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CHAMBERS PRACTICE MANUAL

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I. Issues Related To Pre-Trial Proceedings

A. Authorisation of an investigation pursuant to Article 15 of the Statute

1. As the investigation process drives the work of the Court, it is essential that decisions on the Prosecutor's requests for authorisation of an investigation are taken in a timely manner in order to enable the Prosecutor to plan, organise and proceed with his/her work.

2. With due regard to the need for efficiency, the written decision of the Pre-Trial Chamber under Article 15, paragraph 4 shall be delivered within 120 days from the date the Prosecutor's request for authorisation of an investigation is filed with the Court. Any extension must be limited to exceptional circumstances and explained in detail in a public decision.

B. Issuance of a warrant of arrest/summons to appear

1. The ex parte nature of proceedings under Article 58

3. The application of the Prosecutor under Article 58 of the Statute and the decision of the Pre-Trial Chamber are submitted and issued *ex parte*. Even if the proceedings are public (which is however not recommended), the person whose arrest/appearance is sought does not have standing to make submissions on the merits of the application.

2. The warrant of arrest/summons to appear

4. A warrant of arrest/summons to appear should be issued as a single, concise document, by which the arrest of the person is ordered or the person is summoned to appear before the Court at a specified date and time, respectively. Its content is regulated by Article 58(3) of the Statute, which states that it shall contain: (i) the name of the person and any other relevant identifying information; (ii) a specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and (iii) a concise statement of the facts which are alleged to constitute those crimes. Any detailed discussion of the evidence or analysis of legal questions is premature at this stage and should be avoided.

5. If the person presumably speaks either of the working languages of the Court (English or French), and/or, if applicable, the language of the State on the territory of which the person might be found is either of these languages, the warrant of arrest/summons to appear should preferably be issued directly in such working language.

6. On the basis of the warrant of arrest, the Registrar, in consultation with the Prosecutor, transmits a request for arrest and surrender under Articles 89 and 91 of the Statute to any State on the territory of which the person may be found. As recently instructed by the Judges of the Pre-Trial Division, every time that information of travel into the territory of a State Party, whether planned or ongoing, of a person at large who is the subject of a warrant of arrest is related to the Court or one of its organs, the Registrar shall transmit to the concerned State Party a request for arrest or surrender of the person or, in case such request has already been transmitted, a *note verbale* containing a reminder of the State's obligation to cooperate with the Court in the arrest and surrender of that person. In case the person at large is expected to travel into the territory of a non-State Party, the Registrar shall request the State's cooperation in the arrest and surrender of the person, informing or reminding it that it may decide to provide assistance to the Court in accordance with Article 87(5)(a) of the Statute with regard to the arrest and surrender to that person, or reminding the State of any obligation arising from any Security Council resolution referring the situation to the Prosecutor, in case any such obligation has been imposed.

C. The first appearance

1. Timing of the first appearance

7. The person's first appearance before the Chamber or the Single Judge, in accordance with Article 60(1) of the Statute and Rule 121(1) of the Rules, should normally take place within 48 to 96 hours after arrival at the seat of the Court upon surrender, or on the date specified in the summons to appear.

2. Language that the person fully understands and speaks

8. Under Article 67(1)(a) of the Statute, the person proceeded against has the right to be informed of the nature, cause and content of the charge in a language which they fully understand and speak.

9. Even if not raised by the parties, the Pre-Trial Chamber should verify at the first appearance that the person fully understands and speaks a working language, or determine what other language the person fully understands and speaks. In cases of controversy, a report of the Registrar can be ordered. The meaning of 'fully understands and speaks' needs to be further refined in practice.

3. The right to apply for interim release

10. Article 60(1) of the Statute expressly mentions that, at the first appearance, the Pre-Trial Chamber must be satisfied that the person has been informed of the right to apply for interim release pending trial.

11. The Pre-Trial Chamber should specifically inform the person of this right. This is important because periodic review of detention does not start unless the Defence makes its first application for interim release (i.e. the 120-day time limit under Rule 118(2) runs from the Chamber's ruling on any such application). Applications for interim release should be disposed of as a matter of urgency and, ordinarily, decided within 30 days.

4. The date of the confirmation hearing

12. According to Rule 121(1) of the Rules, at the first appearance, the Pre-Trial Chamber shall set the date of the confirmation hearing. The typical target date for the confirmation hearing should be around four to six months from the first appearance. Efforts should be made to reduce the average time that passes between the first appearance and the commencement of the confirmation of charges hearing.

13. However, this depends on the circumstances of each particular case. In particular, it must be borne in mind that sometimes more time may be necessary in order to ensure that the pre-trial proceedings fully execute their mandate in the procedural architecture of the Court. Also, it may typically occur again that a person would be arrested and surrendered to the Court long time after the issuance of the warrant of arrest, reviving a case that would have been dormant for long. In these circumstances, giving more time to the Prosecutor in order to properly prepare the case should be considered. Indeed, in certain circumstances, allowing more time for the parties' preparation for the confirmation of charges hearing may have the counterintuitive consequence of making the proceedings

more expeditious, as it would tend to avoid adjournments of the confirmation of charges hearing, other obstacles at the pre-trial stage and problems at the initial stage of the trial.

14. In this context, the Pre-Trial Chamber should consider that, as recognised by the Prosecutor herself, it would be desirable, as a matter of policy, that the cases presented by the Prosecutor at the confirmation hearing be as trial-ready as possible. This would allow the commencement of the trial, if any, within a short period of time after confirmation of the charges. Therefore, in setting the date of the confirmation hearing, the Pre-Trial Chamber should take into account that it is indeed preferable that, to the extent possible, the Prosecutor conduct, before the confirmation process, the investigative activities that he/she considers necessary. At the same time, the Chamber shall be mindful that the Appeals Chamber, in line with the system designed by the Court's legal instruments, held that the Prosecutor's investigation may be continued beyond the confirmation hearing, and determining that, barring exceptional circumstances, the Prosecutor's investigations must be brought to an end before the confirmation hearing constitutes an error of law.

D. Proceedings leading to the confirmation of charges hearing

1. Review of the record of the case following the initial appearance

15. At the latest from the moment of the first appearance, the Defence acquires all procedural rights and becomes a party to proceedings that have thus far been conducted *ex parte*. For this reason, the Pre-Trial Chamber should conduct a review of the record of the case and make available to the Defence as many documents as possible, and, at a minimum, and without prejudice to the necessary protective measures, the Prosecutor's application under Article 58 of the Statute and any accompanying documents.

2. Time limit for responses under Regulation 24 of the Regulations of the Court

16. The general 10-day time limit for responses (see Regulation 34(b) of the Regulations of the Court) is incompatible with the fast pace of pre-trial proceedings. In order to avoid delay and to pre-empt the need to issue numerous procedural orders shortening the general time limit, the Pre-Trial Chamber should order that, throughout the entire proceedings leading to the confirmation hearing, any responses shall be filed within five days, or

within another appropriately short time limit. The power to make such order stems from the *chapeau* of Regulation 34.

3. Informal contact with the parties and the Registry

17. In order to streamline proceedings, some minor or peripheral matters can be dealt with by email communication, reducing the need for written submissions and orders. Variation of time and page limits, or leave to reply, can often be decided in this way, and the party can then refer to the communication by email in its filing. Similarly, orders to the Registrar can regularly be given by way of email, such as to reclassify documents in the record or to submit reports on particular issues.

18. The Chamber should, however, make sure that no substantive litigation takes place by email, and should order the submission of formal filings in such cases.

4. Status conferences

19. Pre-Trial Chambers should make full use of the possibility to hold status conferences with the parties. Oral orders and clarifications in relation to the conduct of the proceedings can be provided to the parties during such status conferences, increasing efficiency and eliminating the need for cumbersome written decisions. Parties' procedural requests can also be received, debated and decided at status conferences.

E. Disclosure of evidence and communication to the Pre-Trial Chamber

1. Disclosure of evidence between the parties

20. Disclosure of evidence between the parties takes place through the Registry in accordance with the E-court protocol developed for this purpose. Until the E-court protocol is somehow codified, the current version of the E-court protocol should be put on the record of the case as soon as possible after the first appearance in order to guide disclosure at all stages of the proceedings.

21. The Prosecutor has the duty to disclose to the Defence 'as soon as practicable' and on a continuous basis, all evidence in his/her possession or control which he/she believes shows or tends to show the innocence of the person, or mitigate the guilt of the person or

may affect the credibility of the prosecution evidence (cf. Article 67(2) of the Statute), or is material to the preparation of the defence (cf. Rule 77 of the Rules).

22. As far as the incriminating evidence is concerned, it is the Prosecutor's own choice to disclose to the Defence as much as he/she considers warranted. The disclosure of incriminating evidence by the Prosecutor is subject to the final time limit set out in Rule 121(3) – i.e. 30 days before the confirmation hearing – and, in case of new evidence, in Rule 121(5) – i.e. 15 days before the confirmation hearing.

23. Likewise, the Defence may disclose to the Prosecutor (and rely upon for the confirmation hearing) as much as it considers it necessary in light of its own strategy. The time limits for the Defence disclosure are set out in Rule 121(6).

24. No submission of any 'in-depth analysis chart', or *similia*, of the evidence disclosed can be imposed on either party.

25. The Chamber should advise the Defence to take full advantage of the disclosure proceedings at the pre-trial stage to enable adequate preparation for both pre-trial and trial stage. In this regard, the Defence may also be warned that, subject to consideration of the rights contained in Article 67(1)(b) and (d) of the Statute, if the counsel of the Defence representing the person at the pre-trial stage is replaced by any new counsel for the trial stage, the new counsel may still be subject to strict scheduling of the date the commencement of trial.

2. Extent of communication of disclosed evidence to the Pre-Trial Chamber

26. According to Rule 121(2)(c) of the Rules, all evidence disclosed between the parties 'for the purposes of the confirmation hearing' is communicated to the Pre-Trial Chamber. This should be understood as encompassing all evidence disclosed between the parties during the pre-trial proceedings, i.e. between the person's initial appearance (or, in particular circumstances, even before) and the issuance of the confirmation decision.

27. Communication of evidence to the Pre-Trial Chamber, by way of Ringtail, shall take place simultaneously with the disclosure of such evidence. The evidence communicated to the Pre-Trial Chamber forms part of the record of the case, irrespective of whether it is

eventually included in the parties' lists of evidence under Rule 121(3) and (6) of the Rules.

28. Nevertheless, for its decision on the confirmation of charges the Pre-Trial Chamber considers only the items of evidence that are included in the parties' lists of evidence for the purpose of the confirmation hearing. The determination of what and how much to include in their respective lists of evidence falls within the discretion of each party.

29. Other items of evidence that were communicated to the Pre-Trial Chamber but have not been included in the lists of evidence could only be relied upon by the Pre-Trial Chamber for the confirmation decision provided that the parties are given the opportunity to make any relevant submission with respect to such other items of evidence.

30. The Chamber should not order the assignment of secondary reference numbers to items of evidence communicated to it in order to distinguish those that were inserted on the list of evidence of a party or for any other reason. The numbering regime under the E-court protocol (ERN code) should be the only numbering regime. Any changes in the status of evidence or any other relevant information can be included as metadata.

F. The charges

1. The factual basis of the charges

31. The Prosecutor may expand the factual basis of the charges beyond that for which a warrant of arrest or a summons to appear was issued.

32. However, the Pre-Trial Chamber must ensure that the Defence be given adequate time to prepare (cf. Article 67(1)(b) of the Statute providing that the person has the right '[t]o have adequate time and facilities for the preparation of the defence'). While Rule 121(3) of the Rules establishes the presumption that 30 days between the presentation of the detailed description of the charges and the commencement of the confirmation hearing are sufficient, the Pre-Trial Chamber may order, in light of the particular circumstances of each case, that the Defence be informed, by way of a formal notification in the record of the case, of the intended expanded factual basis of the charges in order not to be confronted at the last possible moment with unforeseen factual allegations in respect of which the Defence could not reasonably prepare.

33. This advance notice – to be made by way of a short filing – would include only, and no more than, a concise statement of the relevant facts, i.e. the time, location and underlying conduct of the crimes with which the Prosecutor will charge the suspect. The detailed description of the charges exhaustively setting out the material facts and circumstances would, in any case, be provided in the document containing the charges 30 days before the confirmation hearing. How much in advance before the confirmation hearing any advance notice of the charges would need to be provided will depend on the particular circumstances of each case, including the total amount of time foreseen between the person's initial appearance and the confirmation hearing and the extent of the proposed expansion of the factual basis of the case. Failure to provide such notice within the time frame set by the Pre-Trial Chamber would make impermissible the bringing of any charges going beyond the factual basis of the warrant of arrest or summons to appear in the particular confirmation proceedings, without prejudice to these other charges being brought as part of new or other proceedings conducted separately.

34. Such notice would also constitute the basis for the Pre-Trial Chamber to request in time, through the Registrar, that the surrendering State provides a waiver of the rule of speciality under Article 101 of the Statute, if applicable (i.e. if the person was surrendered to the Court), as well as the basis for the admission of victims of the alleged crimes to participate in the proceedings.

2. Distinction between the charges and the Prosecutor's submissions in support of the charges

35. The charges on which the Prosecutor intends to bring the person to trial to be presented prior to the confirmation hearing (cf. Article 61(3)(a) of the Statute) shall be spelt out in a clear, exhaustive and self-contained way and shall include all, and not more than, the 'material facts and circumstances' (i.e. the facts and circumstances that must be described in the charges (cf. Article 74(2) of the Statute) and which are the only facts subject to judicial determination to the applicable standard of proof at confirmation and trial stages, respectively) and their legal characterisation.

36. There shall be no confusion between the material facts described in the charges and the 'subsidiary facts' (i.e. those facts that are relied upon by the Prosecutor as part of his/her argumentation in support of the charges and, as such, are functionally 'evidence'). Indeed,

the Prosecutor may present submissions by which he/she proposes a narrative of the relevant events and an analysis of facts and evidence in order to persuade the Pre-Trial Chamber to confirm the charges. However, these submissions in support of the charges should not be confused with the charges. These submissions/argumentation can be included either in the same document containing the charges or in a separate filing (a sort of a '[pre-]confirmation brief'). If the Prosecutor chooses to include submissions in the document containing the charges rather than in a separate filing, the two sections – 'charges' and 'submissions' – must be kept clearly separate, and no footnotes containing cross- references or reference to evidence must be included in the charges.

37. The Pre-Trial Chamber may remedy defects in the formulation of the charges either *proprio motu* or upon request by the Defence, by instructing the Prosecutor to make the necessary adjustments. The Defence may bring any formal challenge to the charges – i.e. challenges which do not touch upon the merits of the charges and do not require consideration of the evidence – at the latest as procedural objections under Rule 122(3) of the Rules prior to the opening of the confirmation hearing on the merits.

38. In any case, the Pre-Trial Chamber shall bear in mind that the decision on what to charge, as well as on how the charges shall be formulated, is fully within the responsibility of the Prosecutor. The Pre-Trial Chamber's interference with the charges by ordering the Prosecutor to remedy any identified deficiency should be strictly limited to what is necessary to make sure that the suspect is informed in detail of the nature, cause and content of the charge (cf. Article 67(1)(a) of the Statute). This will necessarily depend on the particular circumstances of each case. In particular, the required specificity of the charges depends on the nature of the case, including the degree of the immediate involvement of the suspect in the acts fulfilling the material elements of the crimes, and no threshold of specificity of the charges can be established *in abstracto*. What the Pre-Trial Chamber must verify is that the charges enable the suspect to identify the historical event(s) at issue and the criminal conduct alleged, in order to defend him or herself.

39. At the commencement of the confirmation hearing on the merits, any questions on the form, completeness or clarity of the charges must be settled. If the Defence does not raise any challenge to the format of the charges at the latest as procedural objections under

Rule 122(3) of the Rules, it is precluded to raise it at a later stage, being the confirmation hearing or the trial.

G. The hearing on the confirmation of charges

1. Presentation of evidence for the purposes of the confirmation hearing

40. In accordance with Rule 121(3) and (6) of the Rules, the parties, prior to the commencement of the confirmation of charges hearing, shall present their respective lists of the evidence on which they intend rely for the purposes of the hearing. In order to serve its purpose, the list of evidence should not be presented in the form of a chart linking the factual allegations and the evidence submitted in support thereof, but shall rather be a simple list indicating the items of evidence consecutively in any clear order, for instance by ERN or by categories of evidence (with, e.g., statements/transcripts grouped by witness, official documents grouped by source, etc.).

41. The inclusion, in the Prosecutor's submissions for the purpose of the confirmation hearing (and possibly in any Defence submission under Rule 121(9) of the Rules) of footnotes itemising the evidence supporting a factual allegation – preferably with hyperlinks to Ringtail – is encouraged.

42. No footnote (whether internal cross-references or hyperlinks to the evidence) can be included in the charges, as they shall be fully self-contained and shall exhaustively set out all, and no more than, the material facts and their legal characterisation. As stated above, how the Prosecutor's evidence substantiates the charges belongs to the 'submissions' part, not to the 'charges' section. This applies regardless of whether the Prosecutor decides to include his/her submissions in the document containing the charges or in a separate filing.

43. It is up to the parties to determine the best way to persuade the Chamber: there is no basis for the Chamber to impose on the parties a particular modality/format to argue their case and present their evidence. For example, no submission of any 'in-depth analysis chart', or *similia,* of the evidence relied upon for the purposes of the confirmation hearing can be imposed on either of the parties.

2. Live evidence at the confirmation hearing

44. Use of live evidence at the confirmation hearing should be exceptional and should be subject to specific authorisation by the Pre-Trial Chamber. The parties must satisfactorily demonstrate that the proposed oral testimony cannot be properly substituted by a written statement or other documentary evidence.

3. Procedural objections to the pre-confirmation hearing proceedings

45. Under Rule 122(3) of the Rules, the Prosecutor and the Defence, prior to the opening of the confirmation hearing on the merits, may 'raise objections or make observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing'.

46. As clarified above, formal challenges by the Defence to the charges – i.e. challenges which do not touch upon the merits of the charges and do not require consideration of the evidence – fall within the scope of the procedural objections under Rule 122(3) of the Rules as they relate to the respect of the person's right to be properly notified of the charges. Procedural objections under Rule 122(3) of the Rules may also include, for examples, challenges as to the proper time given for the parties' preparation for the confirmation hearing or to the exercise of disclosure obligations by the opposing party, including the propriety of redactions.

47. Decisions taken by the Pre-Trial Chamber on procedural objections under Rule 122(3) become *res judicata* and are also to be considered as preparatory for the ensuing trial. The Pre-Trial Chamber's rulings under Rule 122(3) which are joined, pursuant to Rule 122(6), to the merits, will be set out in the operative part of the confirmation decision, including for easiness of retrieval by the parties and the Trial Chamber.

48. According to Rule 122(4) of the Rules, 'at no subsequent point may the objections and observations made under sub-rule 3 be raised or made again in the confirmation or trial proceedings'. Arguably, the parties are precluded to raise at subsequent points (whether at confirmation or trial) procedural matters related to the proper conduct of the pre-trial proceedings prior to the confirmation hearing, also when they have chosen not to do it before the hearing on the merits is opened, while being in a position to do so.

4. The conduct of the confirmation hearing

49. The parties should be encouraged, as appropriate, to make use of the opportunity to lodge written submissions on points of fact and on law in accordance with Rule 121(9) of the Rules in advance of the confirmation hearing. The filing of such written submissions presenting the full set of the parties' arguments on the merits of the charges would allow them to focus their oral presentations at the hearing to the issues that they consider most relevant. In order to properly organise the conduct of the confirmation hearing, the Pre-Trial Chamber should consider requesting that in these written submissions the parties also provide advance notice of any procedural objections or observations that they intend to raise at the beginning of the hearing pursuant to Rule 122(3) of the Rules before the commencement of the hearing on the merits.

50. In any case, at the opening of the confirmation hearing, after the reading out of the charges as presented by the Prosecutor, the Presiding Judge will request the parties whether they have any procedural observations or objections with respect to the proper conduct of the proceedings leading to the confirmation hearing that they wish to raise under Rule 122(3) of the Rules. The parties will be informed that no such matter might be raised at any subsequent point – whether at confirmation or at trial – if they choose not to do it before the hearing on the merits is opened.

51. As part of the confirmation hearing on the merits, the parties (and the participating victims) shall be allocated a certain amount of time in order to make their respective presentations, without the need that each and every item of evidence be rehearsed at the hearing. In any case, the Pre-Trial Chamber, for the decision on the confirmation of charges, will consider all the evidence that is included in the parties' lists of evidence, and, as explained above, any other evidence disclosed *inter partes* provided that the parties are given an opportunity to be heard on any such other item of evidence.

52. As soon as the parties (and the participating victims) finish with their respective oral presentations the Pre-Trial Chamber will consider whether it is appropriate to make a short adjournment (few hours or one/two days maximum) before the final observations under Rule 122(8) of the Rules. In these final observations, the parties could only respond to each other's submissions: no new argument can be raised.

53. After the final oral observations at the hearing, the confirmation hearing will be closed. No further written submissions from the parties and participants will be requested or allowed.

54. The 60-day time limit for the issuance of the decision on the confirmation of charges in accordance with Regulation 53 of the Regulations of the Court starts running from the moment the confirmation hearing ends with the last oral final observation under Rule 122(8) of the Rules.

H. The decision on the confirmation of charges

1. Issuance of the decision in a timely manner

55. Pursuant to Regulation 53 of the Regulations, the Pre-Trial Chamber shall issue its decision on the confirmation of charges within 60 days after the confirmation hearing.

2. The distinction between the charges confirmed and the Pre-Trial Chamber's reasoning in support of its conclusions

56. According to Article 61(7)(a) of the Statute, the Pre-Trial Chamber, when it confirms those charges in relation to which it has determined that there is sufficient evidence, 'commit[s] the person to a Trial Chamber for trial on the charges as confirmed'. In terms of the factual parameters of the charges, Article 74(2) provides that the Article 74 decision 'shall not exceed the facts and circumstances described in the charges'.

57. The charges on which the person is committed to trial are those presented by the Prosecutor (and on the basis of which the confirmation hearing was held) as confirmed by the Pre-Trial Chamber. Accordingly, the confirmation decision constitutes the final, authoritative document setting out the charges, and by doing so the scope of the trial.

58. The description of the facts and circumstances in the charges as confirmed by the Pre-Trial Chamber is binding on the Trial Chamber. Any discussion in terms of form of the charges (clarity, specificity, exhaustiveness, etc.) and in terms of their scope, content and parameters ends with the confirmation decision, and no issues in this respect can be entertained by the Trial Chamber.

59. As clarified above, this requires that the charges presented by the Prosecutor and those finally confirmed by the Pre-Trial Chamber are clear and unambiguous, and that any procedural challenge to the formulation of the charges be brought before the Pre-Trial Chamber, at the latest, as objections under Rule 122(3) of the Rules.

60. Correspondingly to the distinction between the charges presented by the Prosecutor and the Prosecutor's submissions in support of the charges, in the confirmation decision the charges confirmed by the Pre-Trial Chamber must be distinguished from the Chamber's reasoning in support of its findings.

61. In a decision confirming the charges the operative part shall reproduce *verbatim* the charges presented by the Prosecutor as confirmed by the Pre-Trial Chamber.

62. As already clarified, the charges presented by the Prosecutor, as confirmed by the Pre-Trial Chamber and reproduced in the operative part, set the parameters of the trial: after the charges are confirmed (in whole or in part) by the Pre-Trial Chamber there shall be no discussion or litigation at trial as to their formulation, scope or content. The binding effect of the confirmation decision is attached only to the charges and their formulation as reflected in the operative part of decision. No such effect is attached to the reasoning provided by the Pre-Trial Chamber to explain its final determination (narrative of events, analysis of evidence, reference to subsidiary facts, etc.). The subject-matter of the confirmation decision is limited to the charges only, and does not extend to the Prosecutor's argumentation/submissions as such, whether provided in the same document containing the charges or in a separate brief.

63. Findings on the substantial grounds to believe standard are made exclusively with respect to the material facts described in the charges, and there is no requirement that each item of evidence or each subsidiary fact relied upon by either party be addressed or referred to in the confirmation decision – nor would this be realistic or otherwise providing any benefit. In decisions confirming the charges, in order not to pre-determine issues or pre-adjudicate probative value of evidence which will be fully tested only at trial, the Pre-Trial Chamber should keep the reasoning strictly limited to what is necessary and sufficient for the Chamber's findings on the charges. Decisions declining to confirm

the charges may require, depending on circumstances, a more detailed analysis, given that, as a result thereof, proceedings are terminated.

64. In a decision confirming the charges, the Pre-Trial Chamber may make the necessary adaptations to the charges in order to conform to its findings. By doing so, the Pre-Trial Chamber cannot expand the factual scope of the charges as presented by the Prosecutor. Its interference should be limited to the deletion of, or adjustment to, any material fact that is not confirmed as pleaded by the Prosecutor. This must be done transparently and be clearly identifiable in the confirmation decision, for example by presenting the charges as formulated by the Prosecutor at the beginning of the confirmation decision and the charges as confirmed in its operative part.

3. The structure of the confirmation decision

65. It is fundamental that the structure of the confirmation decision makes clear the distinction between the Chamber's reasoning, on the one hand, and the Chamber's disposition as to the material facts and circumstances described in the charges and their legal characterisation as confirmed, on the other hand.

66. Typically a decision on the confirmation of charges should be structured as follows:

(i) The identification of the person against whom the charges have been brought by the Prosecutor.
(ii) The charges as presented by the Prosecutor.
(iii) A brief reference to the relevant procedural history of the confirmation proceedings.

(iv) Preliminary/procedural matters, including consideration of any procedural objections or observations raised by the parties under Rule 122(3) of the Rules that the Pre-Trial Chamber, pursuant to Rule 122(6) of the Rules, decided to join to the examination of the charges and evidence.

(v) Factual findings ('the facts'), in which the Pre-Trial Chamber provides a narrative of the relevant events (whether chronologically or otherwise), determining whether there are substantial grounds to believe with respect to the material facts and circumstances described in the charges presented by the Prosecutor, both in terms of the alleged criminal acts and the suspect's conduct. Reference to evidence (including to subsidiary

facts) is made to the extent necessary and sufficient to support the factual findings on the material facts.

(vi) Legal findings ('the legal characterisation of the facts'), in which the Pre-Trial Chamber provides its reasoning as to whether the material facts of which it is satisfied to the required threshold constitute one or more of the crimes charged giving rise to the suspect's criminal responsibility under one or more of the forms of responsibility envisaged in the Statute and pleaded by the Prosecutor in the charges.

(vii) The operative part, the only part of the confirmation decision which is binding on the Trial Chamber. In a decision confirming the charges the operative part shall reproduce *verbatim* the charges presented by the Prosecutor that are confirmed by the Pre-Trial Chamber (both the material facts and circumstances described in the charges confirmed and the confirmed legal characterisation(s)). No footnote or cross-reference shall be added. The operative part should also include the Pre-Trial Chamber's decision on any procedural objections or observations addressed before the determination of the merits.

4. Alternative and cumulative charges

67. In the charges, the Prosecutor may plead alternative legal characterisations, both in terms of the crime(s) and the person's mode(s) of liability. In this case, the Pre-Trial Chamber will confirm alternative charges (including alternative modes of liability) when the evidence is sufficient to sustain each alternative. It would then be the Trial Chamber, on the basis of a full trial, to determine which one, if any, of the confirmed alternative is applicable to each case. This course of action should limit recourse to Regulation 55 of the Regulations, an exceptional instrument which, as such, should be used only sparingly if absolutely warranted. In particular, it should limit the improper use of Regulation 55 immediately after the issuance of the confirmation decision even before the opening of the evidentiary debate at trial.

68. The Prosecutor may also present cumulative charges, i.e. crimes charged which, although based on the same set of facts, are not alternative to each other, but may all, concurrently, lead to a conviction. In this case, the Pre-Trial Chamber will confirm cumulative charges when each of them is sufficiently supported by the available evidence

and each crime cumulatively charged contains a materially distinct legal element. In doing so, the Pre-Trial Chamber will give deference to the Trial Chamber which, following a full trial, will be better placed to resolve questions of concurrence of offences.

5. Transmission of the record of the proceedings

69. A smooth and timely transition from the pre-trial to the trial phase of a case is essential to improve the overall efficiency of trial proceedings. While, it is clear that neither the Presidency nor the Trial Division can take any formal action prior to the issuance of a confirmation decision, it is possible to plan for the possibility of trial in advance. To this end there should be close consultations between the two Divisions (through the respective Presidents) as to the expected timing of hearings and decisions. It would also facilitate the work of the Trial Division if, to the extent possible, the Presidency could informally communicate in advance the expected composition of the Chamber should there be a committal. This will especially benefit the Trial Division in its advance planning and preparations for a possible trial proceeding, always respecting the Pre-Trial Chamber's competence with respect to the confirmation decision and the Presidency competency with respect to the composition of Chambers.

70. Further, the transmission of the record from the Pre-Trial Chamber to the Trial Chamber should be as seamless and immediate as possible. Accordingly, a decision confirming the charges should include an order instructing the Registrar to transmit the record of the proceedings to the Presidency as required by Rule 129 of the Rules. The Presidency will then be in a position to constitute the Trial Chamber and transmit the record pursuant to Rule 130 of the Rules. The transmission of the record of the proceedings is without prejudice to the Pre-Trial Chamber's exercise of any functions that remain within its competence such as adjudicating on any request(s) for leave to appeal the confirmation decision, in accordance with Rule 155.

71. The record of the proceedings to be transmitted includes all evidence which has become part of the record by way of its communication to the Pre-Trial Chamber following *inter partes* disclosure (c.f. also Rule 121(10) of the Rules). Considering that the Trial Chamber will ultimately conduct its own assessment as to the admissibility of evidence, its inclusion in the record of proceedings before professional judges is not problematic. The

transmission of the complete record with all its contents is also preferred because of its simplicity.

II. Issues Related to Trial Proceedings before Commencement

A. First status conference

1. Scheduling order

72. The Trial Chamber should generally issue the scheduling order for the first status conference within a week of its composition. The first status conference pursuant to Rule 132(1) of the Rules should generally be held within a month of this scheduling order.

2. Agenda items

73. Trial Chambers should ask for written submissions from the participants on potential issues to be discussed at the first status conference. These submissions can focus the discussion at the first status conference – some issues may even be unnecessary to discuss in the hearing following the written submissions.

74. Possible issues to be addressed in the lead-up and/or at the status conference include:

(i) Timing and volume of disclosure of outstanding evidence pursuant to Article 67(2) of the Statute and Rules 76 and 77 of the Rules (including, for example, any ongoing investigations; transcription and translation of statements; Article 54(3)(e) material).

(ii) Number of witnesses to be called by the Prosecutor and estimated number of hours for in-court testimony.

(iii) Issues concerning the protection of witnesses and other persons (including the need for redactions, delayed disclosure or ICCPP referrals).

(iv) Any experts and related procedure, including joint instruction of experts.

(v) Volume of non-testimonial evidence and use of Rule 68.

(vi) Dates for filing of list of witnesses and summaries of anticipated testimony.

(vii) Dates for filing any other relevant documents (including a trial brief).

(viii) Languages to be used in the proceedings (languages spoken by witnesses; capacity of Registry to provide relevant interpretation during trial).

(ix) Update on (additional) applications by victims to participate in the proceedings.

(x) Trial commencement date.

(xi) Length of opening statements.

(xii) Review of detention.

3. Preliminary directions

75. At or before the first status conference, Trial Chambers should consider explicitly setting out one or more of the following preliminary directions, which reflect the consolidated practice of ICC Trial Chambers:

(i) Requirement of *inter partes* discussions, where justified by the subject matter and circumstances, before filings or applications are made before the Trial Chamber (in particular on disclosure issues).

(ii) Generally, submissions should request a concrete relief and should always be clear as to what the filing purpose is. Notifications or information to the Chamber should generally be limited to those circumstances where they have been required by the Chamber or where a judicial determination is otherwise necessary.

(iii) Publicity: public redacted versions should be made at the same time as the filing of a confidential filing. There is generally no need for judicial review of lesser redacted versions of participants' submissions.

(iv) The contents of confidential filings may be referenced in public submissions, so long as these references do not reveal the information protected by the confidential classification.

B. Trial preparation matters

1. Trial brief

76. A ‘Pre-trial brief’, or its equivalent, has been filed in nearly all cases and is standard practice. Such briefs may be filed by any participant in advance of the commencement of trial, but it is particularly incumbent on the Prosecutor to provide such a brief – which should henceforth be termed a ‘Trial Brief’.

2. Disclosure

77. Disclosure which has taken place at the confirmation stage remains effective. The additional procedures to be set at the beginning of the trial phase in relation to disclosure include the following:

(i) Deadline for disclosure of outstanding materials in the Prosecutor’s possession that the Prosecutor intends to rely upon at trial (the usual practice is three months before the trial commencement).

(ii) Use of rolling disclosure deadlines for incriminatory evidence, to prevent a large volume of material being provided only on the day of the final deadline.

(iii) List of witnesses:

- Filing of a provisional list of witnesses by the Prosecutor prior to the final disclosure deadline, in order to facilitate the Chamber’s understanding of the upcoming case and the Defence’s preparation.

- Inclusion of summaries of anticipated testimony by the Prosecutor for each witness and estimated number of hours necessary for questioning.

(iv) List of evidence, containing all items which the Prosecutor may seek to submit for consideration in the Chamber’s judgment pursuant to Article 74 of the Statute. The procedure for any additions to the evidence list may also be addressed.

(v) A reminder that disclosure of material under Article 67(2) and Rule 77 is to be done promptly and on an ongoing basis.

3. Protocols

78. In general, protocols or procedures which have been adopted by the Pre-Trial Chamber and apply to various stages of proceedings, such as on redactions or the handling of confidential information, will continue to apply.[1]

79. The Trial Chamber should consider adopting a familiarisation protocol governing the period of time shortly before a witness commences his/her testimony.

80. For cases governing dual status witnesses, a protocol governing such witnesses may also be appropriate.

81. A protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses has been used in most cases to date. Given the now largely standardised and somewhat operational nature of this protocol, the Registry may be able to act in accordance with this protocol without it being formally adopted by a Trial Chamber.

4. Pre-commencement motion deadline

82. To assist in the smooth and efficient commencement of trial on the scheduled date, Trial Chambers should set a deadline for all motions which the participants consider as requiring resolution prior to the commencement of trial. This deadline should be set in such a manner as to allow for adequate time for responses and the rendering of any decision prior to the scheduled commencement of trial.

5. Agreed facts

83. In order to streamline the trial proceedings and avoid unnecessary presentation of evidence, Trial Chambers may instruct the parties to have *inter partes* consultations about possible agreed facts.

[1] *See generally* Manual, Section V.

C. Directions for the conduct of the proceedings

84. Pursuant to Article 64(8)(b) of the Statute, the Presiding Judge of a Trial Chamber may give directions for the conduct of proceedings at trial. By practice these orders have been issued with the agreement of the full chamber. To date each Chamber has decided independently on its order. To facilitate the efficiency and consistency of proceedings, at the 2021 retreat the judges adopted a model for the decision on 'Directions for the Conduct of Proceedings' which is appended to the present manual by way of a confidential annex.

D. Review of detention prior to the commencement of trial

85. A review of the accused's detention occurs every 120 days pursuant to Article 60(3) of the Statute and Rule 118(2) of the Rules. Trial Chambers shall continue such reviews up until the commencement of trial.[2] These reviews no longer occur automatically after the trial's commencement, but the Trial Chamber may review a ruling pursuant to Article 60(3) at any time on its own initiative or at the request of the detained person or the Prosecutor.

III. Deadlines Regarding Decisions of the Trial Chamber

86. The recently adopted internal 'Guidelines on Judgment Drafting' and 'Guidelines for ICC Judgment Structure' are incorporated into this Manual. Trial judgments must be written in conformity with both sets of guidelines and in accordance with the Chambers Style Guide.

87. With due regard to the need for efficiency, the judges have agreed that certain time frames need to be introduced for trial judgments. These deadlines, which are as follows, make the early commencement of the drafting process even more crucial. Any extension of these deadlines must be limited to exceptional circumstances and be explained in detail in a public decision.

[2] Detention matters may also be discussed at the first status conference.

88. The written decision under Article 74 of the Statute shall be delivered within 10 months from the date the closing statements end.

89. In order to assist the timely issuance of the judgment, the closing statements shall begin within 90 days from the date the Presiding Judge declares the submission of evidence to be closed under Rule 141, sub-rule 1.

90. The written decision under Article 76 shall be delivered within four months of the date of the decision on conviction.

IV. Deadlines Regarding Judgments of the Appeals Chamber

91. In respect of appeals against conviction, acquittal or reparations orders, the Appeals Chamber shall determine, within one month of the filing of the response to the appeal brief, whether an oral hearing will be held. If no oral hearing is to be held, the written judgment shall be delivered within 10 months of the date of the filing of the response to the appeal brief, thus creating a consistent deadline with that applicable at the trial level. If an oral hearing is to occur, this shall take place within three months of the filing of the response to the appeal brief. In such cases, the written judgment shall be rendered within 10 months of the closing of the oral hearing.

92. As concerns the written judgment on appeals against a decision on sentencing, it shall be rendered together with the final appeal on conviction. Where there is only an appeal from sentencing without a conviction appeal, the Appeals Chamber shall determine, within one month of the filing of the response to the appeal brief, whether an oral hearing will be held. If no oral hearing is to be held, the written judgment shall be delivered within four months of the filing of the response to the appeal brief. In the event that the Appeals Chamber decides to hold an oral hearing, the hearing shall be held within two months of the filing of the response to the appeal brief. In the event of an oral hearing being held, the judgment shall be handed down within four months of the oral hearing.

93. In respect of interlocutory appeals filed under Article 82(1)(a), (c) and (d) and Article 82(2), the Appeals Chamber shall render its judgments within four months from the date of the filing of the response to the appeal brief. In the event that the Appeals Chamber

decides to hold an oral hearing, any decision to do so shall be taken within one month of the filing of the response to the appeal brief and the hearing shall be held within two months of the filing of the response to the appeal brief. In the event of an oral hearing being held, the judgment shall be handed down within four months of the oral hearing.

94. Any extension of these deadlines must be limited to exceptional circumstances and be explained in detail in a public decision.

V. Other Issues Related to Various Stages of Proceedings

95. Considering that nothing in the procedural system of the Court precludes the continued validity of procedural orders of the Pre-Trial Chamber after the transfer of the case to a Trial Chamber, such procedural order continue to apply, subject to necessary adjustments by the competent Chamber. This will simplify proceedings and make them more efficient.

A. Procedure for admission of victims to participate in the proceedings

96. In accordance with Rule 89 of the Rules, the following sets out the system for admission of victims to participate in proceedings which will generally be applicable at all stages of proceedings[3]:

(i) The Registry collects and receives the applications for participation by victims. This should be done using the standard form which has been developed based on practice and collects information for participation and reparations (for individuals and organizations, pursuant to Rule 85 of the Rules).

(ii) With respect to participation, the Registry assesses all victim applications for participation collected or otherwise received, and identifies those applications which are complete and fall within the scope of the relevant case, i.e. in which the applicant alleges to have personally suffered harm, whether direct or indirect, as a result of one or more crimes which are referenced in the warrant of arrest or

[3] In accordance with the jurisprudence of the Appeals Chamber, a Chamber may adopt another model appropriate in the particular circumstances of a case which is similarly consistent with the Rome Statute system.

summons to appear (counts) or, subsequently, charged by the Prosecutor (as formulated in the document containing charges and, thereafter, as confirmed by the Pre-Trial Chamber).

(iii) In consideration of victims applications a high degree of discretion is afforded to Chambers.

(iv) In the exercise of such discretion and depending on the number of victims applications, Chambers may adopt the so called A-B-C Approach under which the Registry classifies the applicants into three categories: (i) applicants who clearly qualify as victims ('Group A'), (ii) applicants who clearly do not qualify as victims ('Group B'); and (iii) applicants for whom the Registry could not make a clear determination for any reason ('Group C').

(v) The Registry then transmits to the Chamber on a rolling basis and in un-redacted form, by way of a filing in the record of the case, all complete applications on the basis of the A-B-C grouping, including any supporting documentation.

(vi) Only Group C applications, and any supporting documentation, are transmitted to the parties for observations pursuant to Rule 89(1) of the Rules, and legal representative as appropriate, with the necessary redactions to expunge the persons' identifying information.

(vii) The Registry prepares reports that accompany each transmission, as provided for by Regulation 86(5) of the Regulations of the Court. These reports are notified to the Chamber, the parties and participants. These reports list the applications for participation and the group they are classified in. The reports need not include application-by-application reasoning or analysis and need not justify the respective classifications.

(viii) The Registry provides assessment reports for Group B applications to the Chamber alone. The reports contain the reasons for rejecting the applications, to allow the Chamber to make a final decision on such applications if necessary.

(ix) All applications falling within Group C that are transmitted to the Chamber are provided, together with the transmission report, to the parties and legal representative as appropriate, at the same time and by way of the same filing in the record of the case made for the transmission to the Chamber.

(x) Barring a clear, material error in the Registry's assessment of Groups A and B, the Chamber, taking into account the Registry's assessment of the Group A and B

applications, will decide. While the Registry's conclusions may be of assistance, it is for the Chamber to ultimately authorise or reject an applicant to participate in the proceedings.

(xi) Once the parties' observations have been received, the Chamber assesses the Group C applications individually and determines whether the victims concerned shall be admitted to participate or not.

97. In light of the procedural progression as envisaged in the Court's legal instruments, when a Chamber adopts the A-B-C Approach, the relevant time frame should be as follows:

(i) In the proceedings before the Pre-Trial Chamber, the Registry transmits the Group A and B applications to the Chamber no later than 15 days before the confirmation hearing, and the Group C applications to the Chamber and the parties no later than 30 days before the confirmation hearing. The parties have 10 days to make observations, if any, on the Group C applications.

(ii) After the charges are confirmed, all victims authorised to participate in the proceedings by the Pre-Trial Chamber continue to do so before the Trial Chamber. In case of partial confirmation of charges, the Registry reviews the list of admitted victims to assess whether their applications still fall within the scope of the confirmed charges. The Registry reports about the results of its review to the Trial Chamber for its consideration.

(iii) For purposes of participation during the trial, the Trial Chamber sets a final time limit, at the latest by the end of the Prosecutor's presentation of evidence, for the transmission of any further application by victims. Thereafter the Registry continues to collect applications and/or relevant information from victims for purposes of potential reparations proceedings only.

B. Exceptions to disclosure in the form of redaction of information

98. Under Rules 81(2) and (4) of the Rules, the Prosecutor may redact information from evidence disclosed to the Defence. Redactions can be implemented without need for a prior authorisation of the Chamber, which is seized of the matter only upon challenge by the Defence. In this case, the Prosecutor retains the burden of proof to justify the challenged redaction. For any redaction applied, the Prosecutor shall indicate the

category by including in the redaction box the code corresponding to each category, unless such indication would defeat the purpose of the redaction.

99. Redaction of the identity of a witness (i.e. anonymity) at the pre-trial stage of the proceedings under Rule 81(4) of the Rules must be specifically authorised upon motivated request by the Prosecutor. This applies also to non-disclosure of an entire item of evidence by the Prosecutor with the Defence not being informed of its existence.

100. This system should be ordered, and remain applicable at all stages of proceedings, through the inclusion of the following text into a decision of the Chamber, ideally the first decision regulating disclosure following the initial appearance:

1. The following procedure shall apply for exceptions to disclosure by the Prosecutor which are subject to judicial control, i.e. under Rule 81(2) and (4) of the Rules of Procedure and Evidence.

2. The Prosecutor 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 5. When disclosing redacted evidence, the Prosecutor 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.*

3. When so disclosing evidence with redactions, the Prosecutor shall assign unique pseudonyms to any persons whose identity is redacted. The Prosecutor 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 Prosecutor shall also file 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 shall also briefly indicate, to the extent possible, the basis for each redaction falling under categories 'A.8' and 'B.5'.

4. Should the Defence consider that a particular redaction is unwarranted or should be lifted as a result of changed circumstances, it shall approach the Prosecutor 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 Prosecutor shall have the burden to justify the particular redaction, and shall file her 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.

5. The above procedure shall not apply to the non-disclosure of witnesses' identities prior to the commencement of trial and to the non-disclosure of entire items of evidence. In such cases, the Prosecutor shall submit to the Chamber a discrete application.

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

7. If the Prosecutor redacts evidence prior to disclosure on the basis of Rule 81(1) of the Rules of Procedure and Evidence, she shall mark this in the redaction box as category 'E'.

C. Handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant

101. Regularly, evidence is disclosed confidentially in the interest of the safety or privacy of witnesses, victims or other persons. To regulate the use of confidential documents or information during the investigations of the receiving party or participant, parties and participants should be ordered to comply with certain technical obligations.

102. A protocol annexed to the manual lays out the obligations of the parties and participants in this regard. It also regulates contact of a party or participant with the witnesses of another party or participant.

103. The Chamber, acting under Articles 57(3)(c) and 68(1) of the Statute, should order the parties and participants to comply with this protocol, and put it on the record of the case, ideally in the first decision regulating disclosure following the initial appearance. The protocol would then remain applicable throughout the proceedings.

VI. Principles and procedures in relation to the issuance of dissenting and separate opinions

A. General principles concerning dissenting and separate opinions

104. While dissenting and separate opinions are a hallmark of judicial independence, any decision to issue such opinions should be considered only once every effort to arrive at consensus, through deliberations, has been exhausted. Dissenting and separate opinions should in principle be a measure of last resort.

105. The primary aim of dissenting or separate opinions is to contribute to the progressive development of the law by presenting alternate legal opinions or reasoning on specific points of contention or agreement contained in the majority document in question.

106. Dissenting and separate opinions should always be written using respectful language and in a spirit of collegiality. In preparing a dissent or separate opinion, judges should be cognisant of, *inter alia*, the long and short-term interests of the Court and the effect on its credibility; the importance of judicial coherence and how an opinion may be perceived by the parties and participants, the legal community, academia and civil society.

107. Sufficient time should be allowed for the preparation and circulation of dissenting and separate opinions. The majority and minority may respond to each other's drafts and amend their own findings or reasoning, if necessary. To this end it is imperative that reasonable timelines for the finalisation of the majority draft judgment, decision or order and any related dissenting or separate opinion be agreed in advance by the judges of the Chamber (*see* further paragraphs 113 - 115 below).

108. In principle, dissenting and separate opinions should not exceed the length of the reasoning of the majority judgment, decision or order and should conform to the style prescribed in the Chambers Style Guide.

109. Where appropriate, and provided that the nature of the reasoning of a dissenting or separate opinion allows, such reasoning may be included in the majority judgment, decision or order so as to reflect the differing or additional view together with that of the majority in a single document.

110. Dissenting and separate opinions should be issued simultaneously with the majority judgment, decision or order.[4]

[4] *See* articles 74(5) and 83(4) of the Statute. It is noted that a delay in the issuance of dissenting or separate opinions, in certain instances, could potentially interfere with the time limits for requesting leave to appeal the decision in question.

B. Proposed procedure for the issuance of dissenting or separate opinions

111. Following deliberations or the circulation of a first draft of a judgment, decision or order, a Judge who wishes to deliver a separate or dissenting opinion shall inform the other judges and circulate an outline of the opinion within a reasonable timeline agreed by the Chamber.

112. The legal team assigned shall be responsible for assisting the judges in the preparation of the majority and dissenting or separate opinion/s based on the instructions received. The legal team shall function as a unit and in accordance with the existing team-based working methods.

113. Shortly after a draft of the majority's judgment, decision or order has been circulated a further deliberation of the Chamber shall take place during which the judges may consider whether further consensus may be reached between the majority and the minority positions.

114. Upon finalisation of the majority draft, it shall be circulated to the Chamber and thereafter, within a reasonable time agreed upon by the Chamber, the dissenting or separate opinion/s shall be circulated.

115. The majority judges may, in response to the dissenting or separate opinion/s, amend the findings or reasoning of the majority draft, where necessary, and circulate same within the Chamber at an agreed upon timeline. Thereafter, the judges writing a dissenting or separate opinion shall be afforded an opportunity to amend the findings or reasoning in their respective drafts to the extent that substantive changes have been made in the majority judgment. A time-limit for the circulation of the revised dissenting or separate opinion shall be fixed.

116. Thereafter, the judgment, decision or order together with the related dissenting and/or separate opinion/s shall be issued simultaneously.

ANNEX: 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

A. Introduction

1. The purpose of this Protocol is to protect the safety of witnesses, victims and other individuals at risk, as well as the integrity of investigations, in a manner consistent with the rights of suspects and accused.

2. This Protocol shall be interpreted restrictively and no provision shall be interpreted to derogate any general rule of confidentiality or other protection accorded to witnesses, victims or other persons at risk on account of the activities of the Court, or any obligations of the parties and participants under the Code of Conduct of the Office of the Prosecutor, the Code of Professional Conduct for counsel, the Code of Conduct for Investigators, the Code of Conduct for Intermediaries and any binding national codes of conduct.

3. Any deviation from this Protocol requires the prior authorisation of the Chamber.

B. Definitions

4. For the purposes of this Protocol:

   (a) 'Party' shall mean the Prosecutor and any member of the Office of the Prosecutor authorised to have access to the information in question, and the suspect or the accused and his or her counsel, assistants to counsel and any other persons properly designated as members of the Defence team;

   (b) 'Participant' shall mean any other entity participating in the proceedings, including but not limited to the legal representatives of victims and States, and any other persons properly designated as members of their teams;

(c) ‘Third party’ shall include any person except a party or participant as defined above, or a Judge or staff of the Court authorised to have access to the information in question;

(d) ‘Confidential document’ shall mean any document, or any other type of material, not classified as ‘public’ in accordance with Regulation 14(b) of the Regulations of the Registry;

(e) ‘Confidential information’ shall mean any information contained in a confidential document which has not otherwise legitimately been made public, and any information ordered not to be disclosed to third parties by any Chamber of the Court;

(f) ‘Witness’ shall mean a person whom a party or participant intends to call to testify or on whose statement a party or participant intends to rely. The term ‘witness’ includes expert witnesses.

5. All of the obligations set out in the present Protocol, and which are imposed upon parties and participants, are also applicable to members of their teams, resource persons and intermediaries acting on instruction of or on behalf of a party or participant, and any other person who performs tasks at their request.

C. Use of confidential documents and information in investigations

1. General provisions

6. Parties and participants are under a general obligation not to disclose to third parties any confidential document or information. This Protocol sets out the conditions and procedures in which the disclosure of confidential documents or information to third parties as part of investigative activities by a party or participant is exceptionally permissible.

7. Throughout the investigation and proceedings, parties and participants shall undertake to minimise the risk of exposing confidential information to the greatest extent possible.

8. Confidential documents or information which have been made available to a party or participant may only be revealed by that party or participant to a third party where such disclosure is directly and specifically necessary for the preparation or presentation of their case. A party or participant shall only disclose to third parties those portions of a confidential document or information of which the disclosure is directly and specifically necessary for the preparation or presentation of its case.

9. When a confidential document or confidential information is revealed to a third party under the preceding paragraph, the party or participant shall explain to the third party the confidential nature of the document or information and warn the third party that the document or information shall not be reproduced or disclosed to anyone else in whole or in part. Unless specifically authorised by the Chamber, and without prejudice to rule 112(1)(e) and (3) of the rules, the third party shall not retain a copy of any confidential document shown to them.

2. Witnesses whose identity has not been made public

10. This section of the Protocol applies to witnesses whose identity or relationship with the Court has not been made public or who are subject to other protection measures known to the investigating party, including those applicable in other cases before the Court.

11. A party or participant may disclose the identity of such a witness to a third party if such disclosure is directly and specifically necessary for the preparation or presentation of its case. If a party or participant is aware that the witness is in the International Criminal Court Protection Programme ('ICCPP') or has otherwise been relocated with the assistance of the Court, the party or participant shall inform the Victims and Witnesses Unit ('VWU') in advance of the details of the place, time and, to the extent possible, the types of organisations, institutions, and, if available, the person(s) to whom it intends to disclose the identity of the witness, and shall consult with the VWU as to specific measures that may be necessary. If the witness is otherwise protected by the VWU, the party or participant shall inform the VWU of the disclosure of the witness's identity as soon as possible, but in any event prior to disclosure.

12. Notwithstanding the previous paragraph, parties and participants shall not reveal to third parties that the witness is involved with the activities of the Court or the nature of such involvement.

13. Visual and/or non-textual material depicting or otherwise identifying witnesses shall only be shown to a third party when no satisfactory alternative investigative avenue is available. To reduce the risk of disclosing the involvement in the activities of the Court of the person depicted or otherwise reflected, a party or participant shall only use such visual material and/or non-textual material which does not contain elements which tend to reveal the involvement of the person depicted in the activities of the Court. When a photograph of a witness is used, it shall only be shown together with other photographs of the same kind. Unless specifically authorised by the Chamber, the third party shall not retain copies of the visual material subject to this provision.

14. If a party or participant is in doubt as to whether a proposed investigative activity may lead to the disclosure of the identity of a protected witness to third parties, it shall seek the advice of the VWU.

3. Investigation of allegations of sexual or gender based crimes

15. Where a witness has stated that he or she has suffered sexual or gender based crimes and it is apparent that the witness has not discussed the violence with members of his or her family, parties and participants must exercise particular caution in investigating the allegations, in order to protect the privacy, dignity and well-being of the witness. Parties and participants shall not reveal information about the witness's alleged victimisation to the family members of the witness or to persons who can reasonably be expected to communicate it to family members. Where there are no suitable alternative investigative avenues, the investigating party or participant may communicate the information to such individuals that the witness has stated he or she has informed or has confirmed are aware of the sexual or gender based crimes suffered, provided that in doing so the investigating party or participant does not reveal that the witness is a witness of the Court.

4. Records of the handling of confidential documents or information

16. Parties and participants shall keep a record of any disclosure of confidential documents or information to third parties, which shall include: (i) the name and particulars of the person(s) to whom the confidential documents or information was disclosed; (ii) the name of the person who disclosed the document or information; (iii) the date of disclosure; and (iv) the location of disclosure.

17. Parties and participants shall keep a record of all members of their team having access to confidential documents and information, which shall include: (i) the name and particulars of the member of the team; and (ii) the period during which they had access to confidential documents and information. Any such member of the team shall, upon separation from the team, return all confidential documents in their possession and return or destroy any copies. The head of the team shall take all reasonable measures to ensure that all confidential documents have been returned, and any copies returned or destroyed.

18. Where there are reasonable grounds to believe that confidential documents or information have been disclosed in violation of this Protocol, the Chamber may instruct the party or participant to disclose to it, and, if appropriate, to other parties and participants, in whole or in part, the records mentioned above.

C. Inadvertent disclosure

19. If a party or participant discovers that it has disclosed material which should not have been disclosed or should have been disclosed in redacted form, it shall immediately inform the receiving party or participant and the Registry. The Registry shall immediately restrict access to the material in the eCourt database. If the information inadvertently disclosed pertains to a witness in the ICCPP or who has been otherwise provided with a form of protective measures, the party or participant shall also directly inform the VWU.

20. If a party or participant discovers that it has received material which it believes should not have been disclosed or should have been disclosed in redacted form, it shall

immediately inform the party or participant who disclosed the material. Pending confirmation by the disclosing party or participant that the material should not have been disclosed or should have been disclosed in redacted form, the party or participant having received the material shall act in good faith and shall ensure that the material is not distributed within the team including, in the case of the Defence, to the accused.

21. As soon as the disclosing party or participant informs the receiving party or participant or confirms that the material should not have been disclosed or should have been disclosed in redacted form, the receiving party or participant shall return the material to the disclosing party or participant and shall return or destroy any copies. This includes electronic copies, including those stored in the party's or participant's own Ringtail or other database. This also includes any copies that may have been provided to the suspect/accused/convicted person. The receiving party or participant must also inform any person who has read or has had access to the confidential material inadvertently disclosed that they must cease all use of the said document and ensure, as far as possible, that any copies are returned to the disclosing party or participant and that any electronic copies are destroyed.

22. After having implemented the Protocol, the receiving party or participant must immediately report to the disclosing party or participant as well as to the Chamber and must: (a) provide the identity of every person who has accessed the document or its content; and (b) confirm that all copies have been returned, deleted or destroyed. The receiving party or participant also has an obligation to provide full cooperation to the VWU in the exercise of its protection mandate.

23. The procedure for exceptions to disclosure under rule 81 of the Rules of Procedure and Evidence shall apply to any dispute as to whether or not the material should have been disclosed or should have been disclosed in redacted form.

D. Breaches of confidentiality

24. If a party or participant discovers that a third party knows or understands that a witness whose identity has not been made public is involved with the Court, it shall inform the

third party of the confidential nature of this information and instruct the third party not to disclose this information any further. The party or participant shall also inform the VWU of such occurrence as soon as possible.

25. A party or participant shall bring to the attention of the VWU as soon as possible any reasonable suspicion that a witness, a member of a witness's family, or another person at risk as a result of the activities of the Court may have been placed at risk for any reason, including reasonable suspicion that a witness's involvement with the Court or protected location has become known to third parties.

26. If a party or participant has revealed confidential information, or has become aware of any other breach of the confidentiality of documents or information, or discovers that a third party has become aware of confidential information, it shall inform the recipient of the confidential nature of such information and instruct him or her not to disclose it any further. In addition, the party or participant shall immediately inform the VWU.

E. Consent to disclosure by witnesses

27. When interviewing a witness, a party or participant shall inform the witness of its disclosure obligations and shall seek to obtain consent of the witness to the disclosure of his or her statement and any visual and/or non-textual material obtained from the witness. A party or participant shall give particular regard to the needs of vulnerable witnesses.

F. Contacts with witnesses of other parties or participants

28. Except under the conditions specified in this section, a party or participant shall not contact or interview a witness of another party or participant (the 'calling party or participant') if the intention to call the witness to testify or to rely on his or her statement has been communicated to the party or participant, or if this intention is otherwise clearly apparent. Where a comprehensive (final) list of witnesses has been filed by a party or a participant for its presentation of evidence at trial, the obligations set out in the present section shall apply only in respect of individuals included in such list, and

not in respect of any other individuals appearing in earlier (provisional) lists or relied upon or otherwise interviewed at earlier stages of the proceedings.

29. A party or participant shall not make inquiries relating to the current location of protected witnesses or other persons who have been admitted to the ICCPP, who have been assisted by the Court to move away from their initial place of residence, or whose location has been protected by the Chamber. Should the location of such protected witnesses or persons become known or apparent to a party or participant, it shall inform the VWU immediately.

30. While the purpose of VWU-organized courtesy meetings is to meet the witness of another party or participant, this meeting can under no circumstances be used to seek the witness's consent to be interviewed. During such meetings, the provisions of the present Protocol continue to apply.

5. Consent of the witness

31. A party or participant shall only contact or interview a witness of another party or participant if the witness consents.

32. The party or participant seeking to interview a witness of another party or participant shall notify the latter of its intent to do so. The calling party or participant shall ask the witness within five days whether he or she agrees to be contacted or interviewed. The calling party or participant shall not attempt to influence the witness's decision whether to agree to be interviewed by the other party or participant.

33. If a party or participant comes into contact with a person during investigation and it becomes clear that he or she is a witness of an opposing party or participant, the party or participant shall refrain from any discussion of the case and shall under no circumstances seek the witness's consent to be interviewed directly. A witness's consent to be interviewed may be obtained only through the calling party or participant, in accordance with this protocol.

34. If the calling party or participant is unable to contact the witness within five days, the party or participant seeking to interview the witness may apply to the Chamber and request that the VWU be instructed to attempt to contact the witness.

6. Interview

35. If the witness consents to be interviewed, the calling party or participant shall immediately inform the investigating party or participant and contact shall be facilitated as appropriate.

36. The calling party or participant shall ensure that, if the witness is particularly vulnerable or otherwise in need of assistance during the interview, such appropriate assistance is provided and that, where necessary, the VWU is informed sufficiently in advance of the scheduled interview in order to arrange for an assessment of the need for assistance by a VWU representative during the interview.

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

38. If the calling party or participant is unable to travel to the particular location where the interview is to be conducted, the parties and participants shall endeavour to reach an agreement concerning alternative arrangements for the participation of a representative of the calling party, such as participation by video link or holding the interview with the witness at another location.

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

40. The representative of the calling party or participant present at the interview shall not prevent or dissuade the witness from answering questions freely. In the event that the

calling party or participant objects to any part of the procedure followed or any particular line or manner of questioning of the witness, it shall raise the issue with the party or participant conducting the interview outside of the presence of the witness. The disagreement shall be recorded and shall not impede or unduly disrupt the interview. The party or participant conducting the interview may, in the event of repeated interference by the calling party or participant, adjourn the interview and apply to the Chamber for leave to conduct it without the presence of the representative of the calling party or participant.

41. A video or audio recording of the interview shall be provided to the calling party or participant as soon as practicable after the conclusion of the interview, to the extent possible, within five days of the interview date.

7. Objection of the calling party or participant to the interview with another party or participant

42. If, despite the consent of the witness, the calling party or participant wishes to object, on an exceptional basis and in the event of a serious problem, for reasons related to the safety or physical or psychological well-being or dignity of the witness, to the interview of the witness with another party or participant, it shall inform the party or participant seeking to interview the witness in writing. If agreement cannot be reached, the calling party or participant shall apply to the Chamber for a ruling and inform the VWU in writing within two days of the disagreement having been notified.

43. Without prejudice to articles 56 and 57(3)(b) of the Statute and rule 114 of the Rules of Procedure and Evidence, the party or participant seeking to interview the witness must refrain from doing so until the matter has been decided by the Chamber.

8. Special provisions for protected witnesses

44. When the party or participant seeking to interview a witness is aware that the witness is a participant in the ICCPP, or has been otherwise assisted by the Court to move away from their place of residence, the party or participant shall, in addition to notifying the

calling party or participant, inform the VWU. All contact with individuals who are part of the ICCPP shall be facilitated exclusively by the VWU.

45. In the event that the investigating party or participant wishes to interview a witness who is a participant in the ICCPP, the VWU will inform the investigating party or participant of the location at which the meeting will take place, and the VWU will undertake all necessary logistical arrangements for the witness to be present in the location specified on the date previously agreed with the investigating party or participant.