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**International
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PRE-TRIAL CHAMBER III

Before: Judge Silvia Fernández de Gurmendi, Single Judge

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO***

Public document

Decision establishing a disclosure system and a calendar for disclosure

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

The Office of the Prosecutor
Mr Luis Moreno-Ocampo
Ms Fatou Bensouda

Counsel for the Defence
Mr Emmanuel Altit

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**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Detention Section

Victims and Witnesses Unit

Others

**Victims Participation and
Reparations Section**

I, Judge Silvia Fernández de Gurmendi, Single Judge for Pre-Trial Chamber III of the International Criminal Court (“Chamber” and “Court” respectively), responsible for carrying out the functions of the Chamber in relation to the case of *The Prosecutor v. Laurent Gbagbo* (“Case”)¹ hereby render this decision for the purpose of establishing a disclosure system as well as a calendar for disclosure.

I) Procedural History

1. On 5 December 2011, the first appearance of Mr Laurent Gbagbo was held before the Court. At the hearing, the Chamber scheduled the commencement of the confirmation hearing for 18 June 2012.²

2. On 9 December 2011, the Single Judge issued the “Decision Convening Status Conferences” in order to (i) discuss with the parties all matters which might be relevant to the disclosure process and (ii) obtain in the course of an *ex parte* hearing with the Prosecutor, the Division of Court Services and the Victims and Witnesses Unit (VWU) information on security matters and protective measures to be put in place, if necessary.³

3. During the first status conference, the Single Judge requested the parties to continue discussing the system for disclosure and redactions as well as the need for the adoption of a protocol on the handling of confidential information during investigations and contact with witnesses of the other party and to submit a “probably joint proposal by 11 January.”⁴ On 11 January 2012, the Prosecutor unilaterally filed the “Prosecution Update on Discussions with Defence

¹ Oral Decision of the Chamber, 5 December 2011, ICC-02/11-01/11-T-1-ENG, page 8.

² ICC-02/11-01/11-T-1-ENG, page 8.

³ Decision Convening Status Conferences, ICC-02/11-01/11-15.

⁴ ICC-02/11-01/11-T-3-ENG ET, page 31, lines 5-16.

Regarding Procedures for Disclosure and Redactions”⁵ (“Prosecutor Update”) whereby the Prosecutor informs the Single Judge of “the outcome of [the] discussions and the agreements reached by the Prosecutor and the Defence on the applicable system of disclosure, format of an in-depth analysis chart and the procedure when seeking redactions” and requests the Single Judge to endorse the agreed procedures.⁶

4. On 13 January 2012, the Defence filed the “*Position de la Défense du Président Gbagbo concernant les procédures de divulgation et d’expurgation*” (“Defence Request”)⁷ submitting that the content of the Prosecutor Update had not been agreed upon and that the Defence had not been informed of its filing. In particular, it contends that important points, which are essential to the conclusion of an agreement, are yet to be discussed. The Defence accordingly provides its own summary of the state of the discussion between the parties, the points of agreement and outstanding issues.

II) Preliminary remarks

5. The Single Judge has carefully reviewed the observations made by the parties at the status conference as well as in their respective written submissions.⁸

6. The Single Judge notes that the parties’ observations, discussions and efforts to reach an agreement were requested in order to facilitate the disclosure and redactions processes with a view to ensuring the expeditiousness of the proceedings. Agreement between the parties is not a prerequisite for the Single Judge to establish the applicable system.

⁵ ICC-02/11-01/11-25 and its annexes.

⁶ *Ibid.*, para.4.

⁷ ICC-02/11-01/11-27-Conf.

⁸ Defence Request, pp.3-4.

7. In light of the foregoing, the Single Judge is of the view that the Chamber has been sufficiently informed of the positions of both parties on all matters related to the disclosure and redaction systems, including the points still under discussion between the parties. Accordingly, and in order not to delay the proceedings, no further submissions are at this stage necessary to enable the Chamber to reach a decision on the matter.

8. Finally, the Single Judge notes that the Defence Request, as well as the annexes thereto, were filed as confidential. However, the Defence has failed to state the factual and legal basis for the chosen classification as required by Regulation 23 *bis* of the Regulations of the Court. Accordingly, and in light of the fact that the submissions of the Defence do not contain any sensitive information, this document should be reclassified as public. However, the annexes thereto shall remain classified as confidential as they contain the contacts details of the Prosecutor's and Defence's teams.

II) Analysis

9. The present decision aims at establishing, in light of the different precedents of the Pre-Trial Chambers of the Court as well as the parties' observations and submissions, (a) the system governing disclosure for the purpose of the confirmation of charges hearing in the present Case; (b) the time-frame for disclosure and requests for redactions; (c) the procedure related to the requests for redactions and protective measures; and (d) the registration procedure.

10. For these purposes, the Single Judge notes Articles 21, 54(3)(e), 61 (3) and (7), 67(1)(a) - (b), (2), 69(3), 72 and 93(8) of the Rome Statute ("Statute"), Rules 15, 63(1), 76-83, 121 (2-10) and 122 of the Rules of Procedure and Evidence ("Rules"),

Regulations 26 and 33 of the Regulations of the Court (“Regulations”), Regulations 15-19, 21, 24, 28 and 53(3) of the Regulations of the Registry (“RoR”) and regulations 48, 51(a) and (b), 55, 56, 58 and 59 of the Regulations of the Office of the Prosecutor.

A. The system governing disclosure for the purpose of the confirmation hearing

11. The Single Judge notes that the Pre-Trial Chambers of the Court have taken different approaches towards the disclosure process.⁹ This divergence in approach derives from a different reading of the relevant provisions as well as a different interpretation of the role of the Chamber with regard to disclosure and, more broadly, to the pre-trial proceedings.

12. At the Status Conference and in their written submissions, the parties *supported the adoption of the disclosure system* adopted by Pre-Trial Chamber I in the case of *The Prosecutor v. Bahar Idriss Abu Garda*¹⁰ (Abu Garda Case) albeit with “minor adjustments” which will be addressed where relevant.¹¹

13. The Single Judge is of the view that Pre-Trial Chamber’s I approach to the disclosure system as established in the Abu Garda Case should, to a large extent, be followed in the present Case for the reasons given below.

⁹ See, for instance, PTC II, Decision on the Evidence Disclosure System and Setting a timetable for Disclosure between the Parties, 31 July 2008, ICC-01/05-01/08-55; PTC II, Decision setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, ICC-01/09-02/11-48; PTC I, Second Decision on issues relating to Disclosure, 15 July 2009, ICC-02/05-02/09-35; PTC I, Decision on issues relating to disclosure, 29 June 2010, ICC-02/05-03/09.

¹⁰ PTC I, Second Decision on issues relating to Disclosure, 15 July 2009, ICC-02/05-02/09-35.

¹¹ Prosecutor Update, para.6; Defence Request, p.5.

14. Rule 121(2)(c) of the Rules refers to “*all evidence disclosed between the Prosecutor and the person* for the purposes of the confirmation hearing.”¹²

Accordingly the disclosure process is envisaged as being *inter partes*.

15. In relation to the evidence that must be “communicated” to the Chamber pursuant to Rule 121(2)(c) of the Rules, the Single Judge concurs with Pre-Trial Chamber I’s interpretation as recalled in the Abu Garda Case. In particular, the Single Judge endorses the view that the duty of communication to the Pre-Trial Chamber of “[a]ll evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing pursuant to Rule 121(2)(c) of the Rules” is aimed “at placing the Pre-Trial Chamber in a position to properly organize and conduct the confirmation hearing.”¹³ Accordingly, such duty of communication only entails the filing in the record of the Case of the evidence to be presented at the confirmation of charges hearing and not all the evidence disclosed *inter partes*.¹⁴

16. As a result of the above, the Prosecutor is required to file in the record of the case the following documents:

- (i) pursuant to Rule 121(3) of the Rules, a document containing a detailed description of the charges (“DCC”) together with a list of the evidence (LoE) relied upon for the purposes of the confirmation hearing;

¹² Emphasis added.

¹³ PTC I, Second Decision on issues relating to Disclosure, 15 July 2009, ICC-02/05-02/09-35, para.7.

¹⁴ PTC I, Second Decision on issues relating to Disclosure, 15 July 2009, ICC-02/05-02/09-35, para.8.

- (ii) pursuant to Rule 121(4) of the Rules, an amendment to the DCC, if any, together with a list of evidence in support of the amended charges; and
- (iii) pursuant to Rule 121(5) of the Rules, a list of new evidence, if he intends to present new evidence.

17. The Defence, should it decide to present evidence pursuant to Article 61(6) of the Statute, shall file, pursuant to Rule 121(6) of the Rules a list of that evidence.

18. Both parties must file in the record of the case the actual evidence contained in the abovementioned lists.

19. As a consequence, the parties are not requested to file in the record of the case the materials that were disclosed in the course of the *inter partes* exchanges and upon which neither of them intends to rely at the hearing. Such materials, which do not need to be filed in the record unless a party intends to rely on them at the hearing, may also include materials that (i) the Prosecutor is under an obligation to disclose to the Defence pursuant to Article 67(2) of the Statute as such evidence “shows or tends to show the innocence of the accused, or mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence;” or (ii) the Prosecutor is, pursuant to Rule 77 of the Rules, under an obligation to permit the Defence to inspect as they are material to the preparation of the Defence or were obtained from or belonged to the person.

20. The Single Judge is of the view that the approach, as outlined above, complies with the limited scope of the confirmation of charges proceedings. Pursuant to Article 61(7) of the Statute, the Chamber’s duty is only to determine

“whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged” and not, as is the task of the Trial Chamber pursuant to Article 66(3) of the Statute, to determine whether the accused is guilty beyond reasonable doubt.

21. Nonetheless, the Single Judge recalls that it is her duty, pursuant to Rule 121(2)(b) of the Rules, to ensure that disclosure takes place under satisfactory conditions and that, in accordance with Article 67(1)(a) and (b) of the Statute, the suspect is informed promptly and in detail of the nature, cause and content of the charges against him and has adequate time and facilities for the preparation of his defence.

22. To that end, the Single Judge orders the parties to file the following additional documents in the record of the Case:

1. Disclosure Note

23. As advocated by the parties and following PTC I’s practice¹⁵ the Prosecutor should file in the record of the case a disclosure note following any act of disclosure of material under Article 67(2) of the Statute. As a record of the *inter partes* exchanges, each disclosure note shall be signed by both parties and shall contain a list of the items disclosed. Such list shall include for each item:

- (i) the reference number (document ID/ERN);
- (ii) the date of the item as well as the date of its disclosure;
- (iii) the type of item;

¹⁵ Prosecutor Update, para.8 ; Defence Request, p.5.

(iv) the title of the item; and

(v) the number of pages of the item.

24. Furthermore, in order to facilitate the Defence's assessment of the materials disclosed pursuant to Article 67(2) of the Statute and to ensure that the Defence has adequate time and facilities for the preparation of its case, the Prosecutor shall also include in the disclosure note (i) a concise summary of the content of each item and (ii) an explanation of the relevance of such item as potentially exculpatory.

25. The Prosecutor shall also highlight in each item disclosed the relevant portions that he believes fall within the ambit of Article 67(2) of the Statute.

2. Pre-Inspection Report

26. In relation to materials covered by Rule 77 of the Rules, the Prosecutor shall file in the record of the case a pre-inspection report. This report shall contain a list of the items submitted to the Defence which shall include:

(i) the reference number (document ID/ERN);

(ii) the date of the item as well as the date of its inspection;

(iii) the type of item;

(iv) the title of the item; and

(v) the number of pages of the item.

27. In relation to those items which are material to the preparation of the defence, the Prosecutor shall also include in the pre-inspection report:

- (i) a concise summary of the content of such items;
- (ii) an explanation of the relevance of such items for the preparation of the defence; and
- (iii) highlighting of the relevant portion(s) that he believes are material to the preparation of the Defence.

3. Inspection Report

28. The Single Judge is of the view that in order to ensure that disclosure takes place under satisfactory conditions, an inspection report shall also be filed by the Prosecutor in the record of the case following any act of inspection of the originals of the documents identified by the Defence. The inspection report shall be signed by both parties and include a list of the items inspected and their reference numbers. In addition, it shall contain a brief account of how and when the inspection took place and whether and when the Defence received the copies requested during the inspection.

4. A consolidated Element Based Chart.

29. The format and purpose of this Chart is further discussed in Section B below.

5. Reports on documents covered by Articles 54(3)(e), 72 or 93(8) of the Statute

30. Pursuant to Article 67(2) of the Statute and Rule 77 of the Rules, the Prosecutor is under an obligation to disclose or permit the inspection to the Defence as soon as practicable of all exculpatory evidence in his possession or of items otherwise material to the preparation of the Defence. Thus, it is also the duty of the Prosecutor to take measures to ensure the disclosure of such documents to the Defence when such documents are subject to Articles 54(3)(e), 72 or 93(8) of the Statute.

31. During the status conference, the Prosecutor indicated that he “did not provide any guarantee under Article 54(3)(e) of the Statute.”¹⁶ Accordingly, he had not obtained, at that stage, documents pursuant to Article 54(3)(e) of the Statute containing exculpatory material.

32. Whilst taking note of the Prosecutor statement, the Single Judge also notes the Prosecutor’s statement that his investigations are still ongoing.¹⁷ Accordingly, in the event that, in the course of his investigations, the Prosecutor obtains documents subject to Articles 54(3)(e), 72 or 93(8) of the Statute which contain potentially exculpatory materials, he must: (i) enter into contact with the document provider as soon as practicable in order to seek its consent for the document’s disclosure and (ii) inform the Chamber as soon as practicable of the existence of such document through a report which shall also contain information as to the actions taken with the information provider.

¹⁶ ICC-02/11-01/11-T-3-ENG ET, p.24.

¹⁷ ICC-02/11-01/11-T-3-ENG ET, p.13.

B. Format and time frame for disclosure

1. Disclosure by the Prosecutor

- (i) *the filing of the detailed description of the charges together with a list of the evidence and element based chart*

33. The parties concur with the adoption of what they called an “In-Depth Analysis Chart” or “IDAC”.¹⁸ The Single Judge notes that such IDAC is similar to the model of the LoE followed in the cases before Pre-Trial Chamber I, albeit with a few additions, and will accordingly be referred to by the Single Judge as the LoE instead of an in-depth analysis chart or IDAC.

34. In particular, the parties submit that the LoE should be “fact-based” and should include the following information: (i) “factual statement, derived from the Document Containing the Charges”; (ii) “document ID or ERN”; (iii) “title of the document”; (iv) “document type”; (v) “date of the document”; (vi) “relevant excerpts of the document”; and (vii) “elements of the charges to which the document pertains”.¹⁹ Furthermore, the parties agreed on the filing of an additional chart which will be based on the constituent elements of the crimes charged.²⁰ The Single Judge will refer to the latter document as an element based chart.

35. The Prosecutor states that since the LoE and the additional element based chart are both based on the facts set out in the DCC, he should provide them pursuant to Rule 121(3) of the Rules, at the latest 30 days prior to the date of the

¹⁸ Prosecutor Update, paras 11-14; Defence Request, pp.7-8, 12, 14.

¹⁹ Prosecutor Update, para.12. See also Defence Request, p.5.

²⁰ Prosecutor Update, para.12. See also Defence Request, p.5.

confirmation hearing.²¹ The Defence requests that provisional DCCs be filed by the Prosecutor during the disclosure process in order to be in a position to adapt to the charges to be brought by the Prosecutor.²² The Defence suggests that such temporary DCCs could be filed every two months.²³ The Defence further requests that each batch of incriminating evidence be disclosed by the Prosecutor together with a LoE as hereinbefore described and that a compiled version of the LoE be disclosed as soon as possible and no later than 30 days before the date of the confirmation hearing.²⁴

36. The Single Judge notes that Article 61(3) of the Statute states that “within a reasonable time before the hearing, the person shall (a) be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and (b) be informed of the evidence on which the Prosecutor intends to rely at the hearing.” In this respect, Rule 121(3) of the Rules provides that the Prosecutor shall provide to the Chamber and the Defence “no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which [he] intends to present at the hearing.” Therefore and in light of Regulation 33 of the Regulations, the Prosecutor shall provide the DCC and the LoE and a consolidated element based chart no later than 16 May 2012.

37. However, the Single Judge would like to emphasize that, as stated by Pre-Trial Chamber II, while Rule 121(3) of the Rules allows the Prosecutor to file the DCC and LoE on the 30th day preceding the start of the confirmation hearing, this is “only indicative of the minimum time-limits that a party can avail itself to

²¹ Prosecutor Update, para.14.

²² Defence Request, p.6.

²³ Defence Request, p.6.

²⁴ Defence Request, p.7.

comply with its disclosure obligations.”²⁵ Furthermore, such provision should be read in conjunction with and subject to Articles 61 and 67 of the Statute. Article 61 of the Statute allows the suspect to object to the charges, challenge the evidence presented by the Prosecutor and to present evidence. Article 67 (1) of the Statute²⁶ sets out as minimum guarantees the right of the suspect to be “informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks” and “to have adequate time” for the preparation of the defence.

38. In light of the foregoing the Prosecutor is encouraged to fulfil his disclosure obligations as soon as practicable without waiting for the statutory deadlines to expire.²⁷ In this respect, the Single Judge notes that during the status conference, the Prosecutor indicated that by “late March or early April [he] should have a much better idea of how many documents [he is] intending to use.”²⁸ The Single Judge is nonetheless of the view that different dead-lines could be set depending on the date on which evidence is collected by the Prosecutor. As highlighted by Pre-Trial Chamber II:

“the Prosecutor is the triggering force of the proceedings, in the sense that the determination as to whether, and when, an application for a warrant of arrest or a summons to appear is to be filed before the Chamber falls squarely within his prerogatives. The Single Judge thus expects that, before approaching the Chamber with his application for summonses to appear [...] the Prosecutor has carefully reviewed the evidence in his possession at that time, both incriminating and exculpatory. Furthermore,

²⁵ PTC II, Decision setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, ICC-01/09-02/11-48.

²⁶ Pursuant to rule 121 (1) of the Rules, the person shall as of her or his first appearance before a Pre-trial Chamber enjoy the rights set forth in article 67 of the Statute.

²⁷ See also PTC II, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, ICC-01/09-02/11-48, para.11.

²⁸ ICC-02/11-01/11-T-3-ENG, page 14, lines 11-18.

this material has been in his domain for sufficient time for him to be able to disclose to the Defence or to request for redactions, if need be, within a short period of time.”²⁹

39. Accordingly, in the view of the Single Judge, the Prosecutor shall disclose to the Defence (i) as soon as practicable and no later than 3 February 2012 any evidence on which he intends to rely on at the confirmation hearing which was collected prior to and used in support of his application pursuant to Article 58 of the Statute (i.e. 25 October 2011) and in relation to which no protective measures are required; (ii) as soon as practicable and no later than 10 February 2012 any evidence on which he intends to rely on at the confirmation hearing which was collected between the 25 October 2011 and the filing of the present decision and in relation to which no protective measures are required and (iii) as soon as practicable, on a rolling basis, and no later than 30 days prior to the date of the confirmation hearing any evidence collected after the filing of the present decision, subject to any further decision of the Chamber setting more specific dead-lines.

40. The Single Judge further considers that in order to place the Defence in a position to adequately prepare for the confirmation hearing:

- (i) each batch of incriminating evidence shall be disclosed to the Defence together with a chart organising each item in light of the constituent element of the relevant crimes (Element Based Chart) as laid down in Annex III to the present decision;

²⁹ PTC 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-01/09-02/11-64, para.17.

- (ii) once all incriminating evidence has been disclosed and the DCC and the LoE have been filed, the Prosecutor shall file in the record of the case a consolidated version of the Element Based Chart with any amendments or additions as may be necessary in light of the filed DCC and LoE.³⁰

41. In light of the abovementioned, the Single Judge is of the view that the additional filing of provisional DCCs, as requested by the Defence, is not necessary.

- (ii) *The disclosure of the statements upon which the Prosecutor intends to rely at the confirmation hearing*

42. During the status conference, the Prosecutor stated that he does not intend to call live witnesses at the confirmation hearing. He further informed the Chamber that he intends to rely on the written statements of at least ten witnesses³¹ of two following kinds: (i) witnesses under Article 55(2) of the Statute and Rule 112 of the Rules for which there will be transcripts of interviews representing between 250 and 300 pages per interview and (ii) statements under Rule 111 of the Rules of witnesses who were not informed of their rights and whose written statements have on average between 20 and 35 pages.³²

43. In this regard, the Single Judge recalls that the Prosecutor is under an obligation, pursuant to Rule 76(1) of the Rules, to provide the Defence with the

³⁰ For instance, items that were disclosed during the *inter partes* exchanges and which will not be presented at the hearing and thus are not in the LoE filed along the DCC, will need to be struck out of the consolidated Element Based List.

³¹ ICC-02/11-01/11-T-3-ENG, pp.18-19

³² ICC-02/01-01/11-T-3-ENG, pp. 18-19.

names of his witnesses, regardless of whether he intends to call them to testify,³³ subject to any protective measures, and copies of their statements “sufficiently in advance to enable the adequate preparation of the defence.” Likewise, Rule 76(2) of the Rules requires the Prosecutor, subject to any protective measures, to “subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements.” The Single Judge further recalls that, pursuant to Rule 76(3) of the Rules, these statements “shall be made available in original and in a language which the accused fully understands and speaks.” Accordingly, the Prosecutor shall provide Mr Gbagbo with French³⁴ versions of the statements of the prosecution witnesses intended to be relied upon at the confirmation hearing pursuant to the general system of disclosure of incriminating evidence, including the deadlines as set out in paragraphs 39 and 52 of the present decision.

2. Disclosure by the Defence

44. Rule 121(6) of the Rules directs the Defence to file its List of Evidence, if any, no later than 15 days before the confirmation hearing.

45. In light of Regulation 33 of the Regulations, in order to comply with Rule 121 (3) of the Rules, the Defence shall submit its LoE no later than 1 June 2012.

46. Pursuant to Rule 78 of the Rules, the Defence shall also permit the Prosecutor to inspect any books, documents, photographs and other tangible

³³ See for instance, PTC I, Decision on the Final System of Disclosure and the Establishment of a Time Table, 15 May 2006, ICC-01/04-01/06-102, paras 93-106.

³⁴ ICC-02/11-01/11-T-1-ENG, page 3, lines 2-8.

objects in its possession or control which are intended for use for the purposes of the confirmation hearing.

47. Furthermore, pursuant to Rule 79 of the Rules, the Defence shall notify the Prosecutor sufficiently in advance of its intent to raise the existence of an alibi or to raise a ground for excluding criminal responsibility.

C. Procedure related to requests for redactions and other protective measures

1. Procedure related to requests for redactions

48. The Single Judge notes that the parties have agreed on a simplified procedure for the redaction of items falling within the ambit of Article 67(2) of the Statute or Rule 77 of the Rules in accordance with which redactions “can be implemented without seeking authorisation from the Chamber” and that “[o]nce disclosed, the Defence may seek further information from the Prosecution regarding the redactions.”³⁵ It is further submitted that if thereafter the Defence “disagrees with a redaction, it may seek a ruling from the Chamber to lift the redaction.”³⁶ With respect to incriminating evidence, both parties submit that the Prosecutor shall request authorisation from the Chamber on a case-by-case basis to redact information.³⁷ The Defence further envisaged the application of the

³⁵ Prosecutor Update, para.15. See also Defence Request, page 5.

³⁶ Prosecutor Update, para.15. See also Defence Request, page 5.

³⁷ Prosecutor Update, para.16. See also Defence Request, pp. 11-12, 14-15.

simplified regime to the incriminating evidence depending on how the process goes.³⁸

(i) *Redactions to items covered by Article 67(2) of the Statute and Rule 77 of the Rules*

49. The Single Judge notes that the simplified regime outlined above for items under Article 67(2) of the Statute or Rule 77 of the Rules has already been applied by Pre-Trial Chamber I in the case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo* ("Katanga and Ngudjolo Case").³⁹

50. In that case, Pre-Trial Chamber I held that:

"the system proposed by the Prosecution also allows for the proper protection of the rights of the Defence insofar as: (i) the Prosecution does not intend to rely on any of the abovementioned documents, (ii) the disclosure process is an *inter partes process*; and (iii) the system proposed by the Prosecution would permit the Defence to request from the Single Judge the lifting of redactions prior to the commencement of the confirmation hearing. [...] Under these circumstances, and in light of the number of documents involved and the time and resources that are necessary to justify redactions in application of the case law of the Appeals Chamber, the Single Judge considers appropriate to adopt the new practice proposed by the Prosecution. The Single Judge reaches this conclusion in light of the need to expedite the proceedings leading to the confirmation hearing [...] and in order to respect the rights of the suspects to the holding of the confirmation hearing within a reasonable period of time after their transfer to the seat of the Court in The Hague"⁴⁰

51. The Single Judge concurs with the approach of Pre-Trial Chamber I in the Katanga and Ngudjolo Case. Accordingly, the Prosecutor shall directly disclose

³⁸ Defence Request, pp.5-6 and 11.

³⁹ PTCL, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 25 April 2008, ICC-01/04-01/07-428-Corr.

⁴⁰ *Ibid.*, paras 143-144.

to the Defence, with the redactions that the Prosecutor considers necessary and without prior authorisation from the Single Judge, items covered by Article 67(2) of the Statute or Rule 77 of the Rules and on which he does not intend to rely for the purposes of the confirmation hearing. In case of disagreement the Defence shall first seek, as soon as practicable, further explanations and the lifting of the redaction from the Prosecutor. If the disagreement persists, the Defence may seek a ruling from the Single Judge, no later than 5 days after the Prosecutor's response and, in any event, no later than 21 days before the date of the confirmation hearing.

(ii) *Redactions to Incriminating evidence*

52. In order to ensure that the disclosure process takes place under satisfactory conditions and within the statutory time frame, it is of the utmost importance that requests pursuant to Rule 81 of the Rules are made as soon as practicable. As stated in paragraph 39 of the present decision, the Single Judge is of the view that a distinction should be made depending on the date on which a piece of evidence has been collected by the Prosecutor. In particular, any request to redact incriminating evidence on which he intends to rely on at the confirmation hearing and which was collected prior to 25 October 2011 shall be submitted to the Single Judge no later than 10 February 2012. Any request for redactions to incriminating evidence collected between 25 October 2011 and 15 February 2012 shall be submitted to the Chamber no later than 9 March 2012. Finally, any additional requests for redaction of evidence collected after 15 February 2012 shall be submitted to the Single Judge no later than 60 days prior to the date of the confirmation hearing. The Single Judge underlines that the Prosecutor should not wait for the expiration of these deadlines but should submit his requests for authorization of redactions as soon as practicable after he

has collected the evidence concerned in order to contribute to the expeditiousness of the proceedings.

53. The Defence has requested access to the reasons underlying the Prosecutor's requests for redactions to the Chamber.⁴¹

54. The Single Judge is of the view that disclosing to the Defence all the factual motivation for the Prosecutor's requests for redactions may defeat the purpose of these requests. In this respect, the Single Judge recalls that Rule 81(2) of the Rules, for instance, provides that the Prosecutor's requests to redact information when its disclosure may prejudice further or ongoing investigations shall be heard on an *ex parte* basis.

55. The Single Judge is nonetheless of the view that the Prosecutor should inform the Defence of the existence of such requests and of the underlying legal and factual basis of his requests for redactions to the largest extent possible. However, with respect to the request itself and its annexes, they shall be filed as *ex parte* and shall include a chart containing all the relevant legal and factual information necessary to allow a determination by the Single Judge in compliance with the Appeals Chamber's guidelines⁴² (as laid down in Annex 4 to the Prosecutor Update).

56. In addition, the Single Judge recalls that, in accordance with the Appeals Chamber judgment of 14 December 2006 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, the *ex parte* character of the proceedings itself does not reduce the need for a properly reasoned decision but makes the provision of proper

⁴¹ Defence Request, page 11.

⁴² ICC-01/04-01/06-568; ICC-01/04-01/06-773; ICC-01/04-01/07-475; ICC-01/04-01/07-521. See also Pre-Trial Chamber I, ICC-01/04-01/07-568.

reasoning more necessary because the other party cannot rely on the context in which the said decision was made.⁴³ The Appeals Chamber further held that “[i]f the provision of the full reasoning would have led to the identification of the witness in question or would otherwise have disclosed information that needed to be protected, the Pre-Trial Chamber could have considered whether the full reasoning should be provided in a decision marked confidential and *ex parte*, Prosecutor only, with a separate redacted version made available to the Defence.”⁴⁴ Accordingly, the Defence will be provided with all relevant information on the basis of which the Single Judge reached a decision on the Prosecutor’s requests for redactions, to the extent that such information does not lead to the disclosure of information that must be protected.

57. The Single Judge recalls, with respect to any material which does not need to be redacted prior to disclosure, that the Prosecutor must disclose this material to the Defence as soon as practicable and in accordance with the deadlines set out in paragraph 39 above.

2. Procedure related to other protective measures

58. With respect to *ex parte* applications for protective measures other than redactions to be put in place for some of the witnesses, the Single Judge is of the view that these *ex parte* applications, if any, shall be made as expeditiously as possible and before 5 March 2012 bearing in mind the date set for the confirmation hearing.

⁴³ Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, 14 December 2006, ICC-01/04-01/09-773 OA5, para.22

⁴⁴ *Ibid.*

59. Finally, the Single Judge notes that the parties have submitted that they are still discussing the protocol regulating the use of confidential information during investigations and contact with witnesses of the other party.⁴⁵ According to the Defence, the Prosecutor intended to submit to the Defence a draft proposal of such protocol.⁴⁶ In light of the date set for the confirmation hearing and the commencement of the disclosure process, the Single Judge is of the view that this issue should be dealt with as soon as practicable. Accordingly, the parties shall conclude their discussions and file a joint proposal for a protocol on the handling of confidential information in the course of their investigations and contact with witnesses of the other party or to file, in the absence of any agreement, observations on that matter at the latest on Friday, 3 February 2012.

D. The registration procedure

60. Rules 15 and 121(10) of the Rules entrust the Registry with the responsibility of creating and maintaining a full and accurate record of all proceedings before the Chamber, including the evidence exchanged between the parties pursuant to Rule 121 of the Rules. In compliance with regulations 15 to 19, 25 to 28 and 53(3) of the RoR, the Registry further manages the access to and storage of the documents of the proceedings, including the registration of the evidence exchanged between the parties.

61. Accordingly, the disclosure process as described above shall be facilitated through the Registry.

⁴⁵ Prosecutor Update, para.5. See also Defence Request, page 5.

⁴⁶ Defence Request, page 6.

62. The Single Judge would like to emphasise that, to enable the Registry to discharge its duty in an efficient manner, it is of paramount importance that the parties provide the Registry with all relevant information. In this regard, the parties shall at all times comply with the e-Court Protocol (see Annex 1) and shall also submit to the Registry, in compliance with Regulation 53(3) of the RoR, the original form of evidence as well as a corresponding electronic copy of it. If the evidence is a tangible object, such evidence shall be submitted in the form of an electronic photograph.

FOR THESE REASONS THE SINGLE JUDGE HEREBY

DECIDES that disclosure for the purpose of the confirmation hearing in the present Case shall be governed by the system as set out in Section II) A of the present decision and shall be facilitated through the Registry;

ORDERS the parties to submit any evidence to the Registry with the appropriate metadata in accordance with the annexed e-Court Protocol (Annex I);

ORDERS the parties to file with the Registry:

- (i) the originals of all evidence for which no redactions pursuant to Rule 81 of the Rules are needed, as public or as confidential, if the parties had requested that it remains confidential;

- (ii) the originals of all evidence for which redactions pursuant to Rule 81 of the Rules are necessary, as *ex parte*;
- (iii) the authorised redacted version of the evidence, as public or as confidential, if the parties had requested that it remains confidential; and
- (iv) an electronic copy of the original and of the authorised redacted version of the evidence, if any, or, in case of a tangible object, its electronic photograph including the details required under the e-Court Protocol, with the appropriate level of confidentiality as set out above;

ORDERS that, when disclosing evidence under Article 67(2) of the Statute, the Prosecutor shall file in the record of the case a disclosure note, signed by both parties, and containing a list of the material disclosed which includes in relation to each item:

- (i) the reference number (document ID/ERN);
- (ii) the date of the item as well as the date of its disclosure;
- (iii) the type of item;
- (iv) the title of the item;
- (v) the number of pages of the item;
- (vi) a concise summary of the content of each item; and

- (vii) an explanation of the relevance of such item as potentially exculpatory.

FURTHER ORDERS the Prosecutor to highlight in each of the items disclosed the relevant portions that he believes fall within the ambit of Article 67(2) of the Statute;

ORDERS the Prosecutor to permit, pursuant to Rule 77 of the Rules, the Defence to inspect, starting as soon as practicable, at a location, time and in a manner agreed by the parties, any books, documents, photographs and other tangible objects in its possession or control which are material to the preparation of the defence, or intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing, or were obtained from or belonged to the person;

ORDERS the Prosecutor to file in the record of the case pre-inspection reports containing a list of the items submitted to the Defence and their reference numbers; and, in relation to those items which are material to the preparation of the defence, to further include in the pre- inspection reports:

- (i) the date of each item as well as the date of its inspection;
- (ii) the type of each item;
- (iii) the title of each item;
- (iv) the number of pages of each item;
- (v) a concise summary of the content of such items; and

- (vi) an explanation of the relevance of such items for the preparation of the defence;

FURTHER ORDERS the Prosecutor to highlight in each of the items disclosed the relevant portions that he believes fall within the ambit of Rule 77 of the Rules;

ORDERS the Prosecutor to provide the Defence, at its request during inspection, with electronic copies or electronic photographs, in the case of tangible objects, of all evidence or material subject to inspection;

ORDERS the Prosecutor, following any act of inspection, to file in the record of the case an inspection report signed by both parties and including:

- (i) a list of the items inspected and their reference numbers; and
- (ii) a brief account of how and when the act of inspection took place and whether and when the Defence received the copies which it requested during the inspection;

ORDERS the Prosecutor to inform the Chamber as soon as practicable of the existence of documents subject to Articles 54(3)(e), 72 or 93(8) of the Statute and containing information falling within Article 67(2) of the Statute or Rule 77 of the Rules, through a report which shall contain information as to the actions taken with the source provider;

ORDERS the Prosecutor to disclose to the Defence:

- (i) as soon as practicable and no later than 3 February 2012, any evidence on which he intends to rely at the confirmation hearing which was collected before 25 October 2011 and for which no protective measures are required;
- (ii) as soon as practicable and no later than 10 February 2012, any evidence on which he intends to rely at the confirmation hearing which was collected between 25 October 2011 and the filing of the present decision and for which no protective measures are required;
- (iii) as soon as practicable and no later than 16 May 2012, any evidence on which he intends to rely at the confirmation hearing which was collected after the filing of the present decision, subject to any further decision of the Chamber setting more specific dead-lines;

FURTHER ORDERS the Prosecutor to submit to the Chamber:

- (i) as soon as practicable and no later than 10 February 2012, any request for redactions of evidence on which he intends to rely at the confirmation hearing and which was collected before 25 October 2011;
- (ii) as soon as practicable and no later than 9 March 2012, any request for redactions of evidence on which he intends to rely at

the confirmation hearing and which was collected between 25 October 2011 and 15 February 2012;

- (iii) as soon as practicable and no later than 19 April 2012, any additional requests for redactions, subject to any further decision of the Chamber setting more specific deadlines;

ORDERS the Prosecutor to disclose to the Defence any evidence for which redactions will be requested as soon as practicable and no later than 5 days after the Chamber's ruling on the Prosecutor's requests for redactions;

ORDERS the Prosecutor to make *ex parte* applications for protective measures other than redactions, if any, as expeditiously as possible and no later than 5 March 2012;

ORDERS the Prosecutor, pursuant to Rule 76 of the Rules, to disclose to the Defence, as soon as practicable and within the abovementioned relevant deadlines, in original and in a language Mr Laurent Gbagbo fully understands and speaks, the names and the statements of the witnesses – with authorized redactions pursuant to Rule 81 of the Rules, if any – on which it intends to rely at the confirmation hearing, regardless of whether the Prosecutor intends to call them to testify;

ORDERS the Prosecutor to disclose each batch of incriminating evidence with an Element Based Chart as set out in Annex III to the present decision and, once all incriminating evidence has been disclosed and the DCC and the LoE have been filed in the record of the case, to file in the record of the case a consolidated version of this list with any amendments deemed necessary in light of the filed DCC and LoE;

ORDERS the Prosecutor to file in the record of the Case, by 16 May 2012, his DCC and the LoE, in a language which Mr Gbagbo fully understands and speaks. In so doing and as set out in Annex II, the Prosecutor shall further organise the LoE in such manner that:

- (i) each item of evidence is linked to the factual statement it is intended to prove;
- (ii) for each item of evidence, its document ID/ERN; title; document type and relevant excerpts shall be included; and
- (iii) each factual statement is linked to a specific element of crime, a mode of liability, or both;

ORDERS the Defence:

- (i) pursuant to Rule 78 of the Rules, to permit, as soon as practicable and no later than 1 June 2012, the Prosecutor to inspect any books, documents, photographs and other tangible object in its possession or control which are intended for use for the purposes of the confirmation hearing at a location and time and in a manner agreed by the parties;

- (ii) to provide to the Prosecutor, at his request during inspection, electronic copies or electronic photographs, in the case of tangible objects, of all evidence or material subject to inspection;

ORDERS the Defence in the event it intends to raise the existence of an alibi or to raise a ground for excluding criminal responsibility, pursuant to Rule 79 of the Rules, to notify the Prosecutor no later than 28 May 2012;

ORDERS the Defence:

- (i) to submit no later than 10 May 2012 any request under Rule 81 of the Rules for redactions to evidence collected by the Defence;
- (ii) to make *ex parte* applications for protective measures other than redactions as expeditiously as possible but no later than 5 March 2012; and
- (iii) to submit to the Prosecutor any request for the lifting of redactions to materials covered by Article 67(2) of the Statute or Rule 77 of the Rules, if any, as soon as practicable following the disclosure of the materials;
- (iv) to submit its requests, if any, for a ruling of the Single Judge on any disagreement with the Prosecutor on the lifting of redactions applied to materials covered by Article 67(2) of the Statute or Rule 77 of the Rules no later than 5 days after the Prosecutor's response

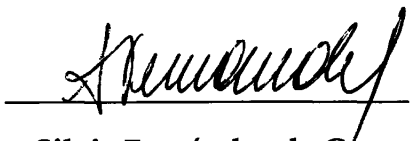
thereon and in any case, no later than 21 days before the date of the confirmation hearing;

ORDERS the Defence to file in the record of the Case no later than 1 June 2012 the Defence List of Evidence, if any, to be presented at the confirmation hearing;

DECIDES to reclassify the Defence Request (ICC-02/11-01/11-27-Conf) as public and to maintain the current level of confidentiality of annexes thereto; and

ORDERS the parties to file a joint proposal for a protocol on the handling of confidential information in the course of their investigations and contact with witnesses of the other party or to file, in the absence of any agreement, observations on that matter at the latest on Friday, 3 February 2012;

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



Judge Silvia Fernández de Gurmendi

Single Judge

Dated this Tuesday 24 January 2012

At The Hague, The Netherlands