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Date: **16 May 2018**

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Single Judge

**SITUATION IN THE REPUBLIC OF MALI
IN THE CASE OF
*THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED
AG MAHMOUD***

Public

Decision on the Evidence Disclosure Protocol and Other Related Matters

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

Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Counsel for the Defence

Mr Yasser Hassan

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

States' Representatives

**Office of Public Counsel for the
Defence**

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

Judge Péter Kovács, designated by Pre-Trial Chamber I (“Chamber”) of the International Criminal Court (“Court”) as Single Judge responsible for carrying out the functions of the Chamber in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* since 28 March 2018,¹ decides the following:

I. Procedural history

1. On 27 March 2018, pursuant to article 58 of the Rome Statute (“Statute”), the Chamber issued a warrant of arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (“Mr Al Hassan”).²
2. On 31 March 2018, Mr Al Hassan was surrendered to the Court; he is currently in custody at the Court’s detention centre in The Hague.³
3. On 3 April 2018, the Single Judge set 4 April 2018 as the date of the first appearance.⁴
4. On 4 April 2018, Mr Al Hassan made his first appearance before the Single Judge in the presence of his counsel and the Prosecution.⁵
5. That same day, the Prosecution filed a request seeking instructions from the Single Judge on the disclosure and redaction of evidence (“Prosecution Request” or “Request”), and in particular seeking the adoption of the protocol used in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (“Al Mahdi case”).⁶
6. The Defence did not submit any observations.

¹ “Decision Designating a Single Judge”, dated 28 March 2018 and reclassified as public on 31 March 2018, ICC-01/12-01/18-6-tENG.

² “Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, dated 27 March 2018 and reclassified as public on 31 March 2018, ICC-01/12-01/18-2-tENG.

³ ICC-01/12-01/18-11-US-Exp.

⁴ “Order Scheduling the First Appearance of Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, 3 April 2018, ICC-01/12-01/18-12-tENG.

⁵ Transcript of the initial appearance hearing, dated 4 April 2018, ICC-01/12-01/18-T-1-CONF-FRA.

⁶ “Prosecution’s Request in relation to its Disclosure and Redaction Practice”, 4 April 2018, ICC-01/12-01/18-15.

7. On 6 April 2018, the Single Judge ordered the Prosecution to submit additional information on the nature of the material to be disclosed and any necessary redactions.⁷

8. On 12 April 2018, the Prosecution submitted its observations to the Chamber ("Observations in Response").⁸

9. On 8 May 2018, the Prosecution filed supplementary clarifications concerning the state of transcripts and translations done by the Office of the Prosecutor ("Supplementary Clarifications").⁹

II. Applicable law

10. The Single Judge refers to articles 21(1)(a), 21(2), 21(3), 51(5), 54(3)(e), 61(3), 61(7), 67, 69(3), 72 and 93(8) of the Statute, rules 15, 63(1), 76 to 83, 121 and 122 of the Rules of Procedure and Evidence ("Rules"), regulations 26 and 53 of the Regulations of the Court and regulations 15 to 19, 24 to 28 and 53(3) of the Regulations of the Registry.

III. Analysis

11. The Single Judge notes that, in its Request, the Prosecution seeks the application in the present case of the protocol on the redaction and exchange (or "disclosure") of evidence and its communication to the Chamber adopted in the *Al Mahdi* case.¹⁰ The Prosecution submits that the protocol: (i) is in accordance with the principles previously adopted in the pre-trial proceedings; (ii) simplifies the evidence disclosure preparation stage and; (iii) sufficiently protects the interests of the suspect, in particular as he or she is kept informed of the nature of redactions

⁷ "Order for Information from the Prosecution further to the 'Prosecution's Request in relation to its Disclosure and Redaction Practice'", 6 April 2018, ICC-01/12-01/18-17-tENG.

⁸ "Prosecution Response to the 'Order for Information from the Prosecution further to the 'Prosecution's Request in relation to its Disclosure and Redaction Practice'" with a confidential *ex parte* annex, 12 April 2018, ICC-01/12-01/18-18-Conf-Exp. The Prosecution subsequently filed two confidential redacted versions on 13 April 2018 and 17 April 2018; see ICC-01/12-01/18-18-Conf-Exp-Red and ICC-01/12-01/18-18-Conf-Exp-Red2, respectively.

⁹ ICC-01/12-01/18-27-Conf-Exp.

¹⁰ Prosecution Request, para. 3.

made and can challenge those redactions if he or she so wishes.¹¹ The Prosecution adds that using the same redaction protocol as that used in the *Al Mahdi* case would ensure a unified procedure, since some of the evidence already redacted in the *Al Mahdi* case would be disclosed in accordance with the same redaction protocol, whereas applying a different redaction system in the present case would lead to confusion and delays.¹²

1. General principles and time frames governing the disclosure of evidence and its communication to the Chamber

12. The Single Judge reminds the Prosecution and the Defence that, in order for a proceeding to reach the stage of holding a confirmation hearing, the core texts of the Court provide for several procedural steps that must be taken by the Chamber and the parties. Central to this is the adoption of a system that regulates the exchange of evidence between the parties and its communication to the Chamber. In this regard, the Single Judge refers to the general principles laid down in the Decision of 31 July 2008 issued in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*,¹³ recalled and developed in several subsequent decisions.¹⁴

13. The Single Judge recalls, as stated previously,¹⁵ that the exchange of evidence as described in rule 121(2)(c) of the Rules is an *inter partes* process which takes place between the Prosecution and the person in respect of whom a warrant of arrest has

¹¹ Prosecution Request, paras. 4-6.

¹² Prosecution Request, para. 7.

¹³ Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", 31 July 2008, [ICC-01/05-01/08-55](#), para. 67 ("Decision of 31 July 2008").

¹⁴ See Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 27 February 2015, [ICC-02/04-01/15-203](#), para. 9 ("Decision of 27 February 2015"); Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 12 April 2013, [ICC-01/04-02/06-47](#), para. 8 ("Decision of 12 April 2013"); Pre-Trial Chamber II, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", dated 6 April 2011 and registered on 7 April 2011, [ICC-01/09-02/11-48](#), para. 6 ("Decision of 6 April 2011"); Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", dated 6 April 2011 and registered on 7 April 2011, ICC-01/09-01/11-44, para. 5 ("Decision in the Ruto and Sang case").

¹⁵ [Decision of 27 February 2015](#), para. 10; [Decision of 12 April 2013](#), para. 7; [Decision in the Ruto and Sang case](#), para. 5; [Decision of 6 April 2011](#), para. 6.

been issued. The process is organized or executed through the Registry, which, pursuant to rule 121(10) of the Rules, creates a record of the proceedings containing all documents communicated to the Chamber, which are accessible, subject to any necessary restrictions concerning protection and confidentiality, to all parties to the proceedings — namely the Prosecution, the suspect and the victims participating in the proceedings or their legal representatives.

14. All evidence exchanged “between the Prosecution and the person for the purposes of the confirmation hearing” must be communicated to the Chamber, regardless of whether the parties intend to rely on or present that evidence during the confirmation hearing. This approach allows the Chamber to ensure that information is exchanged under satisfactory conditions, pursuant to the requirements of article 61(3) of the Statute and rule 121(2)(b) of the Rules and to ensure that the disclosure process is effective with a view to making an informed decision on whether to commit the case to trial. This reading is consistent with a literal and contextual interpretation of the relevant parts of the Statute and the Rules. In particular, the last sentence of rule 121(2)(c) of the Rules requires that “all evidence disclosed [...] be communicated to the Pre-Trial Chamber”.

15. Moreover, the Chamber’s – unique – mandate, namely its filtering function and responsibility to contribute to the establishment of the truth – further bolsters this interpretation. As this Chamber has previously stated:¹⁶

[s]uch contribution by the Pre-Trial Chamber is made in the framework of the confirmation of charges stage when determining whether or not there are substantial grounds to believe that the suspect has committed the crime(s) charged. Fulfilling its mandate to contribute to the establishment of the truth as mentioned above, the Chamber may resort to article 69(3), second sentence, of the Statute, which authorizes the Chamber “to request the submission of all evidence that it considers necessary” for its specific determination at the end of the pre-trial stage, in addition to other evidence which has

¹⁶ Trial Chamber II, *The Prosecutor v. Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, “Decision on the ‘Prosecution’s Application for leave to Appeal the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (ICC-01/09-02/11-48)”, 2 May 2011, [ICC-01/09-02/11-77](#), para. 34; Trial Chamber II, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, “Decision on the ‘Prosecution’s Application for leave to Appeal the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (ICC-01/09-01/11-44)”, 2 May 2011, [ICC-01/09-01/11-74](#), para. 37. See also [Decision of 27 February 2015](#), para. 12; [Decision of 12 April 2013](#), para. 11.

been presented by the parties. Hence, article 69(3), second sentence, of the Statute implies that such evidence must not have been presented previously by either party, but is known to the Chamber, and could, after it is submitted by dint of article 69(3) of the Statute, be discussed, contested and analyzed by both the Prosecutor and the Defence during the confirmation of charges hearing. Thus, it is entirely for the Chamber to base its determination, or parts thereof, on such evidence namely, after the Chamber has requested its submission at the confirmation of charges hearing and after the parties have made their observations, if any, at the hearing.

16. According to the above the Chamber must have access to the following disclosed evidence: (a) all evidence in the Prosecution's possession or control (pursuant to article 67(2) of the Statute) which it believes shows or tends to show the innocence of the suspect, or to mitigate his or her alleged guilt, or which may affect the credibility of the Prosecution evidence; (b) all names of witnesses on which the Prosecution intends to rely at the confirmation hearing and copies of their prior statements, regardless of whether the Prosecution intends to call them to testify (rule 76 of the Rules); (c) all rule 77 material in the possession or control of the Prosecutor (incriminatory, exculpatory or mixed in nature) which is material to the preparation of the defence or is intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or was obtained from or belonged to the person concerned; (d) all rule 78 material in the possession or control of the Defence, which is intended for use as evidence for the purposes of the confirmation hearing; and (e) all evidence the Defence may present under rule 79 of the Rules on which the suspect intends to rely to establish an alibi or a ground for excluding criminal responsibility.

17. In this regard, the Single Judge reminds the Prosecution and the Defence that the Court's statutory documents do not impose the same time limits on both parties to enter material and evidence in the record of the case. According to rule 121(3) of the Rules, the Prosecution shall provide a document containing a detailed description of the charges and a list of evidence for the purposes of the confirmation hearing no later than 30 days before the date of the hearing. If the Prosecution intends to amend the charges or the list of evidence, rule 121(4) of the Rules requires

that the Defence be notified of the amended charges and/or list of evidence no later than 15 days before the date of the hearing.

18. In addition, should the Prosecution intend to present new evidence at the hearing, rule 121(5) of the Rules dictates that it must also provide a list of said evidence no later than 15 days before the date of the hearing. In this respect, the Single Judge wishes to point out that for the purpose of this rule “new evidence” refers to any information, material or evidence which came into the Prosecution’s control or possession after the deadline provided for in rule 121(3) of the Rules. Accordingly, evidence (including new evidence) presented to the Chamber after the time limits specified by the provisions referred to above shall not be considered.¹⁷

19. With respect to the Defence, if the person concerned (i.e. the suspect) intends to present evidence pursuant to rule 121(6) of the Rules, he or she must provide a list of evidence no later than 15 days before the date of the confirmation hearing.

20. In this respect, it should be noted that the intervals referred to in rule 121 of the Rules are only indicative of the minimum notice periods a party may avail itself of to comply with its disclosure obligations. This interpretation finds support in the express wording “no later than” found in rule 121(3-6) and (9) of the Rules. The Single Judge wishes to underline that the Rules serve the application of the Statute and, accordingly, are subordinate to the Statute in all cases, the hierarchy between the two texts being clearly established in article 51(5) of the Statute. The minimum notice periods established in rule 121 of the Rules, especially the notice period set in rule 121(3) regarding disclosure by the Prosecution, must therefore be taken in conjunction with and subject to article 67(1)(b) of the Statute, which provides that the “accused”¹⁸ must have adequate time for the preparation of his or her defence. The Single Judge considers that disclosing evidence as early as possible and on a rolling basis will allow the Defence to properly prepare for the confirmation hearing and to

¹⁷ [Decision of 27 February 2015](#), para. 15.

¹⁸ The Single Judge notes that, pursuant to rule 121(1) of the Rules, the suspect enjoys the rights set forth in article 67 of the Statute upon his or her first appearance before the Pre-Trial Chamber. See [Decision of 27 February 2015](#), footnote 15.

exercise its right as set forth in the aforementioned article 67(1)(b). Disclosing large amounts of evidence for the purposes of the confirmation hearing only 30 days before the start of the hearing might interfere with the suspect's right to have adequate time for the preparation of his or her defence.¹⁹

21. The Single Judge therefore expects the parties to fulfill their disclosure and communication obligations as soon as possible and not to wait until the deadlines set by the Court's texts. The Single Judge stresses that it is desirable, as the Prosecution notes in its Request²⁰ and Observations in Response,²¹ to commence entering into the record of the case all the evidence that has already been gathered and which does not require translation or redaction, as well as evidence already presented to the Chamber in support of the Prosecution's request to issue a warrant of arrest.

22. The Single Judge also requests the Prosecution in this regard to communicate its observations on a provisional schedule for disclosure of evidence, taking into account any possible translation or witness protection requirements, by 31 May 2018. This request above all concerns evidence the Prosecution intends to rely on during the confirmation hearing.

23. The Single Judge also recalls that, pursuant to rule 76(1) of the Rules, the Prosecution is required – subject to any protective measures – to disclose to the Defence the names of its witnesses and copies of statements made by those witnesses “sufficiently in advance to enable the adequate preparation of the defence.” In addition, and pursuant to rule 76(3) of the Rules, “statements of prosecution witnesses shall be made available in the original language and in a language which the accused fully understands and speaks” – in the present case, Arabic. In the event that translating those statements in their entirety risks holding up the proceedings – which does not appear to be the case in view of the Observations in Response or the Supplementary Clarifications – the Prosecution must inform the Single Judge as soon as possible. The Prosecution may confer with the Defence to learn which extracts of

¹⁹ [Decision of 12 April 2013](#), para. 16.

²⁰ Request, para. 1.

²¹ Observations in Response, para. 30.

those statements, once translated, might be sufficient to meet the needs the Defence considers essential for preparing the defence of Mr Al Hassan.²² In the event of disagreement, the parties shall seek a ruling from the Single Judge. The Defence may also request of the Prosecution Arabic translations of evidence other than witness statements if it considers that to be essential for preparing the defence. In the event of disagreement between the Defence and the Prosecution, the Single Judge shall rule at the request of either party.

24. With regard to exculpatory evidence which, according to article 67(2) of the Statute, shall be disclosed “as soon as practicable”, the Single Judge notes that neither the Statute nor the Rules provide for set time limits for the disclosure of exculpatory evidence to the Defence. However, the phrase “as soon as practicable” must be understood as meaning the earliest opportunity for disclosure after the evidence in question comes into the Prosecution’s possession.²³ The Prosecution must therefore disclose such evidence, unless some compelling reasons prevent it from doing so.²⁴ Once again, the Defence must receive such evidence sufficiently in advance of the commencement of the confirmation hearing in order to make effective use of the right provided in article 61(6) of the Statute.²⁵ Furthermore, the Prosecution shall also underscore in each disclosed item the relevant portions that it believes fall within the ambit of article 67(2) of the Statute.²⁶

25. Moreover, the Single Judge reiterates²⁷ that the most important factor in both safeguarding the rights of the Defence and enabling the Chamber to exercise its functions is not for the Prosecution to disclose the greatest volume of evidence, but for it to disclose the evidence which is of true relevance to the case, whether that evidence be incriminating or exculpatory. Disclosure of a considerable volume of

²² [Decision of 27 February 2015](#), para. 35, footnote no. 33 and cited references. Concerning the suspect’s not having an absolute right to request translations of all the documents in the file, see paras. 31-33.

²³ [Decision of 27 February 2015](#), para. 18; [Decision of 12 April 2013](#), para. 17.

²⁴ [Decision of 27 February 2015](#), para. 18, footnote 17 and cited references.

²⁵ [Decision of 27 February 2015](#), para. 8, footnote 17 and cited references.

²⁶ Pre-Trial Chamber III, *The Prosecutor v. Laurent Gbagbo*, “Decision establishing a disclosure system and a calendar for disclosure”, 24 January 2012, [ICC-02/11-01/11-30](#), para. 25.

²⁷ [Decision of 27 February 2015](#), para. 20; [Decision of 31 July 2008](#), para. 67.

evidence of which it is difficult or impossible to comprehend the relevance to the case merely puts the Defence in a position where it cannot genuinely exercise its rights, and will hold up the proceedings.

26. Lastly, with regard to translation into Arabic of documents entered by the Prosecution in the record of the case pursuant to articles 58 or 61 of the Statute, other than those filed as evidence or decisions handed down by the Chamber, the Single Judge recalls previous decisions of the Pre-Trial Chamber according to which, pursuant to article 67(1)(a) of the Statute, the suspect must be informed “in detail of the nature, cause and content of the charges” brought against him or her, in a language which he or she fully understands and speaks.²⁸ The Single Judge considers, therefore, that, at a minimum, the Prosecution must, with the assistance of the Registry if necessary, enter in the record of the case an Arabic version of the document containing the charges and the list of evidence submitted pursuant to article 61(3) of the Statute and rule 121(3) of the Rules. If the Defence considers that other documents must also be translated into Arabic, it must submit a request to that end to the Single Judge at the earliest opportunity.

2. Principles governing the protocol for the redaction of evidence

27. With regard to the redaction of evidence, the Single Judge grants the Prosecution Request to apply the same simplified protocol for the redaction of evidence as that used in the *Al Mahdi* case,²⁹ as set out below.

28. The following procedure shall apply for exceptions to disclosure by the Prosecution which are subject to judicial control, i.e. under rule 81(2) and (4) of the Rules.

29. The Prosecution shall disclose evidence with redactions under rule 81(2) and (4) of the Rules without discrete application to the Chamber, except as provided in

²⁸ [Decision of 27 February 2015](#), para. 32.

²⁹ Pre-Trial Chamber I, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, “Decision on issues related to disclosure and exceptions thereto”, 30 September 2015, [ICC-01/12-01/15-9](#).

paragraph 33 below. When disclosing redacted evidence, the Prosecution shall indicate the type of redaction in the redaction box by using the following codes:

Under rule 81(2) of the Rules:

- Category “A.1”: Locations of witness interviews/accommodation, insofar as disclosure would unduly attract attention to the movements of the Prosecutor’s staff and witnesses, thereby posing a risk to ongoing or future investigations;
- Category “A.2”: Identifying and contact information of the Prosecutor’s, VWU or other Court staff members who travel frequently to, or are based in, the field, insofar as disclosure of this information could hinder their work in the field and thereby put at risk the ongoing or future investigations of the Prosecutor (to be further specified as “A.2.1” for translators, “A.2.2” for interpreters, “A.2.3” for stenographers, “A.2.4” for psycho-social experts, “A.2.5” for other medical experts and “A.2.6” for other staff members falling within this category);
- Category “A.3”: Identifying and contact information of translators, interpreters, stenographers and psycho-social experts assisting during interviews who are not members of the Prosecutor’s staff but who travel frequently to, or are based in the field, insofar as disclosure of this information could hinder their work so that the Prosecutor could no longer rely on them, and thereby put at risk ongoing or future investigations of the Prosecutor (to be further specified as “A.3.1” for translators, “A.3.2” for interpreters, “A.3.3” for stenographers, “A.3.4” for psycho-social experts, “A.3.5” for other medical experts and “A.3.6” for other persons falling within this category);
- Category “A.4”: Identifying and contact information of investigators, insofar as disclosure of this information could hinder their work in the field thereby putting at risk the ongoing or future investigations of the Prosecutor;
- Category “A.5”: Identifying and contact information of intermediaries, insofar as disclosure of this information could hinder their work in the field thereby putting at risk the ongoing or future investigations of the Prosecutor;
- Category “A.6”: Identifying and contact information of leads and sources, insofar as disclosure of this information could result in the leads and sources being intimidated or interfered with and would thereby put at risk the ongoing or future investigations of the Prosecutor (to be further specified as “A.6.1” for individual sources, “A.6.2” for NGOs, “A.6.3” for international organisations; “A.6.4” for national governmental agencies, “A.6.5” for academic sources, “A.6.6” for private companies and “A.6.7” for other sources);
- Category “A.7”: Means used to communicate with witnesses, insofar disclosure of this information may compromise investigation techniques or the location of witnesses and would thereby put at risk the ongoing or future investigations of the Prosecutor;
- Category “A.8”: Other redactions under rule 81(2) of the Rules;

Under rule 81(4) of the Rules:

- Category “B.1”: Recent contact information of witnesses, insofar necessary to protect the safety of the witness;
- Category “B.2”: Identifying and contact information of family members of witnesses, insofar necessary to protect their safety;
- Category “B.3”: Identifying and contact information of “other persons at risk as a result of the activities of the Court” (“innocent third parties”), insofar necessary to protect their safety;

- Category “B.4”: Location of witnesses who are admitted in the International Criminal Court Protection Programme and information revealing the places used for present and future relocation of these witnesses, including before they enter the ICCPP;
- Category “B.5”: Other redactions under rule 81(4) of the Rules.

30. When disclosing evidence with redactions, the Prosecution shall assign unique pseudonyms to any persons whose identity is redacted. The Prosecution need not provide the category code and/or a pseudonym when doing so would defeat the purpose of the redaction but shall make clear which codes/pseudonyms are missing for this reason. The Prosecution shall also enter in the record of the case a report stating which categories of redactions have been applied to particular items of evidence. In this report, the Prosecution shall also briefly indicate, to the extent possible, the basis for each redaction falling under categories “A.8” and “B.5”.

31. Should the Defence consider that a particular redaction is unwarranted or should be lifted as a result of changed circumstances, it shall approach the Prosecution directly. The parties shall consult in good faith with a view to resolving the matter. If they are unable to agree, the Defence may apply to the Chamber for a ruling. In such case, the Prosecution shall have the burden to justify the particular redaction, and shall file its submissions in the record of the case within five days, unless otherwise decided by the Chamber. Thereafter, the Single Judge will rule as to whether the particular redaction is to be lifted or maintained.

32. Furthermore, the Single Judge, in view of previous decisions taken by the Appeals Chamber concerning the necessary judicial control of redactions, shall monitor the necessity for redactions of evidence made by the Prosecution.³⁰ The Single Judge, therefore, must receive the evidence as disclosed to the Defence, but also, where appropriate, in non-redacted version, in order to verify, at his discretion, the validity of any redactions made by the Prosecution and, if necessary, order the Prosecution *proprio motu* to lift, partially or fully, any redactions, after having given the Prosecution the opportunity to submit its observations. The only purpose of

³⁰ Appeals Chamber, *The Prosecutor v. Germain Katanga*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, dated 13 May 2008, [ICC-01/04-01/07-475](#), para. 66.

communicating that non-redacted version of evidence to the Single Judge shall be to give him the opportunity to verify, pursuant to rule 81 of the Rules, the scope and validity of any redactions made by the Prosecution. It is taken as read that the Chamber, in its decision on the confirmation of charges, shall take into account only the version of evidence that was communicated to the Defence. The Prosecution shall consult the Registry with regard to the technical modalities of communicating evidence to the Chamber, with regard to both their redacted and non-redacted versions, the latter being available only to the Chamber and the Prosecution.

33. The above procedure shall not apply to the non-disclosure of witnesses' identities before the commencement of trial or to the non-disclosure of entire items of evidence. In such cases, the Prosecution shall submit a discrete application to the Chamber.

34. The Prosecution shall monitor the continued necessity of redactions, and shall re-disclose evidence with lesser redactions as soon as the reasons justifying them cease to exist, or, if applicable, make an application under regulation 42(3) of the Regulations of the Court.

35. If the Prosecution redacts evidence before disclosure on the basis of rule 81(1) of the Rules of Procedure and Evidence, it shall mark this in the redaction box as category "E".

3. Role of the Registry and the registration procedure

36. The Single Judge reiterates that the process of evidence disclosure is facilitated by the Registry, which is not a party to the proceedings but "a communication channel" between the parties and the Chamber.³¹ The system of evidence disclosure adopted in this case is that which has been applied in previous cases,³² and which is set out below.

³¹ [Decision of 12 April 2013](#), para. 21; [Decision of 31 July 2008](#), para. 34; [Decision in the Ruto and Sang case](#), para. 13; [Decision of 6 April 2011](#), para. 14; [Decision of 27 February 2015](#), para. 10.

³² [Decision of 27 February 2015](#), paras. 21-29.

37. As set forth in rule 121(10) of the Rules and regulations 15 to 19, 24 to 28 and 53(3) of the Regulations of the Registry, the Registry is vested with several responsibilities in the process of disclosure and registration of evidence. Accordingly, the Registry must register and transmit rapidly any evidence disclosed between the parties and communicated to the Chamber.

38. Concerning the registration procedure, the Single Judge wishes to clarify that, upon receipt of the relevant evidence, the Registry shall register each item that is to be exchanged between the parties and communicated to the Chamber with a unique document identification (document ID), to be used throughout the proceedings, given to it by the party that filed the particular item of evidence.³³ To enable the Registry to effectively fulfil its duty, it is of the utmost importance that the parties disclose to it all the relevant information. To that end, the parties shall in all circumstances respect the E-court Protocol, annexed to this Decision, and, pursuant to regulation 53(3) of the Regulations of the Registry, transmit to the Registry the original version and an electronic version of any evidence. If the item of evidence concerned is a tangible object, the parties shall provide a digital photograph of it.

39. Parties are reminded to include the following documentation in their submission of evidence: (i) a list of evidence comprising all pieces of evidence enclosed, with their respective document ID as defined in the E-court Protocol; and (ii) a list of recipients including the level of confidentiality applicable to each item.

40. Unless a party raises an objection against the authenticity of a piece of evidence, the Registry shall not conduct an authentication process confirming that the electronic copy is an exact replica of the original piece of evidence.³⁴ In the event that a piece of evidence, or part of it, needs to be replaced in the record of the case upon an objection, the document shall be provided in accordance with the E-court Protocol.

³³ “Unified Technical protocol (“E-court Protocol”) for the provision of evidence, witness and victims information in electronic form”, para. 21, annexed to this Decision.

³⁴ [Decision of 27 February 2015](#), para. 25; [Decision of 12 April 2013](#), para. 24; [Decision in the Ruto and Sang case](#), para. 16; [Decision of 6 April 2011](#), para. 17; [Decision of 31 July 2008](#), para. 58.

41. When submitting evidence under rule 76 of the Rules, the Prosecution is reminded to provide a translation which will be reflected accordingly in the record of the case. This translation of the document shall be provided in accordance with the E-court Protocol.

42. To ensure the public nature of judicial proceedings, submitted evidence shall in principle be registered as “public” unless there is reason to do otherwise. It is the responsibility of the parties to indicate the desired degree of confidentiality when disclosing evidence and to provide the factual and legal basis for any proposal to classify (as non-public) the evidence submitted.

4. Analysis of evidence exchanged between the parties

43. The Single Judge refers to the conclusions set out in the Decision of 31 July 2008³⁵ and reiterated in subsequent decisions,³⁶ which highlight the importance of providing the Defence with:

all necessary tools to understand the reasons why the Prosecutor is relying on any particular piece of evidence and [...] consequently, the evidence exchanged between the parties and communicated to the Chamber must be the subject of a sufficiently detailed legal analysis relating the alleged factual evidence with the constituent elements corresponding to each crime charged. [...] That analysis consists of presenting each piece of evidence according to its relevance in relation to the constituent elements of the crimes presented by the Prosecutor in his application under article 58 of the Statute and taken into account by the Chamber in its decision of 10 June 2008. Each piece of evidence must be analysed – page by page or paragraph by paragraph, where required – by relating each piece of information contained in that page or paragraph with one or more of the constituent elements of one or more of the crimes with which the person is charged, including the contextual elements of those crimes, as well as the constituent elements of the mode of participation in the offence with which person is charged pursuant to article 25(3)(a) of the Statute. The same analysis technique shall apply *mutatis mutandis* to photographs, maps, videodisks, tangible objects and any other support disclosed by the Prosecutor. [...] [T]his analysis should be presented in the form of a table which shows the interest of the evidence presented in relation to the constituent elements of the crimes with which the person is charged. It should enable the Chamber to verify that for each constituent element of any crime with which the person is charged, including their contextual elements, as well as for each constituent element of the mode of participation in the offence with which he or she is charged, there are one or more corresponding

³⁵ [Decision of 31 July 2008](#), paras. 66-70.

³⁶ Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence”, dated 10 November 2008, [ICC-01/05-01/08-232](#), para. 6 (“Decision of 10 November 2008”); see also [Decision of 27 February 2015](#), para. 37; Decision of 12 April 2013, para. 29; [Decision in the Ruto and Sang case](#), para. 21; [Decision of 6 April 2011](#), para. 22.

pieces of evidence, either incriminating or exculpatory, which the Chamber must assess in light of the criteria set under article 61(7) of the Statute.

44. For the purposes of these proceedings, in particular regarding the considerable amount of evidence that the Prosecution intends to disclose to the Defence, the Single Judge considers that, in order to streamline the evidence disclosure process, the approach adopted in the Decision of 31 July 2008³⁷ and in the Decision of 10 November 2008 should be taken. Furthermore, the Single Judge requests the Prosecution, when disclosing evidence to the Defence and communicating it to the Chamber, to enclose a chart providing an in-depth analysis of that evidence – following the model, *mutatis mutandis*, of that found in the annex to the Decision of 27 February 2015 in the *Ongwen* case³⁸ or of that found in the annex to the above-mentioned Decision of 10 November 2008.³⁹ That chart should be enclosed and communicated to the Chamber every time evidence is exchanged between the parties, after being updated to take the analysis of the new evidence into account.

45. As explained in the Decision of 12 April 2013:⁴⁰

[...] this approach ensures that the Chamber establishes satisfactory conditions for the proper preparation of the Defence. This prevents any unnecessary delays that might negatively impact on the commencement of the confirmation hearing as envisaged by the Chamber. Further, said approach also ensures that the Presiding Judge is in a position to “organise the presentation of evidence by the parties according to the crimes charged with one party responding to the other on each count consecutively”. Thus, this “law-driven” organisation of the chart mirrors the way in which the confirmation hearing before this Chamber will unfold. It streamlines the substantive discussions and, thereafter, the structure and timely preparation of the article 61(7) decision. Thus, the “law-driven” analysis is crucial as the role of the Chamber is not limited to simply verifying whether the facts as presented by the Prosecutor are proven to the requisite threshold. Rather, the “law-driven” approach aims at deciding whether the constitutive elements of the crimes and the mode(s) of liability as charged by the Prosecutor within the factual ambit of the case are established in accordance with the standard set forth in article 61(7) of the Statute. [Footnote not reproduced]

46. As stated in the Decision of 31 July 2008,⁴¹ the Single Judge considers that this approach streamlines the disclosure of evidence, ensures that the defence is prepared

³⁷ [Decision of 31 July 2008](#), paras. 64-73.

³⁸ [Decision of 27 February 2015](#) and its annex II, [ICC-02/04-01/15-203-Anx2](#).

³⁹ [Decision of 10 November 2008](#) and its annex, [ICC-01/05-01/08-232-Anx](#).

⁴⁰ [Decision of 12 April 2013](#), para. 31.

⁴¹ [Decision of 31 July 2008](#), paras. 72-73.

under satisfactory conditions, expedites proceedings and allows the parties to properly prepare for the confirmation hearing; it also expedites the proceedings for the determination of whether there is sufficient evidence to establish substantial grounds to believe that the person charged committed the crimes he or she was charged with. The Single Judge also notes that such an approach was also taken recently in the trial phase, where Trial Chamber I, with regard to its obligation to ensure a fair trial, asked the Prosecution to conduct an analysis of the evidence for each constituent element of the crimes and forms of responsibility charged.⁴²

47. The confirmation of charges hearing will also run more efficiently if the parties have duly observed the proposed methodology since – regard also being had to rule 122(1) of the Rules – the evidence in the record will be presented at the confirmation of charges hearing in the order of the charges contained in the document referred to in article 61(3) of the Statute.

48. The Single Judge is of the view that if the Defence intends to present evidence under article 61(6) of the Statute and in accordance with rules 78, 79 and 121(6) of the Rules – or rely on evidence disclosed by the Prosecution – it should take the same approach.

49. The Single Judge is of the view that article 61(3) of the Statute and rule 121(2) of the Rules empower him to order the parties to proceed in such a way,⁴³ as confirmed in the judgment of the Appeals Chamber dated 17 June 2015.⁴⁴

50. The Single Judge, nevertheless, takes note that in said judgment the Appeals Chamber took the view that the Pre-Trial Chamber had not properly exercised its

⁴² Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, “Order on the further conduct of the proceedings”, ICC-02/11-01/15-1124, 9 February 2018, para. 10.

⁴³ [Decision of 27 February 2015](#), para. 39.

⁴⁴ Appeals Chamber, *The Prosecutor v. Dominic Ongwen*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’”, 17 June 2015, [ICC-02/04-01/15-251](#), para. 33.

discretion by failing to consult the parties before ordering them to produce the charts providing in-depth analyses of the evidence.⁴⁵

51. Accordingly, the Single Judge hereby requests the Prosecution to submit its observations on this matter by 24 May 2018 and the Defence to respond to the Prosecution's observations by 31 May 2018. In particular, the Defence is asked whether this methodology would be useful for its preparation for the confirmation of charges hearing, and the Prosecution is asked what the impact of using such a methodology may be in terms of time frames.⁴⁶ In these circumstances, the Single Judge wishes to remind the Prosecution that rule 121(7) of the Rules gives the Prosecution the opportunity to request a postponement of the confirmation of charges hearing from the Pre-Trial Chamber. The Prosecution is also asked what alternative methodology of evidence analysis might be preferable.

52. Once he has been apprised of the observations of the parties, the Single Judge will pass judgement on the matter and may give further instructions.

5. Documents falling under articles 54(3)(e), 72 and 93(8) of the Statute

53. The Single Judge reminds the Prosecution of its obligation to disclose to the Defence as soon as practicable any exculpatory evidence in its possession or control, under article 67(2) of the Statute, as well as any material that is relevant for the preparation of the defence, under rule 77 of the Rules. In this regard, should the Prosecution receive evidence which article 67(2) of the Statute or rule 77 of the Rules requires it to disclose to the Defence but which is protected by the conditions in articles 54(3)(e), 72 and 93(8) of the Statute, it is the Prosecution's responsibility to ensure that it is disclosed without undue delay. It follows that the Prosecution, with the sources of information at its disposal, shall undertake the necessary consultations to reach an agreement on the lifting of those conditions. The Prosecution shall bring

⁴⁵ Appeals Chamber, *The Prosecutor v. Dominic Ongwen*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters'", 17 June 2015, [ICC-02/04-01/15-251](#), paras. 36, 39, 42 and 46.

⁴⁶ Appeals Chamber, *The Prosecutor v. Dominic Ongwen*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters'", 17 June 2015, [ICC-02/04-01/15-251](#), para. 39.

the documents concerned to the attention of the Chamber as soon as possible. Should a problem arise, the Prosecution must bring the matter to the attention of the Chamber as soon as possible.⁴⁷

FOR THESE REASONS, the Single Judge

GRANTS, in part, the Prosecution Request, insofar as it concerns the simplified protocol for the redaction of evidence;

DECIDES THAT the process of exchanging evidence between the parties shall be facilitated by the Registry;

ORDERS the parties to file their evidence in a timely manner, preferably well before the expiration of the deadlines provided for in rule 121(3-6) and rule 121(9) of the Rules;

DIRECTS the Prosecution to submit observations on a provisional schedule for the disclosure of evidence by 31 May 2018;

ORDERS the parties to follow the simplified protocol for the redaction of evidence according to the terms laid down in paragraphs 27 to 35 above;

ORDERS the parties to submit to the Registry the original version and an electronic version of any evidence filed or, in the case of tangible objects, a digital photograph;

ORDERS the parties to enclose the related metadata with all evidence filed, in accordance with the E-court Protocol annexed to this Decision;

DECIDES that, when submitting any evidence to the Registry, the parties shall provide the following accompanying documentation:

(1) a list of evidence comprising all pieces of evidence enclosed, with their respective document ID; and

⁴⁷ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008'", 21 October 2008, [ICC-01/04-01/06-1486](#), paras. 2 and 3. See also [Decision of 27 February 2015](#), para. 44; [Decision of 12 April 2013](#), para. 33.

(2) a list of recipients for each evidentiary item, stating the access permissions and level of confidentiality applicable to each item;

ORDERS the parties to comply with the evidence registration procedure described in part 3 of this Decision;

ORDERS the parties to provide the factual and legal basis for any proposal to classify (as non-public) the evidence submitted;

DIRECTS the Prosecution to submit observations on a possible analysis of the evidence exchanged between the parties, by 24 May 2018, and the Defence to submit a response to those observations, by 31 May 2018;

ORDERS the Registrar to grant the Chamber unrestricted access to any evidence exchanged between the parties and to organize with the Prosecution a system which also gives the Chamber, where appropriate, access to evidence in non-redacted form;

ORDERS the Registrar to register in the record of the case electronic copies of any evidence submitted and to save the originals in the Registry vault;

ORDERS the Registrar to report to the Single Judge as soon as possible any concern regarding this matter, whether practical or security-related; and

DECIDES that any delays in the process of disclosure which result from procedures of the sort provided for under articles 54(3)(e), 72 or 93(8) of the Statute shall be brought to the attention of the Chamber as soon as practicable.

Done in both English and French, the French version being authoritative.

[signed]

Judge Péter Kovács

Single Judge

Dated this 16 May 2018

At The Hague, Netherlands