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No.: ICC-02/04-01/15
Date: 27 February 2015

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN UGANDA

**IN THE CASE OF
*THE PROSECUTOR v. DOMINIC ONGWEN***

**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

Fatou Bensouda, Prosecutor
Benjamin Gumpert, Senior Trial Lawyer

The Defence

Kripus Ayena Odongo

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

Xavier-Jean Keita

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court” or “ICC”),¹ renders 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 8 July 2005, the Chamber, in its previous composition, issued the “Decision on the Prosecutor’s application for the warrants of arrest under Article 58”,² along with a warrant of arrest for Dominic Ongwen (“Mr. Ongwen”),³ for his alleged responsibility for crimes against humanity and war crimes. At the time, Mr. Ongwen was prosecuted together with others forming the case of the *Prosecutor v. Joseph Kony et al.* (ICC-02/04-01/05).
2. On 16 January 2015, Mr. Ongwen consented to appear voluntarily before the ICC and was transferred, on the same day, to the custody of the Court.⁴
3. On 21 January 2015, Mr. Ongwen arrived to the ICC detention centre.⁵ The same day, the Chamber designated Judge Ekaterina Trendafilova as Single Judge.⁶
4. On 26 January 2015, Mr. Ongwen made his initial appearance before the Single Judge during which, *inter alia*, the date of the confirmation of charges hearing was set for 24 August 2015.⁷ During the initial appearance, Mr. Ongwen was assisted by duty counsel, Ms Hélène Cisse.
5. On 28 January 2015, the Single Judge held an *ex parte* status conference only with the Prosecutor (the “Status Conference”), during which issues “related to

¹ Pre-Trial Chamber II, “[Decision Designating a Single Judge](#)”, 21 January 2015, ICC-02/04-01/05-415.

² Pre-Trial Chamber II, “[Decision on the Prosecutor’s application for the warrants of arrest under Article 58](#)”, 8 July 2005, ICC-02/04-01/05-1.

³ Pre-Trial Chamber II, “[Warrant of Arrest for Dominic Ongwen](#)”, 8 July 2005, ICC-02/04-01/15-6.

⁴ ICC-02/04-01/05-419-Conf-Exp, para. 4; ICC-02/04-01/05-419-Conf-Exp-Anx2.

⁵ ICC-02/04-01/05-419-Conf-Exp, para. 18.

⁶ Pre-Trial Chamber II, “[Decision Designating a Single Judge](#)”, 21 January 2015, ICC-02/04-01/05-415.

⁷ Pre-Trial Chamber II, Transcript of Hearing, 26 January 2015, ICC-02/04-01/05-T-10-ENG, p. 14, lines 7-9.

disclosure of the Prosecutor's evidence, protection of witnesses and other related matters" were discussed.⁸

6. On 6 February 2015, the Single Judge severed the case against Mr. Ongwen from the case of the *Prosecutor v. Joseph Kony et al.*⁹

II. APPLICABLE LAW

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

III. DETERMINATION BY THE SINGLE JUDGE

a) Principles governing disclosure and related time-frame

8. The Single Judge reminds the Prosecutor and the Defence that in order to reach the stage of holding a hearing on whether to confirm the charges, the Court's statutory documents envisage several procedural steps that must be undertaken by the Chamber as well as by the parties. Central to this is the creation of a system that regulates the disclosure of evidence between the parties and its communication to the Chamber.
9. The Single Judge recalls the decision of 31 July 2008 issued by Pre-Trial Chamber III in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*, in which it developed the principles underlying evidence disclosure between the parties for

⁸ Pre-Trial Chamber II, "[Decision on Setting the Date for the Initial Appearance of Dominic Ongwen and the Date for a Status Conference](#)", 21 January 2015, ICC-02/04-01/05-418, para. 8; Pre-Trial Chamber II, Transcript of Hearing, 28 January 2015, ICC-02/04-01/05-T-11-Conf-Exp-ENG.

⁹ Pre-Trial Chamber II, "[Decision Severing the Case against Dominic Ongwen](#)", 6 February 2015, ICC-02/04-01/05-424.

the purposes of the confirmation hearing (the “31 July 2008 Decision”).¹⁰ Following that decision, the principles were further developed in a set of decisions in other cases.¹¹ The Chamber has no reason to depart from the principles laid down in its previous case law. Accordingly, the Single Judge shall apply these principles in the present case.

10. As previously held, disclosure of evidence as envisaged by the language of 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. It is facilitated or implemented through the channel of the Registry. The Chamber receives all evidence disclosed “between the Prosecutor and the person for the purposes of the confirmation hearing” by way of communication in order to ensure that disclosure takes place under satisfactory conditions in line with the requirements of article 61(3) of the Statute together with rule 121(2)(b) of the Rules. This approach places the Chamber in a position to discharge its responsibilities under article 69(3) of the Statute and to take an informed decision in accordance with its statutory mandate under article 61(7) of the Statute.¹²

11. In this context, the Single Judge considers that ensuring an effective disclosure process, which ultimately aims at reaching a proper decision as to whether or not to send the case *sub judice* to trial, requires that all evidence disclosed between the parties be communicated to the Chamber, regardless of whether the parties intend to rely on or present said evidence during the confirmation hearing. This reading is consistent with a literal and a contextual interpretation of the Statute and the

¹⁰ Pre-Trial Chamber III, “[Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties](#)”, 31 July 2008, ICC-01/05-01/08-55.

¹¹ Pre-Trial Chamber II, “[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)”, 6 April 2011, ICC-01/09-01/11-44; Pre-Trial Chamber II, “[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)”, 6 April 2011, ICC-01/09-02/11-48; Pre-Trial Chamber II, “[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)”, 12 April 2013, ICC-01/04-02/06-47.

¹² Pre-Trial Chamber III, “[Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties](#)”, 31 July 2008, ICC-01/05-01/08-55, paras 16 and 42.

Rules thereto. 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”.¹³

12. Moreover, the Chamber’s unique mandate reflected in its filtering function and responsibility to *contribute* to the establishment of the truth, is another reason in support of this interpretation. As this Chamber has previously stated:

Such 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.¹⁴

13. This indicates that the Chamber shall have access to the following disclosed evidence: (a) all evidence in the Prosecutor’s possession or control (pursuant to article 67(2) of the Statute) which she believes shows or tends to show the innocence of the suspect, or to mitigate his alleged guilt, or may affect the credibility of the Prosecutor’s evidence; (b) all names of witnesses and copies of their prior statements on which the Prosecutor intends to rely at the confirmation hearing, regardless of whether the Prosecutor intends to call them to testify (rule 76 of the Rules); (c) all rule 77 material in possession or control of the Prosecutor (incriminatory, exculpatory, or mixed in nature), which is material to the preparation of the Defence or are intended for use by the Prosecutor as evidence

¹³ See also Pre-Trial Chamber I, “[Decision adjourning the hearing on the confirmation of charges pursuant to article 61\(7\)\(c\)\(ii\) of the Rome Statute](#)”, 3 June 2013, ICC-02/11-01/11-432, operative part (d); Partly Dissenting Opinion of Judge Cuno Tarfusser, annexed to Pre-Trial Chamber I, “[Second Decision on issues relating to Disclosure](#)”, 15 July 2009, ICC-02/05-02/09-35; Pre-Trial Chamber I, “[Decision on issues relating to disclosure](#)”, 29 June 2010, ICC-02/05-03/09-49, para. 6.

¹⁴ See recently, Pre-Trial Chamber II, “[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. 37; *id.*, “[Decision on the ‘Prosecution’s Application for leave to Appeal the ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’ \(ICC-01/09-01/11-42\)](#)”, 2 May 2011, ICC-01/09-01/11-74, para. 37.

for the purposes of the confirmation hearing or was obtained from or belonged to the person; (d) all rule 78 material in possession or control of the Defence, which is intended for use as evidence for the purposes of the confirmation hearing; and (e) all evidence the Defence may present as per rule 79 of the Rules, on which the suspect intends to rely, to establish an alibi or a ground for excluding criminal responsibility.

14. In this regard, the Single Judge reminds the Prosecutor and the Defence that the Court's statutory documents impose different time limits on both parties, by which to file the 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 together with a list of evidence, for the purposes of the confirmation hearing, *no later* than 30 days before the date of its commencement. 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 *no later* than 15 days prior to the date of the hearing of the amended charges or/and list of evidence.
15. In addition, should the Prosecutor intend to present new evidence at the hearing, rule 121(5) of the Rules dictates that she shall also provide a list of that evidence *no later* than 15 days before the date of the hearing. In this respect, the Single Judge wishes to point out that for the purpose of this rule "new evidence" refers to any information, material or evidence which came into the Prosecutor's control or possession *after* the deadline provided for in rule 121(3) of the Rules. Accordingly, evidence presented to the Chamber (including new evidence) after the time limits, as specified by the provision referred to above, shall not be considered.
16. With respect to the Defence, pursuant to rule 121(6) of the Rules, if the person (i.e. the suspect) intends to present evidence, he shall provide a list of evidence *no later* than 15 days before the start of the confirmation hearing.
17. In this regard, it should be emphasised that the deadlines referred to in rule 121 of the Rules are only indicative of the *minimum* time limits a party can avail itself to comply with its disclosure obligations. This interpretation finds support in the

express wording of “no later than”, reflected in rule 121(3)-(6) and (9) of the Rules. That said, the Single Judge wishes to underline that the Rules serve the application of the Statute and accordingly they are subordinate to the Statute in all cases. Therefore, the *minimum* time limits established in rule 121 of the Rules, especially the time limit set up in rule 121(3) of the Rules regarding the disclosure by the Prosecutor, must be read in conjunction with and subject to article 67(1)(b) of the Statute which provides that the “accused”¹⁵ must have adequate time for the preparation of his or her defence. Consequently, the disclosure of large portions of the evidence for the purposes of the confirmation hearing *only* 30 days before the date of the confirmation hearing might interfere with the right of the suspect to have adequate time for the preparation of his defence. The early initiation of the process of disclosure better guarantees also the expeditiousness of the proceedings, guided by the overarching principle of fairness. For these reasons, the Single Judge expects that the parties fulfil their disclosure obligations as soon as practicable and not only on the date when the deadline indicated by the statutory documents expires.¹⁶ A disclosure calendar will be established in due course for the purposes of organizing a smooth disclosure process in conformity with the above considerations.

18. In this context, it is significant to make particular reference to exculpatory evidence which, according to article 67(2) of the Statute, shall be disclosed “as soon as practicable”. In this regard, the Single Judge notes that the Statute or the Rules do not provide for particular time limits for the disclosure of exculpatory evidence to the Defence. However, in the view of the Single Judge, the reference to the phrase “as soon as practicable” must be understood as being the earliest opportunity after the evidence comes into the Prosecutor’s possession. Therefore, the Prosecutor shall disclose such evidence immediately after having identified any such

¹⁵ In accordance with rule 121(1) of the Rules, the person enjoys the rights set forth in article 67 of the Statute from the moment of the initial appearance.

¹⁶ See also, Pre-Trial Chamber III, “[Decision establishing a disclosure system and a calendar for disclosure](#)”, 24 January 2012, ICC-02/11-01/11-30, para. 37; Pre-Trial Chamber I, “[Decision establishing a system for disclosure of evidence](#)”, 14 April 2014, ICC-02/11-02/11-57, para. 8.

evidence, unless some justifiable reasons prevent her from doing so.¹⁷ Indeed, the Defence must receive such evidence sufficiently in advance prior to the commencement of the confirmation hearing in order to make effective use of the right provided in article 61(6) of the Statute.¹⁸

19. With a view to establishing a disclosure calendar relating to both incriminating and exculpatory evidence, the Single Judge orders the Prosecutor, as the triggering force of the proceedings, to submit her views and proposals as to possible staggered deadlines for in particular the incriminating evidence on which she intends to rely at the confirmation hearing. This will assist to effectuate disclosure under satisfactory conditions and on a rolling basis in order to place the Defence in a position to adequately prepare for the confirmation of charges hearing as guaranteed in article 67(1)(b) of the Statute. Factors which the Prosecutor may take into consideration when putting forth her proposals for such a calendar could be the following: (i) the time when the pieces of evidence came into the Prosecutor's possession; (ii) whether the evidence concerned can be disclosed without redactions or any other protective measures, or whether it requires authorisation by the Chamber for certain redactions or other protective measures; (iii) the time needed for the consultation process between the Prosecutor's Office and the Defence on translation issues, as developed in paragraph 35 below; and (iv) the time needed to translate the core pieces of the evidence into Acholi, the language Mr. Ongwen fully speaks and understands within the meaning of article 67(1)(a) of the Statute¹⁹.

¹⁷ See also Pre-Trial Chamber II, "[Decision on the 'Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge' and Establishing a Calendar for Disclosure Between the Parties](#)", 20 April 2011, ICC-01/09-01/11-62, para. 21; *id.*, "[Decision on the 'Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge' and Establishing a Calendar for Disclosure Between the Parties](#)", 20 April 2011, ICC-01/09-02/11-64, para. 21.

¹⁸ The need for timely disclosure became a live issue in the disclosure process in the *Ntaganda* case, see Pre-Trial Chamber II, "[Redacted Sixth Decision on the Prosecutor's Requests for Redactions](#)", 3 July 2014, ICC-01/04-02/06-233-Red2, para 23 and footnote 37.

¹⁹ Pre-Trial Chamber II, Transcript of Hearing, 26 January 2015, ICC-02/04-01/15-T-4-ENG, p. 5 lines 13-14.

20. Finally, the Single Judge stresses once more that only such evidence is disclosed which is relevant and apt to support a particular factual allegation underlying the requisite legal element. As stated in the 31 July 2008 Decision, the Prosecutor should not “disclose the greatest volume of evidence, but (...) disclose the evidence which is of true relevance to the case, whether that evidence be incriminating or exculpatory”.²⁰ The same applies for the Defence, should it invoke its right to present evidence in accordance with article 61(6)(c) of the Statute. This approach prevents the case record from expanding with irrelevant material which would otherwise unnecessarily engage the Prosecutor and the Defence in processing and analysing such material and also requesting protective measures where appropriate, thereby bearing the risk to delay proceedings without any reasonable justification. As to the different requests concerning protective measures for witnesses including redactions, the Single Judge wishes to make clear already at this early stage of the pre-trial proceedings that any such request must be submitted as soon as practicable, but no later than the date which shall be specified in the calendar to be established in due course.

b) Role of the Registry and registration procedure

21. The Single Judge reiterates that the process of evidence disclosure is facilitated by the Registry, which is not a party to the proceedings but rather “a communication channel” between the parties and the Chamber.²¹ The Single Judge will apply the modalities of disclosure of evidence and communication of that evidence to the Chamber as laid down in previous decisions and summarized below.

²⁰ Pre-Trial Chamber III, “[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.

²¹ Pre-Trial Chamber III, “[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. 34; Pre-Trial Chamber II, “[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)”, 6 April 2011, ICC-01/09-01/11-44, para. 13; Pre-Trial Chamber II, “[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)”, 6 April 2011, ICC-01/09-02/11-48, para. 14; Pre-Trial Chamber II, “[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)”, 12 April 2013, ICC-01/04-02/06-47, para. 21. See also Pre-Trial Chamber III, “[Decision establishing a disclosure system and a calendar for disclosure](#)”, 24 January 2012, ICC-02/11-01/11-30, paras 60-61.

22. As referred to in rule 121(10) of the Rules and regulations 15-19, 24-28 and 53(3) of the RoR, the Registry has different responsibilities related to the process of evidence disclosure, its communication and its registration. Among these responsibilities is to maintain a full and accurate record of the proceedings containing the evidence disclosed, and subject to restrictions regarding confidentiality or national security information, the Registry facilitates access to the record by the parties and the Chamber. Thus, the Registry must register and transmit all evidence disclosed between the parties and communicated to the Chamber expeditiously.
23. In this regard, the Single Judges recalls that the representative of the Prosecutor during the Status Conference indicated that he would meet the same day with duty counsel of Mr. Ongwen to disclose to her certain evidence.²² Accordingly, should disclosure have taken place prior to the issuance of this decision, the Registry is ordered to immediately communicate to the Chamber any such evidence which has been disclosed *inter partes*.
24. In relation to the registration procedure, the Single Judge wishes to explain that upon receipt of the relevant evidence, the Registry will register each piece of evidence to be disclosed and communicated to the Chamber. Each piece of evidence submitted shall retain for the purpose of the confirmation proceedings its unique document ID number²³ as given by the parties. Evidence shall be submitted by the parties in its original form and a corresponding electronic copy. In case of tangible objects, “the original form of the evidence, whether it is a paper document or an object, shall be placed in the custody of the Registrar”, as provided for in regulation 53(3) of the RoR; an electronic photograph thereof should also be submitted.

²² Pre-Trial Chamber II, Transcript of Hearing, 28 January 2015, ICC-02/04-01/15-T-5-Conf-Exp, p. 10, lines 21-24; p. 44, line 23-p. 45, line 7.

²³ See e-Court Protocol (Annex 1 to this decision), para. 21.

25. Unless a party raises an objection against the authenticity of a piece of evidence,²⁴ the Registry shall not conduct an authentication process confirming that the electronic copy is an exact replica of the original piece of evidence.
26. In case a piece of evidence or part of it needs to be replaced in the record of the case upon an objection, that piece of evidence or part of it shall be provided in accordance with the e-Court protocol (see Annex 1).
27. When submitting evidence under rule 76 of the Rules, the Prosecutor is reminded to provide, if need be, and with the support of the Registry, where necessary, a translation (rule 76(3) of the Rules) 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 (see Annex 1). As regards the extent of translation of core pieces of incriminating evidence falling under the ambit of rule 76 of the Rules, the Single Judge, as announced during the initial appearance of Mr. Ongwen,²⁵ provides further guidance in the following section of the present decision.
28. The parties are reminded to include in their submission of evidence the following documentation: (i) a list of evidence enlisting all pieces of evidence enclosed with their respective document ID as defined in the e-Court protocol (see Annex 1); and (ii) a list of recipients including the level of confidentiality applicable to each item.
29. In view of the principle of publicity of proceedings, the evidence submitted shall in principle be registered as public unless there is a reason to classify it otherwise. It is incumbent upon the parties to indicate such classification when submitting the

²⁴ Pre-Trial Chamber III, "[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. 59; Pre-Trial Chamber II, "[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)", 6 April 2011, ICC-01/09-01/11-44, para. 16; Pre-Trial Chamber II, "[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)", 6 April 2011, ICC-01/09-02/11-48, para. 17; Pre-Trial Chamber II, "[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)", 12 April 2013, ICC-01/04-02/06-47, para. 24.

²⁵ Pre-Trial Chamber II, Transcript of Hearing, 26 January 2015, ICC-02/04-01/15-T-4-ENG, p. 17, lines 18-24.

evidence for disclosure and to provide the factual and legal basis for any proposal to classify (as non-public) the evidence submitted.

c) Translation of documents and evidence into Acholi

30. The Single Judge recalls that Mr. Ongwen indicated during the initial appearance that he fully understands and speaks Acholi.²⁶ Mr. Ongwen's duty counsel requested that he receive "as soon as possible (...) all documents of proceedings and evidence, especially declaration of witness if possible in Acholi audio transcription" so as to safeguard Mr. Ongwen's rights under article 67(1)(f) of the Statute.²⁷

31. As announced during the initial appearance, the Single Judge provides herewith further clarification as to the legal framework governing the question of translation of documents and evidence into a language which the suspect fully understands and speaks. At the outset, the Single Judge wishes to inform Mr. Ongwen that he does not have an absolute right to have *all* documents, including decisions, contained in the case record translated into Acholi. This interpretation is consistent with the drafting history of the Statute²⁸ and the jurisprudence of the Court²⁹ and also with internationally recognized human rights which do not grant an unfettered right to the defence "[requiring] a written translation of all items of written evidence or official documents in the procedure".³⁰

²⁶ Pre-Trial Chamber II, Transcript of Hearing, 26 January 2015, ICC-02/04-01/15-T-4-ENG, p. 5, lines 13-14.

²⁷ Pre-Trial Chamber II, Transcript of Hearing, 26 January 2015, ICC-02/04-01/15-T-4-ENG, p. 17, lines 5-13.

²⁸ See references in Pre-Trial Chamber III, "[Decision on the Defence's Request Related to Language Issues in the Proceedings](#)", 4 December 2008, ICC-01/05-01/08-307, footnote 28.

²⁹ Pre-Trial Chamber I, "[Decision on the Requests of the Defence of 3 and 4 July 2006](#)", 4 August 2006, ICC-01/04-01/06-268, pp. 5-6; Pre-Trial Chamber I, "[Decision on the Defence Request concerning time limits](#)", 27 February 2008, ICC-01/04-01/07-304, p. 4; Pre-Trial Chamber I, "[Decision on the Defence for Mathieu Ngudjolo Chui's Request concerning translation of documents](#)", 15 May 2008, ICC-01/04-01/07-477, p. 5; Pre-Trial Chamber I, "[Decision on the Defence for Mathieu Ngudjolo Chui's request for leave to appeal the Decision concerning the translation of documents](#)", 2 June 2008, ICC-01/04-01/07-538, p. 6; Pre-Trial Chamber III, "[Decision on the Defence's Request Related to Language Issues in the Proceedings](#)", 4 December 2008, ICC-01/05-01/08-307, paras 11-18;

³⁰ See, for example, European Court of Human Rights, *Kamasinski v Austria*, Application no. 9783/82, Judgment of 19 December 1989, para. 74; see also *Hermi v Italy*, Application no. 18114/02, Judgment of

32. For the sake of clarity, the Single Judge wishes to recall the main points for this interpretation. Firstly, this approach stems from the reading and interpretation of article 67(1)(f) together with article 67(1)(a) of the Statute in context. According to these provisions, being part of the minimum guarantees provided by the Statute, Mr. Ongwen is entitled to know of the charges against him, including having translations of those documents into Acholi which are necessary to meet the requirements of fairness. Secondly, Mr. Ongwen is entitled to be tried without undue delay, as enshrined in article 67(1)(c) of the Statute. Naturally, if *all* documents and decisions, beyond what is actually necessary to guarantee the right of Mr. Ongwen to be informed promptly and in detail of the nature, cause and content of the charges, would be translated into Acholi, this would seriously jeopardize the expeditiousness of the proceedings due to the substantial time that such translation would require. In sum, the Chamber's approach to this question is best summarized in the following excerpt of a decision adopted by this Chamber in the *Bemba* case as early as December 2008:

In light of the foregoing, the Single Judge is of the opinion that the use of the phrase "as are necessary to meet the requirements of fairness" in article 67(1)(f) of the Statute shall not be read as granting [the suspect] the right to have *all* evidentiary material disclosed by the Prosecutor and *all* documents in the proceedings translated into the language he fully understands and speaks. Rather, in accordance with article 67(1)(a) and (f) of the Statute, [the suspect] should enjoy the right to interpretation throughout the whole proceedings but is only entitled to receive the (...) translation of such documents that inform him in detail of the nature, cause and content of the charges brought against him. Accordingly, [the suspect] should be provided with a [translation] of the following documents: (i) the Prosecutor's application for a warrant of arrest and the Chamber's decision thereon; (ii) the Document Containing the Charges and the List of Evidence as well as any amendment thereto; and (iii) the statements of prosecution witnesses.³¹

33. And thirdly, the Single Judge notes that Mr. Ongwen is not conducting his defence in person but is assisted by counsel,³² as guaranteed under article 67(1)(d) of the Statute. It is recalled that appointed counsel satisfies the criteria set forth in rule 22 of the Rules, in particular to "have an excellent knowledge of and be fluent in at

18 October 2006, paras 69-70; *Lagerblom v Sweden*, Application no. 26891/95, Judgment of 14 January 2003, para. 61.

³¹ Pre-Trial Chamber III, "[Decision on the Defence's Request Related to Language Issues in the Proceedings](#)", 4 December 2008, ICC-01/05-01/08-307, para. 16.

³² ICC-02/04-01/15-201 and annexes.

least one of the working languages of the Court". Thus, the combination of having the assistance of a competent defence counsel, fluent in either of the working languages of the Court (article 50(2) of the Statute), together with the core documents (and pieces of evidence, as further contemplated in paragraph 35 below) having been translated into Acholi, satisfies, in the view of the Single Judge, the fairness of the proceedings at this stage.

34. In this context, it is worth mentioning that Mr. Ongwen has been served with the warrant of arrest in English and Acholi.
35. Concerning the translation of witness statements which the Prosecutor intends to rely upon for the purposes of the confirmation of charges hearing pursuant to rule 76 of the Rules, the Single Judge refers to the established practice of this Chamber, namely that the Defence will be requested to review the witness statements disclosed with a view to identifying portions which require to be translated and to "request, to the extent necessary, the translation of evidence which is core to the preparation of the defence".³³ In this case, the Defence of Mr. Ongwen will be requested to liaise with the Prosecutor on the final amount of pages to be translated into Acholi and the estimated time required. In a common report, the Prosecutor and the Defence shall inform the Chamber accordingly. Thus, the Chamber will be in a position to resolve any disagreement between the parties in conformity with its statutory powers to ensure fairness of the proceedings with full respect for the rights of the suspect.
36. As a final point, the Single Judge notes that the issue of translation of witness statements appears not to be problematic in this case. According to the Prosecutor, a significant part of the witness statements potentially falling under rule 76(3) of the Rules, is available in Acholi as the witnesses were interviewed on videotape in that language. Accordingly, the transcripts of those interviews are available both

³³ See, for example, Pre-Trial Chamber II, "[Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties](#)", 17 May 2013, ICC-01/04-02/06-64, paras 21-22; Pre-Trial Chamber II, "[Decision on the 'Demande de la Défense aux fins de traduction en Kinyarwanda de certains des principaux elements de preuve'](#)", 24 September 2013, ICC-01/04-02/06-115, para. 12.

in Acholi and English.³⁴ Under these circumstances, translations into Acholi of those witness statements, if to be disclosed, do not seem necessary.

d) Required analysis of the evidence

37. The Single Judge recalls the Chamber's earlier finding in the 31 July 2008 Decision, as recalled in subsequent decisions, wherein particular emphasis was placed on the significance to provide the Defence with:

[A]ll necessary tools to understand the reasons why the Prosecutor relies on any particular piece of evidence and that, consequently, the evidence exchanged between the parties and communicated to the Chamber must be the subject of a sufficiently detailed legal analysis relating the alleged facts with the constituent elements corresponding to each crime charged [...] This analysis consist of presenting each piece of evidence according to its relevance in relation to the constituent elements of the crimes presented by the Prosecutor in his application under article 58 of the Statute and taken into account by the Chamber in its [decision on the said application]. Each piece of evidence must be analyzed [...] by relating each piece of information contained in that page or paragraph with one or more of the constituent elements of one or more of the crimes with which the person is charged, including the contextual elements of those crimes, as well as the constituent elements of the mode of participation in the offence with which the person is charged. The same analysis technique shall apply *mutatis mutandis* to photographs, maps, videodiscs, tangible objects and any other support disclosed by the Prosecutor [...] [This] analysis should be presented in the form of a summary table which shows the relevance of the evidence presented in relation to the constituent elements of the crimes with which the person is charged. It should enable the Chamber to verify that for each constituent element of any crime with which the person is charged, including their contextual elements, as well as for each constituent element of the mode of participation in the offence with which he or she is charged, there are one or more corresponding pieces of evidence, either incriminating or exculpatory, which the Chamber must assess in light of the criteria set under article 61(7) of the Statute.³⁵

38. In the context of the present decision, the Single Judge favours the approach adopted in the 31 July 2008 Decision which was clarified and refined in a decision issued by the same Chamber on 10 November 2008 (the "10 November 2008 Decision"). In the latter decision, the Chamber requested the Prosecutor to present a consolidated version of his in-depth analysis chart of incriminating evidence,

³⁴ Pre-Trial Chamber II, Transcript of Hearing, 28 January 2015, ICC-02/04-01/15-T-5-Conf-Exp-ENG, p. 36, lines 19-21.

³⁵ Pre-Trial Chamber III, "[Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties](#)", 31 July 2008, ICC-01/05-01/08-55, paras 66-70; Pre-Trial Chamber II, "[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)", 6 April 2011, ICC-01/09-01/11-44, para. 21; Pre-Trial Chamber II, "[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)", 6 April 2011, ICC-01/09-02/11-48, para. 22.

following the structure of a draft model chart annexed thereto.³⁶ The Chamber also requested the Defence to follow the exact approach if it “intend[ed] to present evidence under article 61(6) of the Statute and in accordance with rules 78, 79 and 121(6) of the Rules or rely on evidence disclosed by the Prosecutor [...]”.³⁷ For the purposes of the present proceedings, the Single Judge expects that the parties follow the *sample* draft model chart attached as Annex 2 to this decision.

39. As has been explained in previous decisions, the in-depth analysis chart follows a “law-driven” approach insofar as it follows the elements of the crimes (context and individual acts) and the forms of participation, as defined in the Statute.³⁸ The Single Judge believes that requesting from the parties to complement the disclosure of evidence with said analytical chart serves the efficient disclosure of evidence which is relevant to the subject-matter of the case. It is clear that such power derives directly from article 61(3), second sentence, of the Statute to issue any order regarding the disclosure of evidence, as well as rule 121(2), first sentence, of the Rules entrusting the Single Judge to take “the necessary decisions regarding disclosure”. Hence, the in-depth analysis chart, an auxiliary document next to the document containing the charges and the list of evidence, is embedded in the statutory documents of the Court.

³⁶ Pre-Trial Chamber III, “[Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence](#)”, 10 November 2008, ICC-01/05-01/08-232, paras 5-8; [ICC-01/05-01/08-232-Anx](#); The same approach was followed in subsequent decisions setting out the disclosure regime, see Pre-Trial Chamber II, “[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)”, 6 April 2011, ICC-01/09-01/11-44, paras 21-23; Pre-Trial Chamber II, “[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)”, 6 April 2011, ICC-01/09-02/11-48, paras 22-24; Pre-Trial Chamber II, “[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)”, 12 April 2013, ICC-01/04-02/06-47, paras 29-32.

³⁷ Pre-Trial Chamber III, “[Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence](#)”, 10 November 2008, ICC-01/05-01/08-232, para. 9; see also Pre-Trial Chamber III, “[Decision on the Disclosure of Evidence by the Defence](#)”, 5 December 2008, ICC-01/05-01/08-311, paras 9-10.

³⁸ Pre-Trial Chamber III, “[Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties](#)”, 31 July 2008, ICC-01/05-01/08-55, paras 69-70; Pre-Trial Chamber II, “[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)”, 6 April 2011, ICC-01/09-01/11-44, para. 22; Pre-Trial Chamber II, “[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)”, 6 April 2011, ICC-01/09-02/11-48, para. 23; Pre-Trial Chamber II, “[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)”, 12 April 2013, ICC-01/04-02/06-47, para. 31. A sample model in-depth analysis chart is contained in Annex 2 to this decision, following the counts as contained in the warrant of arrest for Mr. Ongwen.

40. Moreover, and most importantly, as the judicial guarantor of the proceedings, it is the duty of the Chamber to ensure the overall efficiency and fairness of the proceedings, including that disclosure takes place under satisfactory conditions within the meaning of rule 121(2)(b) of the Rules so that the parties can prepare adequately for the confirmation of charges hearing. Proper case management is an integral and crucial part of the Chamber's responsibilities. Given the voluminous amount of evidence, a typical feature in the cases brought before this Court, the Chamber must develop and promote practices which will avert exchanges of copious but irrelevant pieces of evidence between the parties and prevent that disclosure takes place in a disorganized manner and unnecessarily time-consuming. *Streamlining* the disclosure process in this fashion brings along the advantage that (i) the disclosing parties focus their analysis on truly relevant evidence; (ii) the confirmation of charges hearing remains focused; and (iii) the parties (and the Chamber) know of the underlying reasons for a party to rely on a particular piece of evidence. In short, the Chamber's approach minimizes any detrimental effects on the effective and timely preparation for the confirmation hearing and the Chamber's timely issuance of the article 61(7) decision pursuant to regulation 53 of the Regulations.

41. To this end, it is essential that the parties indicate in the in-depth analysis chart the relevant information *as specific as possible* by referring to the document ID number, the page, paragraph and/or lines, which provide the factual allegation contained in the evidence supporting the particular legal requirement. In addition, the Single Judge requests the parties to include in the analytical chart a hyperlink directing the reader to the relevant piece of evidence as uploaded in the electronic system of the Court.

42. The Single Judge opines that both parties, having progressively analysed and reviewed the evidence collected in this case,³⁹ with a view to be fully prepared to fulfil their duties, are in a position to provide the above information. The parties

³⁹ Pre-Trial Chamber III, "[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. 69.

are requested to update and file with each disclosure batch an analytical chart of the evidence disclosed between the parties and communicated to the Chamber. A consolidated in-depth analytical chart shall be submitted by the Prosecutor no later than 30 days prior to the commencement of the confirmation of charges hearing pursuant to rule 121(3) of the Rules; and in case she intends to present new evidence at the confirmation hearing, to provide the Defence and the Chamber with a supplement in-depth analysis chart reflecting the new evidence. The same applies to the Defence, namely to submit a consolidated analytical chart no later than 15 days before the date of the confirmation of charges hearing pursuant to rule 121(6) of the Rules.

e) Documents affected by articles 54(3)(e), 72 and 93(8) of the Statute

43. The Single Judge recalls the obligation of the Prosecutor to disclose as soon as practicable to the Defence all exculpatory evidence in her possession or control in accordance with article 67(2) of the Statute or otherwise material for the preparation of the Defence in accordance with rule 77 of the Rules. In this regard, it is the duty of the Prosecutor, in case she has received materials to be disclosed to the Defence pursuant to article 67(2) of the Statute or rule 77 of the Rules and protected under articles 54(3)(e), 72 and 93(8) of the Statute, to ensure that disclosure can take place without undue delay.⁴⁰ In this context, it is recalled that the Prosecutor assured the Single Judge during the Status Conference that the process of seeking the consent of the information providers to lift restrictions undertaken under article 54(3)(e) of the Statute is underway.⁴¹ The Single Judge acknowledges the Prosecutor's efforts and requests that the necessary consultations with the information providers to reach an agreement on a waiver of

⁴⁰ Appeals Chamber, "[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 (OA13).

⁴¹ Pre-Trial Chamber II, Transcript of Hearing, 28 January 2015, ICC-02/04-01/15-T-5-Conf-Exp-ENG, p.21, lines 16-22.

that condition be further pursued. The Prosecutor must bring these documents to the attention of the Chamber as soon as practicable.

44. Should any problem arise, the Prosecutor must also bring it to the attention of the Chamber as soon as practicable.⁴² With a view to efficiently organizing the disclosure process, the Single Judge deems it necessary that the Prosecutor submit an informative progress report on a monthly basis as to the status of documents to be disclosed and which are affected by article 54(3)(e) confidentiality agreements and said consultation process with the information providers.⁴³

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **decides** that the disclosure process between the parties shall be facilitated through the Registry;
- b) **orders** the Registry to communicate to the Chamber immediately any evidence that has already been disclosed *inter partes* in the present case;
- c) **orders** the Prosecutor to submit her views and proposals for the establishment of a calendar for disclosure with staggered deadlines for in particular the incriminating evidence on which she intends to rely at the confirmation hearing, following the Single Judge's guidelines set out in paragraph 19 of the present decision, until **Monday, 30 March 2015**;
- d) **orders** the parties submitting any evidence to present the original of the evidence as well as its electronic copy or, in case of tangible objects, the object itself together with an electronic photograph to the Registry;
- e) **orders** the parties to submit any evidence with the appropriate metadata in accordance with the e-Court protocol as set out in Annex 1 to this decision;

⁴² Appeals Chamber, "[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 of 10 June 2008"](#)", 21 October 2008, ICC-01/04-01/06-1486, paras 2 and 3.

⁴³ Pre-Trial Chamber II, "[Decision Regarding the Non-Disclosure of 116 Documents Collected Pursuant to Article 54\(3\)\(e\) of the Rome Statute](#)", 27 January 2014, ICC-01/04-02/06-229, operative part (c).

- f) **orders** the parties to submit the evidence in due time, preferably *much earlier* than the deadlines as envisaged in rule 121(3)-(6) and (9) of the Rules and according to the deadlines to be established in the disclosure calendar; and **orders** the parties to submit the evidence within official filing hours of the Registry;
- g) **decides** that, when submitting any evidence to the Registry, the parties shall provide the following accompanying documentation:
1. A list of evidence listing all pieces of evidence enclosed with their respective document ID;
 2. A list of identified recipients for each evidentiary item also reflecting the access and level of confidentiality for each item;
 3. An analysis of each piece of evidence reflecting its relevance as described in part III of this decision (see Annex 2);
- h) **decides** that a consolidated list of evidence and in-depth analysis chart shall be submitted by the Prosecutor no later than 30 days prior to the commencement of the confirmation of charges hearing pursuant to rule 121(3) of the Rules; and in case she intends to present new evidence at the confirmation hearing, to provide the Defence and the Chamber with a supplement in-depth analysis chart reflecting the new evidence;
- i) **decides** that a consolidated list of evidence and in-depth analysis chart shall be submitted by the Defence no later than 15 days prior to the commencement of the confirmation of charges hearing pursuant to rule 121(6) of the Rules;
- j) **orders** the parties to comply with the registration procedure of any evidence as described in part III of this decision;
- k) **orders** the Registrar to register electronic copies of any evidence in the record of the case and to store its original in the Registry vault;
- l) **orders** the Registrar to ensure unrestricted access to the Chamber of all evidence disclosed between the parties;

- m) orders** the Registrar to report any related practical or security concern to the Chamber as soon as identified;
- n) orders** the parties to provide the factual and legal basis for any proposal to classify (as non-public) the evidence submitted;
- o) orders** the Prosecutor to submit a progress report on the status of documents affected by article 54(3)(e) confidentiality agreements on a monthly basis, and to bring to the attention of the Chamber as soon as practicable any delays in the process of disclosure, which result from procedures concerning articles 54(3)(e), 72 and 93(8) of the Statute;
- p) rejects** the Defence request that all documents, including decisions, be translated into Acholi.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Friday, 27 February 2015

At The Hague, The Netherlands