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**No. ICC-01/09-01/20
Date: 21 December 2020**

PRE-TRIAL CHAMBER A (ARTICLE 70)

Before: Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. PAUL GICHERU

**Public
*With two public annexes***

Decision Setting the Regime for Evidence Disclosure and Other Related Matters

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart

Counsel for the Defence

Mr Michael Karnavas

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
for Victims**

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and
Reparations Section**

Other

PRE-TRIAL CHAMBER A (ARTICLE 70) of the International Criminal Court (the ‘Court’) issues this decision setting a regime for the disclosure of evidence between the parties and other related matters for the purpose of the organization of the upcoming proceedings in the present case.

I. PROCEDURAL HISTORY

1. On 10 March 2015, Pre-Trial Chamber II, in its then composition, issued warrants of arrest against Mr Gicheru and Mr Bett for their alleged responsibility for offences against the administration of justice under article 70(1)(c) of the Rome Statute (the ‘Statute’).¹

2. On 2 November 2020, Mr Gicheru surrendered himself to the authorities of the Kingdom of the Netherlands (‘the Netherlands’).

3. On 2 November 2020, the President of the Pre-Trial Division constituted the present Chamber pursuant to rule 165(2) of the Rules of Procedure and Evidence (the ‘Rules’), as drawn up by the judges of the Court acting under article 51(3) of the Statute on 10 February 2016 (‘Provisional Rule 165 of the Rules’), and regulation 66*bis*(1) of the Regulations of the Court (the ‘Regulations’), which was adopted and entered into force on the same day.²

4. On 3 November 2020, following the completion of domestic proceedings in the Netherlands, Mr Gicheru was surrendered to the Court and arrived at the Court’s Detention Centre.

5. On 6 November 2020, in accordance with the Chamber’s order dated 4 November 2020,³ Mr Gicheru appeared before the Chamber pursuant to article 60(1) of the Statute and rules 121(1) and 163(1) of the Rules. The Chamber *inter alia* ordered: (i) the Prosecutor to submit observations on the progress of her investigation, the disclosure of evidence, and the protection of witnesses by 18 November 2020;⁴ and (ii) the Prosecutor and the Defence to submit observations on the possibility of severing

¹ Decision on the “Prosecution’s Application under Article 58(1) of the Rome Statute”, ICC-01/09-01/20-1-Conf-Exp; a public redacted version was notified on the same day, *see* [ICC-01/09-01/20-1-Red.](#)

² [Decision Constituting a Chamber Composed of one Judge from the Pre-Trial Division to Exercise the Powers and Functions of the Pre-Trial Chamber in the Present Case](#), ICC-01/09-01/20-32.

³ [Order Setting the Date for the Initial Appearance of Mr Gicheru](#), ICC-01/09-01/20-34.

⁴ ICC-01/09-01/20-T-001-CONF-ENG, p. 11, lines 21-23.

the case against Mr Gicheru from the case against Mr Bett by 20 November 2020 and 26 November 2020 respectively.⁵ The Chamber also decided that, in accordance with rule 165(3) of the Rules, no confirmation hearing should be held in the present case, and that parties should instead file written submissions on 15 March 2021 at the latest.

6. On 16 November 2020, the Chamber received the ‘Prosecution’s written submissions concerning self-representation, severance of the charges, registration and disclosure of evidence, and other procedural matters pertaining to pre-confirmation proceedings’.⁶

7. On 18 November 2020, the Chamber received the ‘Notification of the Appointment of Mr Michael G. Karnavas as Counsel for Mr Paul Gicheru’.⁷

8. On 1 December 2020, the Chamber received ‘Paul Gicheru’s Response to the Prosecution’s written submissions concerning severance of the charges, registration and disclosure of evidence, and other procedural matters pertaining to pre-confirmation proceedings’.⁸

9. On 10 December 2020, the Chamber issued the ‘Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence’.⁹ The Chamber found that Provisional Rule 165 of the Rules is applicable and that it has been properly constituted as a chamber composed of one judge to exercise the functions and powers of the Pre-Trial Chamber in the present case.¹⁰

10. On 11 December 2020, the Chamber issued the ‘Decision Severing the Case against Mr Gicheru’.¹¹

⁵ ICC-01/09-01/20-T-001-CONF-ENG, p. 12, lines 5-9.

⁶ [ICC-01/09-01/20-46](#).

⁷ [ICC-01/09-01/20-48](#), together with [public annex I](#).

⁸ [ICC-01/09-01/20-56](#).

⁹ [ICC-01/09-01/20-61](#).

¹⁰ [ICC-01/09-01/20-61](#), p. 22.

¹¹ [ICC-01/09-01/20-62](#).

II. SUBMISSIONS RECEIVED BY THE CHAMBER

A. The Prosecutor

11. The Prosecutor seeks the application of the most recent version of the Unified Technical Protocol ('E-Court Protocol') for the provision of evidence, witness and victims information in electronic form.¹²

12. The Prosecutor further submits that the Chamber should follow the practice of other pre-trial chambers and adopt the procedure for exceptions to disclosure in the form of redaction of information under rules 81(2) and (4) of the Rules as contained in paragraphs 99 to 101 of the latest version of the Chambers Practice Manual. The Prosecutor requests that the Chamber 'specify that [...] the procedure set out therein applies to both the Prosecutor and the Defence'.¹³

13. The Prosecutor avers that any other redaction not falling under the standard categories listed in the Chambers Practice Manual 'be subject to discrete applications for the Chamber's authorization, redacted versions of which shall also be provided to the receiving party', in line with the practice in other cases.¹⁴ The Prosecutor contends that the Chamber should allow the parties 'to simultaneously proceed to disclosure with redactions' so as to prevent the prolonging of the disclosure process.¹⁵ It would be for the Chamber, afterwards, to either authorize or order the lifting of those redactions.¹⁶

14. Finally, the Prosecutor submits that the adoption at the pre-trial and trial phases of protocols on witness contacts and confidential information during investigations has become 'standard practice at the Court'. The Prosecutor avers that the Chamber should adopt the Protocol on the handling of confidential information during investigations and contact between a party and witnesses of the other party, adopted in the other case concerning offences against the administration of justice, namely *The Prosecutor v. Bemba et al.* (the 'Proposed Protocol' or the '*Bemba et al.* Protocol'), as it 'modifies

¹² [ICC-01/09-01/20-46](#), para. 20; Unified Technical protocol ('E-court Protocol') for the provision of evidence, witness and victims information in electronic form, [ICC-02/05-01/20-116-Anx1](#).

¹³ [ICC-01/09-01/20-46](#), para. 21.

¹⁴ [ICC-01/09-01/20-46](#), para. 22.

¹⁵ [ICC-01/09-01/20-46](#), paras 21-22.

¹⁶ [ICC-01/09-01/20-46](#), para. 22.

only slightly’ the protocols adopted in other cases and is ‘more suitable to address the specific circumstances of [the article 70] proceedings’ in this case.¹⁷

15. The Prosecutor seeks: (i) the change of the record number and the removal of the second sentence of paragraph 3 of the Proposed Protocol and, (ii) that ‘party’ be defined as ‘the Prosecution or Mr Paul Gicheru and their respective teams, including counsel, resource persons, and investigators’, as implemented by Trial Chamber VII.¹⁸

B. The Defence

16. The Defence does not object to the adoption of the E-Court Protocol or the Protocol for handling confidential information and contacting witnesses, as requested by the Prosecutor.¹⁹

17. On the use of redactions, the Defence submits that redactions under categories ‘A.8’ and ‘B.5’ of the Chamber’s Practice Manual, and other non-standard redactions, should be subject to ‘reasoned applications and prior authorization’ of the Chamber.²⁰

18. The Defence further seeks the use of pseudonyms for redacted names.²¹

¹⁷ [ICC-01/09-01/20-46](#), paras 23-25 referring to Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Decision adopting a Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party and Witnesses of the Other Parties, 20 July 2015, ICC-01/05-01/13-1093, and its annex, [ICC-01/05-01/13-1093-Anx](#).

¹⁸ [ICC-01/09-01/20-46](#), para. 26 ; *Bemba et al.*, ICC-01/05-01/13-1093-Anx, p.1.

¹⁹ [ICC-01/09-01/20-56](#), para. 2 referring to Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Order on disclosure and related matters, 17 August 2020, ICC-02/05-01/20-116, para. 11, and its annex, [ICC-02/05-01/20-116-Anx1](#).

²⁰ [ICC-01/09-01/20-56](#), para. 3 referring to Trial Chamber X, *The Prosecutor v. Al Hassan*, Decision on the evidence disclosure protocol and other related matters, 30 December 2019, ICC-01/12-01/18-546, para. 14.

²¹ [ICC-01/09-01/20-56](#), paras 3-4 referring to Pre-Trial Chamber II, *The Prosecutor v. Yekatom*, , Public Redacted Version of “Decision on Disclosure and Related Matters”, 23 January 2019, ICC-01/14-01/18-64-Red, para. 29.

III. DETERMINATION BY THE CHAMBER

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

19. The Chamber reminds the Prosecutor and the Defence that, in order for a proceeding to reach the stage of holding a confirmation hearing – which, in the present proceedings, will be replaced by written submissions – 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 disclosure of evidence between the parties and its communication to the Chamber. In this regard, the Chamber 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*,²² recalled and developed in several subsequent decisions.²³

20. The Chamber recalls, as stated previously,²⁴ that the disclosure of evidence as described in rule 121(2)(c) of the Rules is an *inter partes* process which takes place between the Prosecutor and the person in respect of whom a warrant of arrest has 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

²² Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on the Evidence Disclosure Protocol and Other Related Matters](#), 16 May 2018, ICC-01/12-01/18-31-tENG-Corr (‘Decision of 16 May 2018’), para. 12; 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’).

²³ See Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on the Evidence Disclosure Protocol and Other Related Matters](#), 16 May 2018, ICC-01/12-01/18-31-tENG-Corr-Anx (‘Decision of 16 May 2018’), para. 12; 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 (‘[Decision of 27 February 2015](#)’), para. 9; 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 (‘Decision of 12 April 2013’), para. 8; 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 (‘Decision of 6 April 2011’), para. 6; 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 (‘Decision in the Ruto and Sang case’), para. 5.

²⁴ [Decision of 16 May 2018](#), para. 13; [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.

restrictions concerning protection and confidentiality, to all parties to the proceedings — namely the Prosecutor and the suspect.

21. All evidence disclosed ‘between the Prosecutor 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 in their written submissions. This approach allows the Chamber to ensure that information is disclosed 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’.

22. 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 Pre-Trial Chamber I has previously stated:²⁵

[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 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.

²⁵ [Decision of 16 May 2018](#), para. 15; 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.

23. According to the above, the Chamber must have access to the following disclosed evidence: (i) all evidence in the Prosecutor'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 Prosecutor's evidence; (ii) all names of witnesses on which the Prosecutor intends to rely at the confirmation hearing (or, in the present case, in her written submissions) and copies of their prior statements, regardless of whether the Prosecutor intends to call them to testify (rule 76 of the Rules); (iii) 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, in the present case, of the filing of the written submissions) or was obtained from or belonged to the person concerned; (iv) 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 (or, in the present case, of the filing of its written submissions); and (v) 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.

24. In this regard, the Chamber reminds the Prosecutor 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 Prosecutor 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, or, in the present case, the date of the filing of the written submissions, set for 15 March 2021. If the Prosecutor 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, or, in the present case, the date of the filing of the written submissions.

25. In addition, should the Prosecutor intend to present new evidence in her written submissions, 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 filing of written submissions. In this respect, the Chamber wishes to point out that for the purpose of this rule, 'new evidence' refers to any information, material or evidence which came into the Prosecutor'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.²⁶

26. With respect to the Defence, if the person concerned (namely, 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, or, in the present case, the date of the filing of the written submissions, set for 15 March 2021.

27. 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 Chamber 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) of the Rules regarding disclosure by the Prosecutor, must therefore be taken in conjunction with and subject to article 67(1)(b) of the Statute, which provides that the ‘accused’²⁷ must have adequate time for the preparation of his or her defence. The Chamber considers that disclosing evidence as early as possible and on a rolling basis will allow the Defence to properly prepare for the filing of its written submissions and to exercise its right as set forth in the aforementioned article 67(1)(b) of the Statute. Disclosing large amounts of evidence for the purposes of the confirmation hearing, or, in the present case, the filing of the written submissions, only 30 days before such filing might interfere with the suspect’s right to have adequate time for the preparation of his or her defence.²⁸

28. The Chamber 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 Chamber stresses that it is desirable to commence entering into the record of the case all the evidence that has already been gathered and which

²⁶ [Decision of 16 May 2018](#), para. 18; [Decision of 27 February 2015](#), para. 15.

²⁷ [Decision of 16 May 2018](#), para. 20, n. 18 *noting 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 also* [Decision of 27 February 2015](#), footnote 15.

²⁸ [Decision of 16 May 2018](#), para. 20; [Decision of 12 April 2013](#), para. 16.

does not require translation or redaction, as well as evidence already presented to the Chamber in support of the Prosecutor's request to issue a warrant of arrest.

29. The Chamber also requests the Prosecutor 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 20 January 2021. This request above all concerns evidence the Prosecutor intends to rely on during the confirmation hearing.

30. The Chamber also recalls that, pursuant to rule 76(1) of the Rules, the Prosecutor 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, English. In the event that translating those statements in their entirety risks holding up the proceedings – which does not appear to be the case in the present proceedings – the Prosecutor must inform the Chamber as soon as possible. The Prosecutor may confer with the Defence to learn which extracts of those statements, once translated, might be sufficient to meet the needs the Defence considers essential for preparing the defence of Mr Gicheru.²⁹ In the event of disagreement, the parties shall seek a ruling from the Chamber. The Defence may also request of the Prosecutor English 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 Prosecutor, the Chamber shall rule at the request of either party.

31. With regard to exculpatory evidence which, according to article 67(2) of the Statute, shall be disclosed ‘as soon as practicable’, the Chamber 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

²⁹ [Decision of 16 May 2018](#), para. 23; [Decision of 27 February 2015](#), para. 35, footnote no. 33 and cited references. Concerning the suspect not having an absolute right to request translations of all the documents in the file, *see* paras 31-33.

question comes into the Prosecutor's possession.³⁰ The Prosecutor must therefore disclose such evidence, unless some compelling reasons prevent it from doing so.³¹ 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.³² Furthermore, the Prosecutor shall also underscore in each disclosed item the relevant portions that she believes fall within the ambit of article 67(2) of the Statute.³³

32. Moreover, the Chamber reiterates³⁴ 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 Prosecutor 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 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.

B. Principles governing the protocol for the redaction of evidence

33. With regard to the redaction of evidence, the Chamber grants the Prosecutor's request to apply the same simplified protocol for the redaction of evidence as that used in the Chambers Practice Manual, as set out below.

34. The following procedure shall apply for exceptions to disclosure by the Prosecutor and the defence which are subject to judicial control under rule 81(2) and (4) of the Rules.

35. The Prosecutor and the defence shall disclose evidence with redactions under rule 81(2) and (4) of the Rules without discrete application to the Chamber, except as provided in paragraph 40 below. When disclosing redacted evidence, the Prosecutor

³⁰ [Decision of 16 May 2018](#), para. 24; [Decision of 27 February 2015](#), para. 18; [Decision of 12 April 2013](#), para. 17.

³¹ [Decision of 16 May 2018](#), para. 24; [Decision of 27 February 2015](#), para. 18, footnote 17 and cited references.

³² [Decision of 16 May 2018](#), para. 24; [Decision of 27 February 2015](#), para. 8, footnote 17 and cited references.

³³ [Decision of 16 May 2018](#), para. 24; 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.

³⁴ [Decision of 27 February 2015](#), para. 20; [Decision of 31 July 2008](#), para. 67.

and the defence 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.

36. When disclosing evidence with redactions, the Prosecutor and the defence shall assign unique pseudonyms to any persons whose identity is redacted. The Prosecutor and the defence 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 Chamber notes that the defence submits that ‘[p]seudonyms should be used for redacted names’, but it is unclear whether it argues that this should be done without any exception. In any case, the defence refers to a decision of Pre-Trial Chamber II in the case of *Yekatom*, in which the Single Judge rejected the defence’s request that ‘code/pseudonyms be always indicated, without exception’ on the ground that ‘the rights of the Defence, in this instance, must be balanced against the interests of witnesses [...]’. On balance, the Single Judge considers it sufficient that the disclosing party provide the reasons for the missing code/pseudonym and, in case of dispute, the Chamber intervene’.³⁵ The Chamber concurs with this reasoning.

37. The Prosecutor and the defence 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 Prosecutor and the defence shall also briefly indicate, to the extent possible, the basis for each redaction falling under categories ‘A.8’ and ‘B.5’. The Chamber notes the request of the defence that ‘[r]easoned applications and prior authorization should be required for proposed redactions under categories “A.8” and “B.5”’ and refers to a decision of Trial Chamber X in the case of *Al Hassan*.³⁶ In this respect the Chamber notes that this reference is irrelevant because the redaction regime is different at the pre-trial and trial stages of the proceedings. This is clear for example from articles 61(5) and 68(5) of the Statute that allows the Prosecutor to disclose summaries of testimonies ‘for the purposes of any proceedings conducted prior to the commencement of the trial’. Therefore, the Chamber rejects the defence’s request. However, the Chamber notes that the defence is entitled to contest any redaction applied by the Prosecutor, including those applied under categories ‘A.8’ and ‘B.5’, as specified in paragraph 38 of the present decision.

38. Should a party consider that a particular redaction is unwarranted or should be lifted as a result of changed circumstances, it shall approach the other party directly.

³⁵ See above n. 21.

³⁶ See above n. 20.

The parties shall consult in good faith with a view to resolving the matter. If they are unable to agree, the parties may apply to the Chamber for a ruling. In such case, the party who applied the contested redaction 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 Chamber will rule as to whether the particular redaction is to be lifted or maintained.

39. Furthermore, the Chamber, 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 Prosecutor³⁷ as it was done by Pre-Trial Chamber I in the case of *Al Hassan*.³⁸ The Chamber, therefore, must receive the evidence as disclosed to the defence, but also, where appropriate, in non-redacted version, in order to verify, at its discretion, the validity of any redactions made by the Prosecutor and, if necessary, order the Prosecutor *proprio motu* to lift, partially or fully, any redactions, after having given the Prosecutor the opportunity to submit its observations. The only purpose of communicating that non-redacted version of evidence to the Chamber shall be to give it the opportunity to verify, pursuant to rule 81 of the Rules, the scope and validity of any redactions made by the Prosecutor. 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 Prosecutor 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 Prosecutor.

40. 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 Prosecutor and the defence shall submit a discrete application to the Chamber, as for any other redaction that do not fall under the standard categories listed above.³⁹ In those cases, parties shall wait for the ruling of the Chamber before disclosure. The Chamber has noted the Prosecutor's request that the Chamber allow the parties 'to simultaneously proceed to disclosure with redactions' before the ruling of

³⁷ 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'](#), 13 May 2008, ICC-01/04-01/07-475, para. 66.

³⁸ [Decision of 16 May 2018](#), para. 32.

³⁹ *See above* para. 36.

the Chamber, so as to prevent the prolonging of the disclosure process. However, the Chamber notes that practice has shown that chambers may disagree to a great extent with the redactions proposed by the parties, including by ordering to apply additional redactions that were not proposed by the Prosecutor. Therefore, it is the view of the Chamber that it would render the proceedings more efficient to first wait for the ruling of the Chamber before proceeding with the disclosure of the redacted items of evidence, in order to proceed with disclosure only once.

41. The parties 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.

42. If a party redacts evidence before disclosure on the basis of rule 81(1) of the Rules, it shall mark this in the redaction box as category ‘E’.

C. Role of the Registry and the registration procedure

43. The Chamber 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.⁴⁰ The system of evidence disclosure adopted in this case is that which has been applied in previous cases,⁴¹ and which is set out below.

44. 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.

45. Concerning the registration procedure, the Chamber wishes to clarify that, upon receipt of the relevant evidence, the Registry shall register each item that is to be disclosed 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.⁴² To enable the Registry to

⁴⁰ [Decision of 16 May 2018](#), para. 36; [Decision of 27 February 2015](#), para. 10; [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.

⁴¹ [Decision of 16 May 2018](#), para. 36; [Decision of 27 February 2015](#), paras 21-29.

⁴² Unified Technical protocol (‘E-court Protocol’) for the provision of evidence, witness and victims information in electronic form, para. 21, annexed to this Decision.

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.

46. 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.

47. 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.⁴³ 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.

48. When submitting evidence under rule 76 of the Rules, the Prosecutor 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.

49. 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.

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

50. The Chamber reminds the Prosecutor 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 Prosecutor receive

⁴³ [Decision of 16 May 2018](#), para. 40; [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.

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 Prosecutor's responsibility to ensure that it is disclosed without undue delay. It follows that the Prosecutor, with the sources of information at its disposal, shall undertake the necessary consultations to reach an agreement on the lifting of those conditions. The Prosecutor shall bring the documents concerned to the attention of the Chamber as soon as possible. Should a problem arise, the Prosecutor must bring the matter to the attention of the Chamber as soon as possible.⁴⁴

E. Confidentiality Protocol

51. The Chamber notes that the Prosecutor requests the Chamber to adopt the 'Protocol on the handling of confidential information during investigations and contacts between a party and witnesses of other parties' adopted by Trial Chamber VII in the case of *Bemba et al.*⁴⁵ The Chamber notes that this protocol was adopted in 2015. The Chamber concurs with Pre-Trial Chamber I when it stated in the case of *Al Hassan* that it should adopt the Practice Manual Protocol because it resulted from the '[best practices] based on the experience and expertise of judges across trials at the Court',⁴⁶ and notes that the Practice Manual Protocol is more recent than the *Bemba et al.* Protocol. The Chamber also concurs with Pre-Trial Chamber I when it stated that 'when it comes to be applied the content [of the Practice Manual Protocol] is likely to evolve, in particular in response to the observations made by the parties on the specific problems which they may encounter, or have encountered in previous cases'.⁴⁷ For the foregoing reasons, the Chamber finds that, in the present case, it should apply the

⁴⁴ 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 16 May 2018](#), para. 53; [Decision of 27 February 2015](#), para. 44; [Decision of 12 April 2013](#), para. 33.

⁴⁵ [ICC-01/09-01/20-46](#), para. 24 referring to Trial Chamber VII, *The Prosecutor v. Bemba et al.*, [Decision adopting a Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party and Witnesses of the Other Parties](#), 20 July 2015, ICC-01/05-01/13-1093, and its annex, [ICC-01/05-01/13-1093-Anx.](#)

⁴⁶ Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on the Adoption of a Protocol on the Handling of Confidential Information During Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant](#), ICC-01/12-01/18-40-tENG ('Al Hassan Decision'), para. 10 quoting Chambers Practice Manual, 2017, p. 3.

⁴⁷ [Al Hassan Decision](#), para. 10.

protocol adopted by Pre-Trial Chamber I in the case of *Al Hassan* (the ‘*Al Hassan Protocol*’), which is an amended version of the Practice Manual Protocol.⁴⁸ Additionally, the Chamber observes that this protocol is similar to the more recent protocols adopted by chambers, namely by Trial Chamber X in the case of *Al Hassan* and Pre-Trial Chamber II in the case of *Yekatom and Ngaïssona*.⁴⁹

52. Besides, the Chamber disagrees with the Prosecutor’s statement that the *Bemba et al.* Protocol is the most relevant because ‘like the present [case] it concerned offences against the administration of justice only and thus is more suitable to address the specific circumstances of these proceedings’.⁵⁰ The Prosecutor does not support her contention any further, and the Chamber sees no particular reason why the *Bemba et al.* Protocol would more closely reflect the specificities of article 70 cases, apart from the fact that, as noted by the Prosecutor, ‘it omits all references to the rights of participating victims given that there are none in the present case’,⁵¹ and that it does not mention the paragraph relating to ‘investigation of allegations of sexual or gender based crimes’ as it is not relevant to proceedings under article 70 of the Statute. In this respect, the Chamber decides not to modify the *Al Hassan* Protocol, despite the Prosecutor’s request, for the reason that chambers are aiming at using one standardized protocol. Therefore, if one provision is not applicable to the case at hand (for example, those relating to ‘investigation of allegations of sexual or gender based crimes’ or the rights of participating victims), it shall simply not be applied by the parties in the present case, with no need to tailor the standardized protocol in this respect.

⁴⁸ See Annex II to the present decision. See also *Al Hassan* Decision and its Annex, [ICC-01/12-01/18-40-Anx-tENG](#).

⁴⁹ See respectively Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Annex 2 to the Decision on the ‘Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant’, the ‘Dual Status Witness Protocol’, and related matters](#), 19 March 2020, ICC-01/12-01/18-674-Anx2; Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Annex A to the Decision on a Protocol on the Handling of Confidential Information and Contacts with Witnesses](#), 22 March 2019, ICC-01/14-01/18-156-AnxA. The Chambers notes that it does not refer to the confidentiality protocol adopted by Pre-Trial Chamber II in the case of *Ali Muhammad Ali Abd-Al-Rahmani*, because in this case the Single Judge decided to adopt the protocol of the Chambers Practice Manual without reproducing any of the last modifications made to this protocol in the most recent cases. See Pre-trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, [Order on disclosure and related matters](#), 17 August 2020, ICC-02/05-01/20-116, para. 14.

⁵⁰ [ICC-01/09-01/20-46](#), para. 24.

⁵¹ [ICC-01/09-01/20-46](#), para. 25.

53. Therefore, the Chamber orders the parties to apply the protocol contained in Annex II of the present decision, which is identical to the *Al Hassan* Protocol.

FOR THESE REASONS, the Chamber

DECIDES THAT the process of disclosure of evidence between the parties shall be facilitated by the Registry as provided for in this Decision;

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 Prosecutor to submit observations on a provisional schedule for the disclosure of evidence by 20 January 2021;

ORDERS the parties to follow the simplified protocol for the redaction of evidence according to the terms laid down in paragraphs 33 to 42 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 (Annex I);

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

(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 III of this Decision;

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

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

ORDERS the Registry 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 Registry to report to the Chamber as soon as possible any concern regarding this matter, whether practical or security-related;

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; and

ORDERS the parties to comply with the provisions of the Confidentiality Protocol annexed hereto (Annex II).

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



Judge Reine Adélaïde Sophie Alapini-Gansou

Dated this Monday, 21 December 2020

At The Hague, The Netherlands