

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04-02/06

Date: 12 April 2013

**PRE-TRIAL CHAMBER II**

**Before: Judge Ekaterina Trendafilova, Single Judge**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF  
*THE PROSECUTOR v. BOSCO NTAGANDA***

**Public  
URGENT**

**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

**Counsel for the Defence**  
Marc Desalliers

**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

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**Registrar**  
Silvana Arbia

**Deputy Registrar**  
Didier Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**PRE-TRIAL CHAMBER II** (the “Chamber”) of the International Criminal Court (the “Court”) 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 22 August 2006, Pre-Trial Chamber I, to which this case had originally been assigned, issued the “Decision on the Prosecution Application for a Warrant of Arrest”,<sup>1</sup> along with a corresponding warrant of arrest for Bosco Ntaganda (“Mr. Ntaganda”),<sup>2</sup> for his alleged responsibility for the war crimes of conscripting, enlisting children under the age of fifteen and using them to participate actively in hostilities under either article 8(2)(b)(xxvi) or article 8(2)(e)(vii) of the Rome Statute (the “Statute”).
2. On 15 March 2012, the Presidency re-assigned the situation in the Democratic Republic of the Congo to Pre-Trial Chamber II.<sup>3</sup>
3. On 13 July 2012, the Chamber issued its “Decision on the Prosecutor’s Application under Article 58”.<sup>4</sup> In this decision the Chamber issued a second warrant of arrest against Mr. Ntaganda for his alleged responsibility for the crimes against humanity of murder, rape/sexual slavery and persecution based on ethnic grounds under articles 7(1)(a), 7(1)(g) and 7(1)(h) of the Statute; and the war crimes of murder, intentional

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<sup>1</sup> Pre-Trial Chamber I, “Decision on the Prosecution Application for a Warrant of Arrest”, 22 August 2006, ICC-01/04-02/06-1-US-Exp-tEN; and redacted version, 6 March 2007, ICC-01/04-02/06-1- Red-tENG.

<sup>2</sup> Pre-Trial Chamber I, “Warrant of Arrest – Corrigendum”, 7 March 2007, ICC-01/04-02/06-2-Corr-tENG-Red.

<sup>3</sup> Presidency, “Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d’Ivoire situations”, ICC-01/04-02/06-32.

<sup>4</sup> Pre-Trial Chamber II, “Decision on the Prosecutor’s Application under Article 58”, 13 July 2012, ICC-01/04-02/06-36-Conf-Exp; and public redacted version, 13 July 2012, ICC-01/04-02/06-36-Red.

attacks against civilians, pillaging and rape/sexual slavery under articles 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(v) and 8(2)(e)(vi) of the Statute .<sup>5</sup>

4. On 22 March 2013, the Single Judge<sup>6</sup> issued the “Decision on Setting the Date for the Initial Appearance and Related Issues”, in which it, *inter alia*, noted Mr. Ntaganda’s voluntary surrender to the Court<sup>7</sup> and decided to convene a hearing for his initial appearance on 26 March 2013.<sup>8</sup>

5. On 26 March 2013, before the closure of the hearing on the initial appearance the Single Judge issued an oral decision convening a status conference on Monday 15 April 2013, for the purpose of discussing “issues related to the disclosure of evidence” (the “Oral Decision”).<sup>9</sup>

## II. APPLICABLE LAW

6. 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 Statute, rules 15, 63(1), 76-83, 121 and 122 of the Rules of Procedure and Evidence (the “Rules”), regulation 26 of the Regulations of the Court, 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**

7. 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

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<sup>5</sup> Pre-Trial Chamber II, “Decision on the Prosecutor’s Application under Article 58”, 13 July 2012, ICC-01/04-02/06-36-Conf-Exp, p. 37; and public redacted version, 13 July 2012, ICC-01/04-02/06-36-Red, p. 37.

<sup>6</sup> Pre-Trial Chamber II, “Decision Designating a Single Judge”; 21 March, ICC-01/04-02/06-40.

<sup>7</sup> Pre-Trial Chamber II, ICC-01/04-02/06-41, p. 4.

<sup>8</sup> *Ibid.*, p. 5.

<sup>9</sup> Pre-Trial Chamber II, Transcript of Hearing, 26 March 2013, ICC-01/04-02/06-T-2-ENG ET, p. 12, lines 11-13.

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.

8. In this regard, 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 the purposes of the confirmation hearing (the “31 July 2008 Decision”).<sup>10</sup> The Single Judge also recalls the two decisions of 6 April 2011 in the cases of the *Prosecutor v. William Ruto et al.*,<sup>11</sup> and the *Prosecutor v. Francis Muthaura et al.*<sup>12</sup> (the “6 April 2011 Decisions”), in which the principles underlying the disclosure of evidence between the parties were recalled and further developed on the basis of the 31 July 2008 Decision. The Chamber has no reason to depart from the principles laid down in the 31 July 2008 Decision and the 6 April 2011 Decisions. Accordingly, the Single Judge shall apply these principles in the present case.

9. As stated in the 31 July 2008 Decision and reiterated in the 6 April 2011 Decisions, 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

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<sup>10</sup> 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.

<sup>11</sup> Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, 6 April 2011, ICC-01/09-01/11-44.

<sup>12</sup> Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, 6 April 2011, ICC-01/09-02/11-48.

position to take an informed decision in accordance with its statutory mandate under article 61(7) of the Statute.<sup>13</sup>

10. 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 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”.

11. 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.<sup>14</sup>

12. 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

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<sup>13</sup> 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.

<sup>14</sup> 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. 34.

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 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.

13. 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.

14. 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.

15. 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.

16. In this respect, it should be noted 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. In this regard, 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”<sup>15</sup> 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 fulfill their disclosure obligations as soon as practicable and not only on the date when the deadline indicated by the statutory documents expires.

17. 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

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<sup>15</sup> 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.



evidence comes into the Prosecutor's possession. Therefore, the Prosecutor shall disclose such evidence, unless some justifiable reasons prevent her from doing so. 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. For the purposes of both incriminating and exonerating evidence, the Single Judge will establish in due course, after the status conference of 15 April 2013, a disclosure calendar for the parties.

19. Finally, all evidence disclosed by both parties for the purposes of the confirmation hearing and contained in the record of the case shall be presented to the Chamber at the confirmation hearing as determined by the Presiding Judge in accordance with rule 122(1) of the Rules.

20. As to the different requests concerning protective measures for witnesses including redactions, the Single Judge wishes to make clear 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.<sup>16</sup> The Single Judge will apply the modalities of disclosure of evidence and communication of that evidence to the Chamber as laid down in the 31 July 2008 Decision and 6 April 2011 Decisions.

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

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<sup>16</sup> 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.

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 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 be assigned with an independent "EVD number". Evidence shall be submitted by the parties in its original form and a corresponding electronic copy. In case of tangible objects, evidence shall be submitted in the form of an electronic photograph.

24. Unless a party raises an objection against the authenticity of a piece of evidence,<sup>17</sup> the Registry shall not conduct an authentication process confirming that the electronic copy is an exact replica of the original piece of evidence.

25. In case a piece of evidence or part of it needs to be replaced in the record of the case upon an objection, the document shall be provided in accordance with the e-Court protocol (see Annex 1).

26. 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 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).

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<sup>17</sup> 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.

27. 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.

28. 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.

**c) Required analysis of the evidence exchanged between the parties**

29. The Single Judge recalls the earlier findings in the 31 July 2008 Decision and reiterated in the 6 April 2011 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 – page by page or, where required, paragraph by paragraph – 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.<sup>18</sup>

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<sup>18</sup> 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.

30. In the context of the present decision, the Single Judge favours the approach adopted in the 31 July 2008 Decision<sup>19</sup> 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, following the structure of a draft model chart annexed to the 10 November 2008 Decision.<sup>20</sup> 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 [...]”.<sup>21</sup> The same approach was later endorsed by the Single Judge in the 6 April 2011 Decisions. 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 the present decision.

31. The approach advanced in the referenced decisions and reiterated in the present one aims at streamlining the process of evidence disclosure. In particular, this approach ensures that the Chamber establishes satisfactory conditions for the proper preparation of the Defence. This prevents any unnecessary delays that might negatively impact on the commencement of the confirmation hearing as envisaged by the Chamber. Further, said approach also ensures that the Presiding Judge is in a position to “organise the presentation of evidence by the parties according to the crimes charged with one party responding to the other on each count consecutively”.<sup>22</sup> Thus, this “law-driven” organization of the chart mirrors the way in which the

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<sup>19</sup> 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 66-73.

<sup>20</sup> 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, pp. 8-9.

<sup>21</sup> *Ibid.*, 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.

<sup>22</sup> 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 72-73; 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. 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, para. 24.

confirmation hearing before this Chamber will unfold. It streamlines the substantive discussions and, thereafter, the structure and timely preparation of the article 61(7) decision. Thus, the “law-driven” analysis is crucial as the role of the Chamber is not limited to simply verifying whether the facts as presented by the Prosecutor are proven to the requisite threshold. Rather, the “law-driven” approach aims at deciding whether the constitutive elements of the crimes and the mode(s) of liability as charged by the Prosecutor within the factual ambit of the case are established in accordance with the standard set forth in article 61(7) of the Statute.

32. That said, the Single Judge stresses again that the in-depth-analysis chart is an auxiliary instrument, and shall be useful and efficient for both parties and the Chamber. To this end, it is essential that only *relevant* information extracted from the evidence, which supports the facts presented under a particular legal requirement, should be included in the chart. This practically means that the appropriate quote from the piece of evidence concerned should be included in the chart. However, the “copy and paste” of large extracts from the evidence into the chart, thus making it unreadable and of no much use for the Defence and the Chamber, should be avoided. It follows that larger portions of information (for example, expanding over several pages) should be succinctly summarized indicating the essence of the relevant information. In addition, the Single Judge requests the Prosecutor to include in the chart, as established in Annex 2 to this decision, a hyperlink directing the reader to the relevant piece of evidence as uploaded in the electronic system of the Court. Lastly, each extract of information included in the chart shall be referenced as specific as possible, including the document ID number and, where necessary, the page, paragraph or lines. The Single Judge opines that the Prosecutor, having progressively analysed and reviewed the evidence collected in this case “page by page or, where required, paragraph by paragraph”,<sup>23</sup> with a view to be fully prepared to fulfill her

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<sup>23</sup> 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.

duties, is in a position to provide the above information to the Defence and the Chamber.

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

33. 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. It follows that the Prosecutor should conduct the necessary consultations with any information provider to reach an agreement on a waiver of that condition. The Prosecutor must bring these documents to the attention of the Chamber as soon as practicable. Should any problem arise, the Prosecutor must also bring it to the attention of the Chamber as soon as practicable.<sup>24</sup>

**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 parties submitting any evidence to present the original of the evidence as well as its electronic copy or, in case of tangible objects, its electronic photograph to the Registry;
- c) 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;

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<sup>24</sup> 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.

**d) 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 within official filing hours of the Registry;

**e) 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);

**f) orders** the parties to comply with the registration procedure of any evidence as described in part III of this decision;

**g) 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;

**h) orders** the Registrar to ensure unrestricted access to the Chamber of all evidence disclosed between the parties;

**i) orders** the Registrar to report any related practical or security concern to the Single Judge as soon as possible;

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

**k) decides** that any delays in the process of disclosure, which result from procedures concerning articles 54(3)(e), 72 and 93(8) of the Statute, shall be brought to the attention of the Chamber as soon as practicable.

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



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**Judge Ekaterina Trendafilova**  
Single Judge

Dated this Friday, 12 April 2013

At The Hague, The Netherlands