of IDAC used in *Prosecutor v Katanga (''Katanga'')*, stating that the IDAC *"has proved less useful… because it's such a confusing point of reference''*.[28]

34. The Defence in those cases provided honest and transparent criticisms regarding the lack of utility of the law-driven model of the IDAC. They did not seek to unfairly delay the proceedings or waste Prosecution time and resources on a worthless analysis. Instead, they acknowledged the need for something useful to assist them in their work, rather than lengthy, cumbersome incomplete documents that would in turn unfairly prejudice their clients by leading to unreasonable delays.

35. Chambers have also recognised that the IDAC is of limited utility in other cases:

- For instance in *Prosecutor v Kenyatta et al.*, the Chamber found that an IDAC was unnecessary and that the updated DCC filed in addition to the written submissions was sufficient to ensure that the Accused were informed of the charges against them and would not be prejudiced in their preparation for trial.[29] The Chamber noted: *"there is no reference to this document in the core legal texts of the Court, and in light of the provision of the two documents just described, the Chamber is of the view that the […] provision of such a document is unnecessary."*[30]

- Judge van den Wyngaert similarly stated that *"I agree that what we must achieve is to have something that is useful both for the Defence and for the Trial Chamber. ..I am a*

[27] ICC-02/04-01/15-232, para. 15.
[28] ICC-01/09-01/11-T-15-ENG ET, p. 32, l.15-17.
[29] See ICC-01/09-02/11-251, para. 11. Similarly in *Ruto et al.*, the Defence was only provided with an updated DCC and detailed written submissions, see ICC-01/09-01/11-440, notably after the Defence submitted that the IDAC is "less useful" and indicated that a document detailing the Prosecution's case "Summary of the Charges" would be a preferable form of presenting the Prosecution's case. See ICC-01/09-01/11-T-15-ENG ET, p. 32, l. 20, p. 33, l. 3.
[30] ICC-01/09-02/11-451, para. 11.

Judge in the Katanga case, so also in a trial where a chart has been asked from the Prosecutor, and it remains to be seen how useful this chart is for the Trial Chamber; and that applies to all the other cases where charts have been asked, but where the judgment still needs to be written''.[31]

36. As part of the justification to use an IDAC in this case, the Single Judge in the present case referred to the recent decision of Trial Chamber I in *Prosecutor v Gbagbo and Blé Goudé* where the Prosecution has been required to submit a mid-trial brief.[32] The Prosecution observes that this is a very different stage of the proceedings where the totality of the Prosecution's evidence to be relied upon has already been disclosed to the Defence and submitted to the Chamber in the course of the trial. In *Prosecutor v Gbagbo*, at pre-trial phase, another case-specific alternative to an IDAC was found to be appropriate.[33]

37. The use of the proposed law-driven IDAC would also be contrary to the best practices as adopted by the Chambers in the Chamber Practice Manual, which was issued after the IDACs proposed or adopted in *Ongwen* and *Bemba*, in which the Chambers recognised that "*no submission of any 'in-depth analysis chart', or similia, of the evidence disclosed can be imposed on either party''*[34] and that ''*[i]t is up to the parties to determine the best way to persuade the Chamber: there is no basis for the Chamber to impose on the parties a particular modality/format to argue their case and present their evidence''*.[35] The Appeals Chamber has also recognised the value of this Manual to improve the confirmation proceedings "*in order to reduce uncertainties and streamline and expedite the criminal process as a whole*".[36]

[31] ICC-01/09-02/11-T-18-ENG ET, p. 50, l. 5-12.
[32] ICC-01/12-01/18-31, para. 46 citing ICC-02/11-01/15-1124, para. 10. [REDACTED].
[33] ICC-02/11-01/11-432 and ICC-02/11-01/11-592 (which upon the agreement of the Parties included a hyperlinked DCC and List of Evidence, and elements-based chart).
[34] Chamber Practice Manual, p. 10 and 14.
[35] Chamber Practice Manual, p. 14.
[36] *See* ICC-01/05-01/13-2275-Red, para. 198, fn. 441.

38. Although the Single Judge has discretion to adopt practices of the Chambers Practice Manual, the Prosecution submits that the Single Judge should only deviate from the Chambers' recognised best practices in exceptional circumstances, where absolutely necessary to further streamline the process or improve efficiency, and when it is fair and reasonable to do so. In this instance, rather than expediting the process, the IDAC would only make it more burdensome. The Prosecution submits it would not be fair and reasonable. In particular, where the Prosecution commenced a large proportion of its evidence review and preparation for disclosure based on its understanding that the best practices reflected in the Chambers Practice Manual would also apply in this instance. This ensures for consistency, predictability, and equality across the cases and enables parties to plan the use of limited resources.

39. The use of the IDACs as proposed significantly deviates from the practice of pre-trial disclosure in other cases, where no such IDACs have been required.[37] It also departs from the system adopted by other international tribunals, where the Prosecution has not been required to provide an IDAC-type document but rather simpler and more user-friendly 'fact-driven' analyses of the evidence, comparable to the footnoted document in support of the DCC referred to above.[38]

40. Indeed, a more useful and complete document for the Parties and Chamber, is a document with an analysis of the evidence linked to the material facts underlying the crimes and modes of liability. The document in support of the DCC will provide a comprehensive fact-driven analysis for the Chamber and Defence, as it would be prepared with an assessment of the evidence according to the material facts and legal elements, and every material fact and legal element will be footnoted to relevant parts of incriminatory evidence by hyper-links, in a concise and user-friendly manner.

[37] See for instance, cases against *Lubanga* (ICC-01/04-01/06-102); *Katanga and Ngudjolo* (ICC-01/04-01/07-259); *Gbagbo* (ICC-02/11-01/11-30); *Blé Goudé* (ICC-02/11-02/11-57); *Bemba et al*. (ICC-01/05-01/13-134).
[38] See para. 6 and 40. STL Decision, para. 3, see also para. 16-32.

41. However, should the Chamber still consider that an additional alternative to the IDAC is required at the time of disclosure, which the Prosecution disputes, the Prosecution proposes a disclosure table, which is not updated or consolidated, as provided in the form as set out at Annex A to this filing. The disclosure table would provide an initial indication of the potential legal issues of relevance in the document and a brief description of its contents. However, this tool, which has not been provided in most previous cases, would be also time consuming. The Prosecution estimates that it would take approximately two to three additional months to complete, which could delay final disclosure until November 2018.

b. The IDAC would impact on the fair and expeditious conduct of the proceedings

42. Implementing an updated IDAC will significantly slow down the disclosure process and the proceedings. In *Ongwen*, in which there was a similar volume of evidence for review, it was estimated on the basis of past case experience that implementing an IDAC for every disclosure of incriminatory evidence would lead to approximately one year delay in the proceedings.[39]

43. Although it is not possible at this stage to give a definitive amount of time for producing an updated IDAC, it is unlikely to be less than the time estimated in *Ongwen*, and at minimum would require additional several months. In *Ongwen*, the Prosecution had a team of about ten staff to review approximately 18,000 total documents (94,620 pages), to identify potentially incriminatory, rule 77 and exonerating documents.[40]

44. In this case, the total number of documents that remain to be reviewed are 18,081 documents (59,436 pages): namely, 16,722 documents (51,939 pages) that have not yet been reviewed to identify relevant evidence for disclosure and additionally 1,359

[39] *See* ICC-02/04-01/15-T-5-ENG, p. l. 4, l. 11; p. 15, l.16.
[40] *See* ICC-02/04-01/15-T-5-ENG, p. 8, l.4-8; p. 14, l. 11; p. 15, l. 16.

documents (7,497 pages) already reviewed and identified as incriminatory[41], but that would have to be re-reviewed for the purposes of an IDAC. In this case there are currently ten Prosecution staff members, not including the Senior Trial Lawyer, to review and produce an IDAC analysis. [REDACTED].

45. An IDAC is a complex document, which routinely comprises hundreds or even thousands of pages.[42] Producing an IDAC requires referencing, cross-referencing and reproducing each relevant segment of all evidentiary items, and breaking them down across the constituent elements of the case. In addition, only one staff member at a time can work on the composite updated document to insert cross-referencing.

46. Prolonging the proceedings for the sake of an analytical tool that has no discernible advantage would lead to unfairness in the proceedings for both parties.

47. It would unfairly prejudice the rights of the Suspect to be tried without undue delay pursuant to article 67(1)(c). As another concrete example of immediate prejudice to the Defence, the Suspect's transcripts of interview are available for disclosure by next week, but if an IDAC is required the Prosecution would not be able to disclose the transcripts for at least another two months. The transcripts are comprised of 883 pages and cover most if not all issues in the case so would take a considerable amount of time to review for the purposes of an IDAC (in addition, some tapes are not transcribed yet). As a result, the delays in disclosure will prevent the Defence from starting to understand the suspect's evidence and prepare its case.

48. In addition, the use of IDACs would unfairly burden and intrude into the Prosecution's ability to undertake its core work prior to the confirmation hearing.

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[41] From the batch of 9,163 documents already reviewed and identified as relevant for disclosure purposes.

[42] In the *Katanga et al.* case, the IDAC was approximately 1000 pages, ICC-01/04-01/07-1643-Conf-AnxB to N; In the *Bemba* case, the updated IDAC exceeded 500 pages, ICC-01/05-01/08-781, Annex A; In the *Kenyatta et al.* case, the IDAC exceeded 6,600 pages, ICC-01/09-02/11-257, Annexes C1-C5; In the *Ruto et al* case the IDAC exceeds 12,000 pages, ICC-01/09-01/11-241, Annexes A-E.

49. Any IDAC provided at the time of initial disclosure would require considerable time and resources to prepare a detailed form of analysis, as described at paragraph 45. Moreover, if the Single Judge requires an updated and consolidated IDAC every time new evidence is submitted as proposed,[43] every individual IDAC would need to be edited, which is extremely time-consuming.

50. The Prosecution does not have the resources to conduct such an exercise, and this additional task of creating an updated IDAC with every disclosure of incriminatory evidence would deviate the Prosecution from core priority and time-sensitive work it must complete in this case including:

- [REDACTED];
- ongoing disclosure review that is already an extremely time-intensive process;
- preparation of the DCC and document in support that can only start after such a resource-intensive and time-consuming exercise as an IDAC is completed because the entire Prosecution team would be needed to complete the IDAC; [REDACTED],
- [REDACTED].

51. Accordingly, requiring an IDAC would unfairly affect the Prosecution's independence under article 42(1) to determine how best to use its resources to comply with its statutory duties to [REDACTED]. This unfairness is exacerbated by the fact that the IDACs will not assist the Prosecution to present its case at the confirmation hearing as it may not present the final charges or evidence.

52. In the context of limited resources, the additional duty to prepare IDACs would likely necessitate the Prosecution to request a substantial postponement of the commencement of the confirmation of charges hearing. [REDACTED].

[43] ICC-01/12-01/18-31, para. 44.

53. Moreover, since the IDAC cannot effectively assist the Prosecution to present its case at the hearing, the Prosecution will require additional time to prepare in advance so that during the hearing it can "support each charge with sufficient evidence".[44] This is because the Prosecution would need to fully explain at the hearing how its contextual analysis of the evidence presented at the hearing establishes each of the material facts included in the DCC. Moreover, an IDAC of the complexity and scale ordered by the Decision may also inevitably contain clerical mistakes and errors. This could lead to litigation and requests for clarification, thus causing further delays and uncertainty in the proceedings.[45]

B. Calendar for disclosure of evidence

54. The Single Judge ordered the Prosecution to indicate a provisional calendar for disclosure of evidence. [REDACTED] approximately 26,000 may be relevant out of which 9163 incriminatory, rule 77 and exonerating evidence have been finally reviewed and are ready to disclose, and, as regards the incriminatory evidence, subject to the Single Judge's decision regarding use of an IDAC. If an IDAC is required, the Prosecution will need to re-review entirely the incriminatory disclosure packages previously prepared.

55. The Prosecution anticipates that if no IDAC requirement is imposed and no alternative disclosure table required, it will be able to disclose the bulk of its incriminatory materials by end of August 2018. Moreover, it would be able to disclose on a rolling basis. However, if the Single Judge adopts instead the alternative model disclosure table as suggested in Annex A to this filing, the Prosecution estimates that it would take an additional two to three months (until November 2018) to review evidence (including evidence previously reviewed) and to produce the tables with every disclosure of incriminatory evidence.

[44] Article 61(5).
[45] This was a factor acknowledged by the STL. See STL Decision, para. 31.

56. The Prosecution should complete all of the translations of its witness statements or transcripts of interview by mid-July. [REDACTED].

Conclusion

57. The Prosecution requests the Single Judge not to adopt an updated IDAC, but rather use the document in support of the DCC. If the Single Judge adopts the use of the disclosure table, in the form attached as Annex A, this would provide further indication of relevance of the materials. However, this disclosure table would further delay the process. Bearing in mind the potential detrimental delay in proceedings, the Prosecution requests that there be a status conference to provide both Parties with an additional opportunity to be heard.

Fatou Bensouda, Prosecutor

Dated this 25th day of May 2018
At The Hague, The Netherlands