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Chambers Practice Manual

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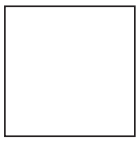

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I. Issues Related To Pre-Trial Proceedings

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

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

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

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

1. The ex parte nature of proceedings under Article 58

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

2. The warrant of arrest/summons to appear

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

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

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

C. The first appearance

1. Timing of the first appearance

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

2. Language that the person fully understands and speaks

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

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

3. The right to apply for interim release

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

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

4. The date of the confirmation hearing

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

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

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

D. Proceedings leading to the confirmation of charges hearing

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

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

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

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

3. Informal contact with the parties and the Registry

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

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

4. Status conferences

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

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

1. Disclosure of evidence between the parties

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

21. The Prosecutor has the duty to disclose to the Defence 'as soon as practicable' and on a continuous basis, all evidence in his/her possession or control which he/she believes shows or tends to show the innocence of the person, or mitigate the guilt of the person or may affect the credibility of the prosecution evidence (cf. Article 67(2) of the Statute), or is material to the preparation of the defence (cf. Rule 77 of the Rules).

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

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

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

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

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

26. According to Rule 121(2)(c) of the Rules, all evidence disclosed between the parties 'for the purposes of the confirmation hearing' is communicated to the Pre-Trial Chamber. This should be understood as encompassing all evidence disclosed between the parties during the pre-trial proceedings, i.e. between the

person's initial appearance (or, in particular circumstances, even before) and the issuance of the confirmation decision.

27. Communication of evidence to the Pre-Trial Chamber, by way of Ringtail, shall take place simultaneously with the disclosure of such evidence. The evidence communicated to the Pre-Trial Chamber forms part of the record of the case, irrespective of whether it is eventually included in the parties' lists of evidence under Rule 121(3) and (6) of the Rules.

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

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

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

F. The charges

1. The factual basis of the charges

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

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

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

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

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

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

36. There shall be no confusion between the material facts described in the charges and the 'subsidiary facts' (i.e. those facts that are relied upon by the Prosecutor as part of his/her argumentation in support of the charges and, as such, are functionally 'evidence'). Indeed, the Prosecutor may present submissions by which he/she proposes a narrative of the relevant events and an analysis of facts and evidence in order to persuade the Pre-Trial Chamber to confirm the charges. However, these submissions in support of the charges should not be confused with the charges. These submissions/argumentation can be included either in the same document containing the charges or in a separate filing (a sort of a '[pre-]confirmation brief'). If the Prosecutor chooses to include submissions in the document containing the charges rather than in a separate filing, the two sections – 'charges' and 'submissions' – must be kept clearly separate, and no

footnotes containing cross- references or reference to evidence must be included in the charges.

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

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

39. At the commencement of the confirmation hearing on the merits, any questions on the form, completeness or clarity of the charges must be settled. If the Defence does not raise any challenge to the format of the charges at the latest as procedural objections under Rule 122(3) of the Rules, it is precluded to raise it at a later stage, being the confirmation hearing or the trial.

G. The hearing on the confirmation of charges

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

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

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

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

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

2. Live evidence at the confirmation hearing

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

3. Procedural objections to the pre-confirmation hearing proceedings

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

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

47. Decisions taken by the Pre-Trial Chamber on procedural objections under Rule 122(3) become *res judicata* and are also to be considered as preparatory for the ensuing trial. The Pre-Trial Chamber's rulings under Rule 122(3) which are

joined, pursuant to Rule 122(6), to the merits, will be set out in the operative part of the confirmation decision, including for easiness of retrieval by the parties and the Trial Chamber.

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

4. The conduct of the confirmation hearing

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

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

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

52. As soon as the parties (and the participating victims) finish with their respective oral presentations the Pre-Trial Chamber will consider whether it is appropriate to make a short adjournment (few hours or one/two days maximum) before the

final observations under Rule 122(8) of the Rules. In these final observations, the parties could only respond to each other's submissions: no new argument can be raised.

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

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

H. The decision on the confirmation of charges

1. Issuance of the decision in a timely manner

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

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

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

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

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

59. As clarified above, this requires that the charges presented by the Prosecutor and those finally confirmed by the Pre-Trial Chamber are clear and unambiguous,

and that any procedural challenge to the formulation of the charges be brought before the Pre-Trial Chamber, at the latest, as objections under Rule 122(3) of the Rules.

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

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

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

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

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

3. The structure of the confirmation decision

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

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

(i) The identification of the person against whom the charges have been brought by the Prosecutor.

(ii) The charges as presented by the Prosecutor.

(iii) A brief reference to the relevant procedural history of the confirmation proceedings.

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

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

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

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

on any procedural objections or observations addressed before the determination of the merits.

4. Alternative and cumulative charges

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

68. The Prosecutor may also present cumulative charges, i.e. crimes charged which, although based on the same set of facts, are not alternative to each other, but may all, concurrently, lead to a conviction. In this case, the Pre-Trial Chamber will confirm cumulative charges when each of them is sufficiently supported by the available evidence and each crime cumulatively charged contains a materially distinct legal element. In doing so, the Pre-Trial Chamber will give deference to the Trial Chamber which, following a full trial, will be better placed to resolve questions of concurrence of offences.

5. Transmission of the record of the proceedings

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

70. Further, the transmission of the record from the Pre-Trial Chamber to the Trial Chamber should be as seamless and immediate as possible. Accordingly, a decision confirming the charges should include an order instructing the Registrar to transmit the record of the proceedings to the Presidency as required by

Rule 129 of the Rules. The Presidency will then be in a position to constitute the Trial Chamber and transmit the record pursuant to Rule 130 of the Rules. The transmission of the record of the proceedings is without prejudice to the Pre-Trial Chamber's exercise of any functions that remain within its competence such as adjudicating on any request(s) for leave to appeal the confirmation decision, in accordance with Rule 155.

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

II. Issues Related to Trial Proceedings before Commencement

A. First status conference

1. Scheduling order

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

2. Agenda items

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

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

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

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

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

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

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

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

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

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

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

(x) Trial commencement date.

(xi) Length of opening statements.

(xii) Review of detention.

3. Preliminary directions

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

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

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

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

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

B. Trial preparation matters

1. Trial brief

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

2. Disclosure

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

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

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

(iii) List of witnesses:

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

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

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

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

3. Protocols

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

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

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

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

4. Pre-commencement motion deadline

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

5. Agreed facts

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

C. Directions for the conduct of the proceedings

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

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1 *See generally* Manual, Section V.

D. Review of detention prior to the commencement of trial

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

III. Deadlines Regarding Decisions of the Trial Chamber

86. The internal 'Guideline for ICC Judgment Drafting' and 'Guideline for ICC Judgment Structure' adopted in 2019 are incorporated into this Manual by way of annexes. Trial judgments must be written in conformity with both sets of guidelines and in accordance with the Chambers Style Guide.

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

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

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

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

IV. Deadlines Regarding Judgments of the Appeals Chamber

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

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

the oral hearing.

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

93. In respect of interlocutory appeals filed under Article 82(1)(a), (c) and (d) and Article 82(2), the Appeals Chamber shall render its judgments within four months from the date of the filing of the response to the appeal brief. In the event that the Appeals Chamber decides to hold an oral hearing, any decision to do so shall be taken within one month of the filing of the response to the appeal brief and the hearing shall be held within two months of the filing of the response to the appeal brief. In the event of an oral hearing being held, the judgment shall be handed down within four months of the oral hearing.

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

V. Other Issues Related to Various Stages of Proceedings

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

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

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

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

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

(ii) With respect to participation, the Registry assesses all victim applications for participation collected or otherwise received, and identifies those applications which are complete and fall within the scope of the relevant case, i.e. in which the applicant alleges to have personally suffered harm, whether direct or indirect, as a result of one or more crimes which are referenced in the warrant of arrest or summons to appear (counts) or, subsequently, charged by the Prosecutor (as formulated in the document containing charges and, thereafter, as confirmed by the Pre-Trial Chamber).

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

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

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

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

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

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

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

(x) Barring a clear, material error in the Registry's assessment of Groups A and B, the Chamber, taking into account the Registry's assessment of the Group A and B applications, will decide. While the Registry's conclusions may be of assistance, it is for the Chamber to ultimately authorise or reject an applicant to participate in the proceedings.

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

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

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

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

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

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

98. Under Rules 81(2) and (4) of the Rules, the Prosecutor may redact information from evidence disclosed to the Defence. Redactions can be implemented without need for a prior authorisation of the Chamber, which is seized of the matter only

upon challenge by the Defence. In this case, the Prosecutor retains the burden of proof to justify the challenged redaction. For any redaction applied, the Prosecutor shall indicate the category by including in the redaction box the code corresponding to each category, unless such indication would defeat the purpose of the redaction.

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

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

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

2. The Prosecutor shall disclose evidence with redactions under Rule 81(2) and (4) of the Rules without discrete application to the Chamber, except as provided in paragraph 5. When disclosing redacted evidence, the Prosecutor shall indicate the type of redaction in the redaction box by using the following codes:

Under Rule 81(2) of the Rules

- *Category 'A.1': Locations of witness interviews/accommodation, insofar as disclosure would unduly attract attention to the movements of the Prosecutor's staff and witnesses, thereby posing a risk to ongoing or future investigations;*

- *Category 'A.2': Identifying and contact information of the Prosecutor's, VWU or other Court staff members who travel frequently to, or are based in, the field, insofar as disclosure of this information could hinder their work in the field and thereby put at risk the ongoing or future investigations of the Prosecutor (to be further specified as 'A.2.1' for translators, 'A.2.2' for interpreters, 'A.2.3' for stenographers, 'A.2.4' for psycho-social experts, 'A.2.5' for other medical experts and 'A.2.6'. for other staff members falling within this category);*

- *Category 'A.3': Identifying and contact information of translators, interpreters, stenographers and psycho-social experts assisting during interviews who are not members of the Prosecutor's staff but who travel frequently to, or are based in the field, insofar as*

disclosure of this information could hinder their work so that the Prosecutor could no longer rely on them, and thereby put at risk ongoing or future investigations of the Prosecutor (to be further specified as 'A.3.1' for translators, 'A.3.2' for interpreters, 'A.3.3' for stenographers, 'A.3.4' for psycho-social experts, 'A.3.5' for other medical experts and 'A.3.6'. for other persons falling within this category);

- *Category 'A.4': Identifying and contact information of investigators, insofar as disclosure of this information could hinder their work in the field thereby putting at risk the ongoing or future investigations of the Prosecutor;*

- *Category 'A.5': Identifying and contact information of intermediaries, insofar as disclosure of this information could hinder their work in the field thereby putting at risk the ongoing or future investigations of the Prosecutor;*

- *Category 'A.6': Identifying and contact information of leads and sources, insofar as disclosure of this information could result in the leads and sources being intimidated or interfered with and would thereby put at risk the ongoing or future investigations of the Prosecutor (to be further specified as 'A.6.1' for individual sources, 'A.6.2' for NGOs, 'A.6.3' for international organisations; 'A.6.4' for national governmental agencies, 'A.6.5' for academic sources, 'A.6.6' for private companies and 'A.6.7' for other sources);*

- *Category 'A.7': Means used to communicate with witnesses, insofar disclosure of this information may compromise investigation techniques or the location of witnesses and would thereby put at risk the ongoing or future investigations of the Prosecutor;*

- *Category 'A.8': Other redactions under Rule 81(2) of the Rules;*

Under rule 81(4) of the Rules

- *Category 'B.1': Recent contact information of witnesses, insofar necessary to protect the safety of the witness;*

- *Category 'B.2': Identifying and contact information of family members of witnesses, insofar necessary to protect their safety;*

- *Category 'B.3': Identifying and contact information of 'other persons at risk as a result of the activities of the Court' ('innocent third parties'), insofar necessary to protect their safety;*

- *Category 'B.4': Location of witnesses who are admitted in the International Criminal Court Protection Programme and information revealing the places used for present and future relocation of these witnesses, including before they enter the ICCPP;*

- *Category 'B.5': Other redactions under Rule 81(4) of the Rules.*

3. *When so disclosing evidence with redactions, the Prosecutor shall assign unique pseudonyms to any persons whose identity is redacted. The Prosecutor need not provide the category code and/or a pseudonym when doing so would defeat the purpose of the redaction but shall make clear which codes/ pseudonyms are missing for this reason. The Prosecutor shall also file in the record of the case a report stating which categories of redactions have been applied to particular items of evidence. In this report, the Prosecutor shall also briefly indicate, to the extent possible, the basis for each redaction falling under categories 'A.8' and 'B.5'.*

4. *Should the Defence consider that a particular redaction is unwarranted or should be lifted as a result of changed circumstances, it shall approach the Prosecutor directly. The parties shall consult in good faith with a view to resolving the matter. If they are unable to agree, the Defence may apply to the Chamber for a ruling. In such case, the Prosecutor shall have the burden to justify the particular redaction, and shall file her submissions in the record of the case within five days, unless otherwise decided by the Chamber. Thereafter, the Chamber will rule as to whether the particular redaction is to be lifted or maintained.*

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

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

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

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

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

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

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

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

A. General principles concerning dissenting and separate opinions

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

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

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

107. Sufficient time should be allowed for the preparation and circulation of dissenting and separate opinions. The majority and minority may respond to each other's

drafts and amend their own findings or reasoning, if necessary. To this end it is imperative that reasonable timelines for the finalisation of the majority draft judgment, decision or order and any related dissenting or separate opinion be agreed in advance by the judges of the Chamber (*see* further paragraphs 113 - 115 below).

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

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

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

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

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

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

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

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

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

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

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

ANNEX
PROTOCOL ON THE HANDLING OF CONFIDENTIAL INFORMATION DURING INVESTIGATIONS AND CONTACT BETWEEN A PARTY OR PARTICIPANT AND WITNESSES OF THE OPPOSING PARTY OR OF A PARTICIPANT

A. Introduction

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

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

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

B. Definitions

4. For the purposes of this Protocol:

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

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

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

   (d) 'Confidential document' shall mean any document, or any other type of

material, not classified as 'public' in accordance with Regulation 14(b) of the Regulations of the Registry;

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

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

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

C. Use of confidential documents and information in investigations

1. General provisions

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

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

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

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

2. *Witnesses whose identity has not been made public*

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

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

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

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

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

3. *Investigation of allegations of sexual or gender based crimes*

15. Where a witness has stated that he or she has suffered sexual or gender based crimes and it is apparent that the witness has not discussed the violence with members of his or her family, parties and participants must exercise particular caution in investigating the allegations, in order to protect the privacy, dignity and well-being of the witness. Parties and participants shall not reveal information about the witness's alleged victimisation to the family members of the witness or

to persons who can reasonably be expected to communicate it to family members. Where there are no suitable alternative investigative avenues, the investigating party or participant may communicate the information to such individuals that the witness has stated he or she has informed or has confirmed are aware of the sexual or gender based crimes suffered, provided that in doing so the investigating party or participant does not reveal that the witness is a witness of the Court.

4. Records of the handling of confidential documents or information

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

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

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

D. Inadvertent disclosure

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

20. If a party or participant discovers that it has received material which it believes should not have been disclosed or should have been disclosed in redacted form, it shall immediately inform the party or participant who disclosed the material. Pending confirmation by the disclosing party or participant that the material should not have been disclosed or should have been disclosed in redacted form, the party or participant having received the material shall act in good faith and shall ensure that the material is not distributed within the team including, in the

case of the Defence, to the accused.

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

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

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

E. Breaches of confidentiality

24. If a party or participant discovers that a third party knows or understands that a witness whose identity has not been made public is involved with the Court, it shall inform the third party of the confidential nature of this information and instruct the third party not to disclose this information any further. The party or participant shall also inform the VWU of such occurrence as soon as possible.

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

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

F. Consent to disclosure by witnesses

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

G. Contacts with witnesses of other parties or participants

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

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

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

1. Consent of the witness

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

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

33. If a party or participant comes into contact with a person during investigation and

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

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

2. Interview

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

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

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

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

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

40. The representative of the calling party or participant present at the interview shall not prevent or dissuade the witness from answering questions freely. In the event that the calling party or participant objects to any part of the procedure followed or any particular line or manner of questioning of the witness, it shall raise the issue with the party or participant conducting the interview outside of the presence of the witness. The disagreement shall be recorded and shall not impede or unduly disrupt the interview. The party or participant conducting the interview may, in the event of repeated interference by the calling party or participant, adjourn the

interview and apply to the Chamber for leave to conduct it without the presence of the representative of the calling party or participant.

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

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

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

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

4. Special provisions for protected witnesses

44. When the party or participant seeking to interview a witness is aware that the witness is a participant in the ICCPP, or has been otherwise assisted by the Court to move away from their place of residence, the party or participant shall, in addition to notifying the calling party or participant, inform the VWU. All contact with individuals who are part of the ICCPP shall be facilitated exclusively by the VWU.

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

ANNEX

GUIDELINE FOR ICC JUDGMENT DRAFTING[1]

I. Preparations and judgment drafting at the trial preparation stage

A. Early commencement and ongoing process

1. Practice within ICC Chambers has consistently demonstrated that preparation for judgment drafting should commence as soon as possible after the Trial Chamber is constituted. The Chamber should have in place its plan for judgment drafting well before it begins to hear evidence. Moreover, as discussed in detail below, it is essential that judgment drafting is viewed as an ongoing process which begins during the trial preparation phase and continues throughout the hearing of the evidence. It should not be relegated to the post hearing phase. This is integral to both an effective and efficient judgment drafting process and is necessary to avoid lengthy delays in the trial.

B. The legal team

2. It is the primary responsibility of the judges assigned to the trial to produce the reasoned judgment required by Article 74 of the Statute. The drafting of the judgment should at all stages be based on the decisions of the trial judges as communicated to staff through directions and instructions. At the same time it is clear from practice that a well-structured and coordinated team supporting the Chamber will significantly enhance the trial and judgment drafting processes.

C. Team structure and composition

3. Experience at the ICC and within other Tribunals has consistently demonstrated it is imperative that the legal officers assigned to a Trial Chamber work as a single coordinated unit. This does not of course preclude establishing 'sub-teams' with different mandates. In fact, as discussed below, practice supports the usefulness of a dedicated judgment drafting team. This judgment drafting team may include dedicated sub-teams on different topics such as legal research, evidence etc. in accordance with the specific needs of the case. However, whatever structure or division of work it is essential that from the beginning all legal officers understand that they are working as a part of a team supporting the Trial Chamber assigned

1 This guideline is a product of the Working Group on Style Guide and Judgment drafting which has been mandated by the Judiciary. At this stage of development, the International Criminal Court has accumulated significant experience in judgment drafting. The Working Group has drawn on that experience – positive and negative – to prepare this draft for consideration and discussion by judges.

to the particular case. While individual judges may be assisted in their work by assigned legal officers, these officers should always function as part of the team and not operate independently.

4. The composition and size of the team will be dependent on the views of the Trial Chamber, taking into account the advice of Head of Chambers/Trial Division legal advisor and of course resource circumstances. In considering this issue, Trial Chambers should keep in mind the need for a balance between sufficient resources for proper support and a team the size of which may complicate, as opposed to, facilitate the process. At minimum, all teams should be composed of more than one team member to ensure that continuity can always be maintained. On the latter point practice shows that with a larger team, there can be fragmentation in style and methods which can make the process less efficient. In many instances a smaller, well-structured and managed team can be more effective. There is no set optimal size for a team – it will depend on the factors noted above as well as the complexity and nature of the case and the views of the Chamber.

D. Team coordinators

5. To ensure the team functions as a single unit, there should be a designated team coordinator or coordinators[2] in place from the beginning of the process and the structure of the work of the team should support this coordinated approach. While the legal officers assigned to the coordinator role may change over the course of a lengthy trial, what is essential is to have someone in that position throughout the trial. This is the most effective way to ensure that there is an organised approach, even distribution of work, efficient use of resources and proper follow up in terms of assignments and deadlines. One of the most important responsibilities of the coordinator(s) will be to encourage coordination, cooperation and teamwork within and between any sub-teams.

6. Particular skills and experience are required to effectively perform the coordinator function notably management, communication and inter-personal skills. Importantly the coordinator must be able to prioritise tasks and take decisions in accordance with the directions of the judges in order to advance the case. Thus it is critically important that the coordinator(s) are carefully selected by the Trial Chamber in consultation with the Head of Chambers and Trial Division legal advisor with those requirements in mind.

2 In some instances it may be beneficial to have two coordinators if there are distinct teams responsible for day to day work and judgment drafting as discussed later in the paper.

E. Work plans and organisational tools

7. Each Chamber will decide on the tools and approaches to be used to organise the ongoing work and assigned tasks in the case including those related to judgment drafting. Practice will vary but can include a shared work plan accessible to the team, planning meetings, use of technology such as SharePoint for making documents accessible etc. Whatever method or methods are adopted there is a need for clarity of assignments and transparency as between team members to avoid duplication of efforts and delay.

F. Dedicated personnel for judgment drafting

8. A consistent challenge in all cases is to ensure that the judgment drafting process does not get 'side-lined' in terms of priorities because of the demands on the team arising from the day to day trial work.

9. The traditional 'team' approach at the ICC and other tribunals has been to have team members involved in all aspects of the case – day to day trial assignments, witness and document summary preparations and judgment drafting. While there are benefits to this approach, the significant downside is that faced with day to day tasks with more urgent deadlines, judgment drafting work does not receive sufficient attention and progress on it can quickly be delayed. This has been the general experience at the ICC especially in cases in which the parties have been quite active with substantive and procedural motions during the course of the trial. As a result, in most cases the vast majority of the judgment drafting has taken place after the hearing phase, and this has significantly added to the length of proceedings.

10. For this reason recent Trial Chambers have explored other team structures designed to ensure that judgment drafting receives attention throughout the trial. The most successful approach has been to divide up the tasks of legal officers such that certain team members are dedicated solely to judgment drafting from the beginning of the trial process. The remaining team members are responsible for the ongoing day to day trial work and will ultimately participate in drafting once the hearing phase ends. Practice demonstrates that if effectively implemented this approach will result in a far more advanced judgment drafting product by the end of the trial hearing.

11. It is essential to the success of this model that there is communication and engagement between the team members working on the different mandates. The judgment drafting team will need to be kept updated on the ongoing trial matters and in some instances may want to provide input regarding key issues. Similarly the trial team will want to know how the judgment draft is advancing and be in a position to highlight particular issues to the judgment drafting team.

12. Different structures can be used, such as to have two coordinators (one for the day to day work and one for judgment drafting). Key to effectiveness has been

the selection of coordinators with the right skill sets and strong coordination and communication between the coordinators and amongst the team as a whole.

13. Given the experience drawn from ICC practice to date it is recommended that Trial Chambers structure their teams with a coordinator and some legal officers dedicated to judgment drafting throughout the trial.

G. Index and judgment outline

14. While each Chamber will define the details of its own approach, best practice supports early agreement - before the trial hearings begin - on a judgment outline and a list of the relevant issues in the particular case. The judgment outline will set out the proposed sections of the judgment and how it will be structured. The list of issues will identify the expected factual and legal issues as best can be identified at that stage of the process. Generally in ICC practice to date there has been a tendency towards an index of topics separate and apart from the judgment outline. The practice in other Tribunals has been to have a single document which is a detailed judgment outline that incorporates the list of key topics. Both approaches achieve the aim such that it is for each Chamber to decide which is most appropriate and practical for the particular case and in terms of available resources.

15. As indicated, the list of issues will be based on the documentation available such that the quality of it will be dependent on early familiarisation with the information generated at the initial stage of the process. This would include the confirmation decision, any evidence which may be admitted by the Chamber before trial and items such as any trial brief which may be available.

16. Each Chamber will decide on the level of detail of the list of issues. Practice indicates it is important to strike a balance between sufficient precision to make the outline of issues relevant and useful but not so much detail as to make the document unworkable as a practical tool. Some Chambers have adopted the approach of having two outlines – short form and longer form- which can help with case management, especially with larger cases.

17. To be an effective resource for judgment drafting the index and judgment outline should be living documents that can be amended as the case proceeds. To ensure that the judges and all staff are working from the same document a protocol should be in place as to how amendments will be agreed and inputted and with what frequency.

H. Preparing draft sections in the trial preparation stage

18. Resources permitting, it is advantageous in the phase before the trial hearing to formulate drafts of those parts of the judgment which can be prepared, or at least advanced to a certain stage, before evidence begins. Of particular relevance in this

regard are the sections on applicable law which are not controversial and general evidentiary approaches which should already be agreed by the start of the trial. As the issues in the case develop it may also be useful to draft sections on law even if there is controversy or the matter is not the subject of clear jurisprudence. The early outline of the law and legal issues will facilitate the preparation of the judgment and will also assist the judges in analysing the evidence - *vis-à-vis* the law- as the case advances.

19. Other sections which can be drafted at an early stage would include those which are descriptive i.e. the charges, identification of the accused etc.

20. Early preparation of parts of the judgment will also permit advance translation in order to better distribute time and resources which are ultimately needed for translation work.

I. Translation plan

21. Translation challenges add a level of complexity to ICC judgment drafting distinct from a domestic context.

22. Consideration needs to be given to translation needs for the ultimate judgment from the beginning of the process and these should be discussed with the interpretation/languages section at any early stage.

23. As discussed above, as far as possible sections of the judgment should be submitted to translation on an ongoing basis through the trial process to better manage translation time and resources.

24. Of particular concern will be ensuring that a translation of key parts of the judgment will be available in a language which the accused fully speaks and understands at the time that judgment is delivered. To achieve this, as the judgment drafting advances, those sections of the judgment should be identified so that work on translation can be carried out in parallel to judgment drafting.

II. Approach to judgment drafting during trial

A. Regular meeting of Judges

25. A final judgment will only be drafted once all the evidence has been adduced, the parties and participants have been fully heard and there has been full analysis and deliberation by the judges. However, that principle does not in any way preclude advancing the preparation of the judgment by deliberating and drafting throughout the trial proceedings with the understanding of this overarching principle.

26. It is vital to commence judgment drafting at the earliest stage possible and to view it as an ongoing process throughout the trial.

27. The judges of the Trial Chamber must guide and direct the preparation of the judgment throughout the proceedings. It is essential that there is regular direction and input from the judges in the drafting as the case advances. The Presiding Judge of the Chamber has a particular responsibility in this regard to ensure that procedures are in place for the judges to discuss and deliberate and communicate the positions of the judges to the staff.

28. To be effective in this regard, there need to be regular meetings of the Trial Chamber judges at which evidence can be discussed and assessed contemporaneously as it is adduced. The timing and frequency of those deliberations will be for each Trial Chamber to decide upon in accordance with its preferred working methods and hearing schedule but it should be as proximate as possible to the relevant court sessions.

29. In accordance with practice, the Trial Chamber judges will read and review the evidence[3] and come to the meetings equipped to provide views on the same and to discuss. The opinions expressed by the judges in the meeting will instruct and direct the legal staff in terms of the drafts to be prepared. The more detail the judges provide the better in terms of advancing the drafts. The meeting topics over the course of the trial should be comprehensive to ensure that the judges have discussed and considered all relevant issues including applicable law, credibility of witnesses, Rule 68 statements[4] and documentary evidence. It is especially critical that the judges provide initial assessments as to the credibility of each witness soon after the evidence is given and while it is fresh in their memories. Some Trial Chambers have had a practice of deliberating immediately after each witness while others have adopted a schedule of periodic meetings where the evidence of different witnesses is discussed. In either case the priority has been to have the discussion on credibility proximate to the testimony. While opinions may change as other evidence is given that initial assessment is still important to have captured in a timely manner.

30. From these ongoing deliberations the team will take notes and be instructed for drafting. Depending on the Trial Chamber's working methods and preferences, judges may participate directly in the initial drafts prepared after the discussions, as well as providing input at the review stage detailed below. This structure and process will ensure that the judgment -from the start- reflects the views of the judges who are responsible for it.

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3 In the case where evidence is in a language which the judge does not read arrangements should be made for translation if possible or the preparation of detailed summaries for the judge's review.

4 While it will be up to the Chamber it can be useful for both the analysis and to advance cohesiveness for the Judges to view any video evidence together rather than watching individually.

31. It is equally necessary to understand that the process is a flexible one in that the position of judges on a number of issues may change as the evidence evolves. This continuous deliberation approach not only allows for more effective and efficient judgment drafting but it also encourages more unanimity amongst the judges. Ongoing discussion on the evidence and issues, in many instances can lead to better clarity of views and often will identify points of agreement. It also avoids the significant problem of being overwhelmed at the end of hearings in a lengthy trial by evidence which has not been the subject of preliminary discussion and review.

B. Staff participation in meetings of judges

32. There can be no fixed rule as to the participants in the judges' meeting. It is for each Chamber to decide. In practice to date the composition has varied depending on the issue being considered. On some occasions the judges may wish to meet on their own to discuss issues especially those which are sensitive or difficult. In such a case it will be important that the outcome of the discussion is conveyed to the staff as soon as possible afterwards. Each Chamber will adopt an approach on the practice in terms of participation which is best suited to the circumstances of the Chamber and team.

C. Best practice for drafting

1. Structured review process

33. A key good practice identified through ICC experience and that of the Tribunals is a structured review process as the judgment progresses. Depending on the size of the judgment drafting team, it is beneficial to 'team up' drafters who review each other's work and share comments. The drafts prepared should also be considered by the judgment drafting coordinator. The coordinator needs to review all the judgment parts, on more than one occasion, providing comments and concrete drafting suggestions. These layers of review not only provide quality control but give the coordinator an overarching perspective which will ensure greater consistency in drafting across the entire judgment. Importantly once segments of the judgment have had a sufficient level of review by legal officers they should be transmitted to judges for their consideration, review, and direction. For this review process to work effectively there need to be reasonable deadlines in place at each stage of the process which are respected as far as possible.

2. Timetable and staggered review

34. As the trial progresses it is advantageous to set a timetable for the completion of sections of the judgment, with staggered deadlines for review. This is a means of ensuring that the draft of the judgment is progressing not only in terms of the initial drafts but also incorporating reviews within the team and by the judges.

Again this will reduce the amount of drafting work left for the post hearing phase.

35. Shortly after the closing statements, the Chamber should agree internally on a target date for delivery of the judgment and make best efforts to meet that deadline. In setting the target date the Chamber should take all relevant factors into account, including the complexity of the case and the size of the drafting team.

36. In the latter stages of the process it is important to plan sufficient time for the detailed review that will be needed to check footnotes, language, confidentiality issues and to prepare a summary of the judgment for delivery. Again the timelines will need to take into account what has to be translated and the timing of that process.

D. Materials generated based on evidence

37. For effective judgment drafting it is essential to generate internal documents which will best facilitate discussion and analysis of evidence and judgment drafting. There is varied practice between Chambers as to the types of documentation produced for this purpose and it will depend to an extent on the nature of the case and the preferences of the Trial Chamber. The following discussion of ICC and other Tribunal/Court practice is designed to assist Chambers by highlighting what experience suggests is best practice.

38. Before deciding on the practice to be adopted each Chamber should carefully consider its overall working methods to determine what types of documents are needed and for what purpose. Given resource limitations particular attention should be paid to the latter question in order to avoid the generation of internal documents which ultimately are of minimal value in terms of analysis, deliberation or drafting.

39. The guiding principle for judges and the legal team should be to decide on what type of information is needed to best facilitate deliberation and drafting in the particular case and to assign resources accordingly. Importantly different issues may require different tools. For example there may be discrete legal issues which would benefit from a more detailed legal memorandum or a difficult factual question which may best be assessed with aid of a chart or graphic. The lesson from ICC practice is to avoid an overly formalistic approach to the supporting materials generated and to focus on what will best assist in practical terms.

E. Documentation related to witness evidence

40. It has been consistent practice within ICC Chambers to prepare reference documents reflecting the testimony of witnesses, including witness evidence admitted pursuant to Rule 68.

41. However there has been considerable variation within the ICC and between various Tribunals/Courts as to the content of the witness/document reference material. At this juncture for the Court it is useful to try and standardise the approach to this issue across Trial Chambers as far as possible, with sufficient flexibility depending on the nature and size of the case.

1. Information common to all approaches

42. In ICC practice, some information is uniformly reflected in witness documents whatever approach is being utilised including basic descriptive information about the witness (witness number, name, date of birth/age, occupation or other pertinent personal information) the technical details of the evidence given (order of the witness, dates of testimony, party calling the witness, mode of witness (*vive voce live*, *vive voce* Rule 67, Rule 68)), language of the testimony, protective and special measures, Rule 74 assurances, any relevant procedural history and an entry for the comments of the judges particularly on credibility, to be filled in after deliberation. Including a picture of the witness is also part of recent practice to assist with recollection of the person's testimony.

43. There is consistent inclusion of a chart listing all exhibits[5] discussed with the witness[6] as an attachment to the summary.[7]

44. Depending on the case it may also be helpful to include lists of persons/entities and locations mentioned by the witness albeit without the need for transcript references which are time consuming, resource intensive and do not add value to these lists.

45. One issue not currently addressed in witness reference documents is highlighting material which is relevant for the assessment of the credibility of the witness both internal to the witness testimony and external factors (such as other witnesses who have testified to the same events or documents which might corroborate or challenge the witness testimony).

46. For information internal to the testimony the summary document could include references to transcript sections or documents which might be relevant to assessing the internal consistency and credibility of the witness. For external

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5 Key information captured for each item in the chart is Document ID number, use by what party (including specifying defence team if more than one, main date of the document, title and type. In some cases the chart also included the transcript references to where the exhibit was discussed which is more resource intensive and may be unnecessary if the transcript is easily searchable with the document ID number.

6 Depending on the evidentiary system being used by the Chamber the chart can be divided as bet ween exhibits submitted/admitted through the witness and those discussed or left general as exhibits discussed.

7 This chart can be electronically generated so it is not resource intensive.

inconsistencies, it would be helpful, as far as possible, to have cross-referencing to other witnesses and documentary evidence which may confirm or contradict the evidence of the witness.

47. The above information should be standard for all cases.

2. Witness summaries

48. At the ICTY/ICTR the dominant practice was the preparation of witness documents which included a summary of the testimony of each witness with an index of the topics covered. This approach has been replicated at the ICC to some extent. However both at the ICTY/ICTR and the ICC, there has been variation as to the extent of the evidence summary.

3. Detailed summary

49. One model used in the larger ICTY cases was to produce a highly detailed summary which would give a thorough overview of what the witness said and was in a form such that text could be drawn from the summary for direct insertion into the judgment.

50. However to achieve the quality necessary for the summaries to serve this latter purpose the drafting needs to be very detailed and there must be a multiple-layer review process, which includes the judges, before the summary is finalised.

51. At the ICC, it can be challenging to use this approach without creating a backlog and experiencing delays. In some instances the absence of sufficient resources has meant problems with the quality of the summary necessitating that work be redone for the actual judgment draft. This results in unhelpful duplication of effort and delay. Experience to date indicates that this model is not necessarily an effective one for ICC cases. However, should a Trial Chamber consider this approach appropriate and it has sufficient resources to prepare and thoroughly review these detailed summaries, it could elect to use this process

4. General summary

52. An alternative model used both at ICTY/ICTR and at the ICC is to prepare a less detailed, though still comprehensive, witness summary. With this approach the summary is not drafted as to be 'judgment ready 'but rather with the aim to provide a general overview of the testimony of the witness. These summaries, which are less time consuming and resource intensive, can be used by the judges to refresh their memory about a witness and as a guide for the legal staff as to the key points and subject areas covered in the testimony. As such the summary is useful for both the deliberation process and to assist the legal staff in connecting evidence, identifying issues and finding the relevant witnesses for subject areas in

the judgment drafting process. Provided the summaries are kept to a reasonable length and level of detail, this model, which is not overly resource intensive, is workable for the ICC.

53. However each Chamber will need to consider if in the context of their working methods and resources a summary of evidence is necessary and sufficiently usefulness. Some factors to consider in this respect would be the proximity of the deliberations to the witness testimony and how the judgment drafting team is structuring its work in terms of the timing of the inclusion of witness testimony information into the judgment draft.

5. Witness reference document

54. In recent ICC practice there has been a third model which is the use of a concise witness reference document which does not summarise the witness evidence. As such, the reference document is the least resource intensive to prepare.

55. The purpose of this reference document is distinct in that it does not purport to describe the evidence as given. Rather it provides an overview of topics covered which can be used to refresh memory for deliberations and it can serve as a guide/roadmap to assist the judgment drafter in navigating through the evidence.

56. In this model, replacing the detailed summary is a concise outline of the evidence – the relevant factual allegations addressed, a short description (few lines/short paragraph) of the content of the testimony and an index of the evidence as given, divided by topics, with brief bullet point descriptions. The index is divided by party examining the witness and includes detailed transcript references.

57. This model has also been successfully used in ICC practice. It will be particularly helpful where resources are quite limited and the Chamber considers that the summary of evidence is not of particular value given their working methods.

58. Whichever model is used, the witness document should include an index of topics covered in the testimony which is linked either by topic title or by cross reference to the main index/judgment outline being utilised in the case. This will facilitate judgment drafting by providing an easy identification of the witnesses pertinent to the particular issues in the case.

59. One important caution in this regard is that witness documents prepared early on will need to be reviewed as the trial progresses because in most instances the main index/judgment outline will change as the trial progresses. Thus it will be necessary to update the earlier material to ensure the most recent version of the topic list is properly reflected in the reference document and that all of the relevant subjects are identified.

6. Judges' assessments

60. The most essential part of the witness document in all models is the section completed after deliberations which reflects the assessments of the judges and discussion of the evidence, including their views on credibility.

7. Documentary evidence

61. In the preparation of reference material, documentary evidence should not be overlooked or excluded from the process. In most cases it will not be practical or necessary to prepare individual reference documents for each document before the Chamber. However different practices can be used to assist the Chamber in its consideration of documentary evidence. Whichever evidence scheme is being employed it may help the Chamber to set criteria that the parties should address in submitting documents. This practice can generate some discipline with the parties in terms of document selection and will provide useful reference material for the subsequent consideration of the documents submitted.

62. In those cases where the Chamber has elected to make individual admissibility rulings there should naturally be material available about each document arising from that process. In cases where documents are being submitted and rulings are more limited it might be useful to prepare a summary for some key documents especially those which are lengthy. This can in some instances reduce the time that ultimately needs to be expended in reviewing and summarizing the material at a later stage. But of course it will depend on the nature of the case and the type of documents given that ultimately it is the exhibit itself which constitutes the evidence and not the summary of it. For example it might be useful to have a summary or index of a lengthy military document especially if only parts are relevant to the case. In contrast it will not be useful to prepare summaries of intercepted conversations or speeches which need to be weighed and considered in totality by the Trial Chamber.

III. Content and structure

A. Guiding considerations

1. Audience

63. A judgment should be 'addressed' to the accused, the prosecution and the participating victims. However, there are other relevant audiences which can be kept in mind in terms of the content, structure and drafting including the Appeals Chamber, victims and affected communities more broadly and States, academics, NGO's and others interested in the work of the Court.

2. Charges

64. The judgment should be carefully restricted to the charges as confirmed by the Pre-Trial Chamber and it may be a useful tool to start the relevant sections by repeating each confirmed charge being discussed.

3. Reasoned judgment

65. The content of the judgment will be guided first and foremost by Article 74. Thus the judgment must provide 'a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusion'. The requirements of the Article are applicable whatever the outcome of the case - be it an acquittal or a conviction.

66. Accordingly, the judgment must detail with clarity the factual findings made and the reasons for them, including those related to credibility, the legal findings i.e. describing the legal characterisation of the facts found and set out the ultimate conclusion (disposition).

67. It is these principles which must guide the content and structure of the judgment.

B. Factual findings and reasoning

68. At the core of the judgment is the facts found by the Trial Chamber – this will form the basis for the legal conclusions which follow. The judgment structure needs to be such that there is complete clarity as to those findings. For this reason and bearing in mind the different audiences, the facts and circumstances of the case as found by the Trial Chamber should be presented as a clear narrative which sets out an easily readable story of the relevant aspects of the case.

69. It is equally important that each of the factual findings, which will also include negative findings, is supported by clear reasoning and evidentiary analysis which explains how the conclusion was reached with reference and citation to the specific evidence relied upon or not accepted. Special attention should be paid to findings of credibility. The judgment must describe the specific credibility findings made and provide a precise explanation as to the basis upon which those conclusions were reached.

70. Evidentiary analysis and assessment is at the core of the Trial Chamber's reasoning. It is not sufficient to recite what witnesses have said on an issue and cite that evidence as the basis for a factual finding. The Trial Chamber must reflect the different pieces of evidence relevant to a particular issue, drawn from witness and documentary sources, and provide an explanation as to why that has led to a factual conclusion.

71. For some findings the analysis will be straightforward and in other instances it may be quite complex. Nonetheless what is essential to meet the requirements

of Article 74 is that each of the findings is supported by specified evidence and evidentiary analysis as necessary to explain the conclusion.

72. As mentioned, these analysis requirements are equally applicable to findings of credibility. Especially in relation to key witnesses or evidence related to central issues it is not sufficient to recount what was said and indicate that the Trial Chamber found the evidence credible or not. The Trial Chamber needs to set out the factors upon which it decided that a witness was credible or not with as much specificity as possible. This should include an analysis of any other evidence which supports or challenges credibility in the particular instance.

73. The judgment should also be structured so that it is easily discernible where the evidence relied upon can be found in the transcript or exhibits. For this a clear footnote citation system needs to be consistently used throughout the judgment.

C. Applicable law

74. The judgment should clearly set out the law applied by the Trial Chamber. There should be a statement of the relevant law for each of the issues in the case, as interpreted and relied upon by the Trial Chamber. In aid of judicial efficiency, efforts should be made to restrict the applicable law description to only those issues of law which arise on the facts of the case.

D. Legal findings

75. The Trial Chamber will need to present clearly its legal findings with a reasoned explanation as to how each of those findings was made.

76. Thus, the judgment should detail the application of the law to the factual findings with an analysis of each element of each crime including contextual requirements as applicable and the components of each mode of responsibility considered by the Trial Chamber. This analysis will form the basis for the Trial Chamber's conclusions as to whether or not the legal requirements of the crimes and modes of liability as charged and the guilt of the accused are established beyond reasonable doubt.

77. If practicable, the judgment should give consideration to all of the elements identified above even if there is a finding that an element is not established on the evidence. This avoids a situation where an Appeals Chamber overturns a finding but must either reassess the evidence or send the case back because the Trial Chamber did not identify its findings on other relevant issues.

E. Submissions of the parties

78. As part of full reasoning, the judgment must address the key submissions of parties. However, practice does not support the use of a dedicated section of the judgment to summarise the submissions of the parties. Such a section is repetitive and creates the possibility for the parties to dispute the accuracy of the summary. Instead the submissions can be more relevantly and directly addressed by referring to them, as appropriate, in the course of the reasoning, analysis and conclusions, in the assessment of evidence, findings of fact, legal findings or individual criminal responsibility sections.

F. Confidential information

79. In drafting, careful consideration will need to be given to confidential information and how to protect it. It is useful to have review procedures in place that will specifically look for issues related to confidentiality as the draft progresses. Such reviews should consider the judgment holistically as certain statements taken in isolation may not be problematic but when combined with other material may reveal protected information. While redacted public versions of judgments can be issued, the aim should be for the judgment to be as publicly accessible as possible in terms of its content.

80. Different drafting techniques can be used to avoid references to sensitive information with no or limited reliance on redactions. For example it may be that the sensitive information in a narrative is unnecessary detail that need not be reflected. Or it may be possible to describe evidence that was adduced before the Chamber in closed session without reference to its source or to content that would disclose its source. The supporting references to the evidence can be included in the footnotes necessitating only the redaction of those references. Guidance should be provided on these various drafting options to staff unfamiliar with the same.

IV. Guideline for ICC Judgment Structure

81. There will always need to be some flexibility in judgment structure to address the particularities and nature of each case. For example there will be differences between judgments in Articles 6, 7, 8 and 8*bis* cases and those in Article 70 cases in light of the different nature of the crimes and what has to be established. Further, the approach to how the assessment of evidence is set out may differ – witness by witness or by crime sites or otherwise – depending on the nature and size of the case. The number of accused can also impact on judgment structure especially in terms of the assessment of individual criminal responsibility.

82. Nonetheless, the aim of this project was to have agreement on core sections and order which can be replicated in each case with the variations that may be needed due to the nature of the case. Drawing from the guidelines outlined above proposals for judgment content and structure are set out in a separate document.

V. Summary of Guidelines for Judgment Drafting

- Judgment drafting should begin upon the constitution of the Trial Chamber and be a continuous process grounded on the instructions and directions generated through ongoing deliberations by the trial judges throughout the trial.

- The legal support team should have a dedicated judgment drafting sub-team with day to day matters being handled by a separate sub-team. Both sub-teams should have a coordinator. There should be a structured review process in place for the judgment drafts.

- Trial Chambers should generate support material drawn from the evidence including witness reference documents.

- The content and structure of the judgment should follow the Guidelines for Judgment Structure.

ANNEX

GUIDELINE FOR ICC JUDGMENT STRUCTURE[1]

I. General introduction

1. Consistent with general practice, it is proposed that each judgment should start with a very general introduction section which gives brief narrative information about the case background including the number of witnesses appearing or whose evidence was admitted, number of documents submitted, and victim participation information, as well as geography, history or other factors as may be appropriate to the particular circumstances.

2. This would be followed by the standard information across all cases as to the identification of the Accused and an outline of the charges. Given the purpose of the judgment it is not necessary to include a procedural history of the case. That information is technical in nature and can be generated from court records. If a Chamber wishes to do so for convenience, it can include a procedural history as an Annex to the judgment.

II. Section addressing general evidentiary approaches and specific issues

3. It is also general practice that each judgment contains a section on evidence which outlines the general evidentiary principles applied by the Trial Chamber in the case such as standard of proof, approaches to evidence, facts requiring no proof, experts, burden of proof etc. This section can also be used to address any specific evidentiary issues which might have arisen in the case e.g. challenge to authenticity of documents, intercepts, general challenge to the credibility of a particular witness.[2] It is essentially a "catch all" section to describe the Chamber's approach to evidence and to address the specific key evidentiary issues in the case.

1 This guideline has been prepared on the basis of an examination of judgments of the ICC to date with some consideration of judgments of the *ad hoc* tribunals. The following is a draft of a proposed structure intended for discussion by ICC judges.

2 On the latter point see section on credibility finding below.

III. Findings of fact, credibility and assessment of evidence

A. Optional structural approaches

4. It is proposed that the judgment should next address the central task of the trial process – fact finding. As highlighted in the guidelines on judgment drafting, it is essential that the judgment clearly identifies the facts found by the Trial Chamber. In addition, in accordance with Article 74, the reasoning for each of those findings must be detailed in the judgment with a specific description of the evidence relied upon or not accepted, with accompanying transcript/document citations. The challenge is to find a structure for the judgment in which the factual findings are visibly distinguishable while the reasoning and analysis leading to each finding is at the same time detailed with clarity and comprehensively. In addition the judgment must be readable and easy to follow taking into account the various audiences for it.

5. From a drafting perspective this is the most difficult balance to achieve within a judgment especially in complex and lengthy cases where analysis will need to be extensive. There are different drafting approaches which can be employed to achieve these goals. Through a review of practice to date the following two options have been identified for recommendation.

1. Option 1

6. An approach which ensures complete clarity as to the factual findings is to first provide a narrative of the facts found without any evidentiary discussion or citations and to place the evidentiary discussion/analysis in a separate section which follows.[3] With this method the judgment begins by detailing the facts of the case as found by the Trial Chamber in a clear and comprehensive way and it is known from the start what the Chamber found on the evidence before it. In addition the reader is presented with a narrative that is well-defined and easy to follow without the disruption of having to read through the detailed analysis that led to each finding, which can also be confusing. Further it avoids a situation of very detailed footnotes which may be difficult to read and follow.

7. A possible disadvantage is that to those unfamiliar with the approach the relationship between the narrative section and the analysis which follows may not be evident. A Trial Chamber using this approach will need to make the distinction and relationship between the two sections clear by the section titles and, if necessary, by including explanatory notes. Similarly, a structural method

3 Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment pursuant to Article 74 of the Statute, 19 October 2016, ICC-01/05-01/13-1989.

must be employed to plainly associate each finding to the analysis/reasoning which underpins it. This will require either repetition of the findings in the analysis section or a detailed form of cross-referencing or both. The downside of this approach is duplicative text will be unavoidable increasing the length of the judgment and that may be a significant matter in lengthy cases.

2. Option 2

8. An alternative method is to combine the findings and the reasoning in one section, using drafting style and footnotes to distinguish between the two. With this approach the findings of the Trial Chamber are set out in a narrative style as in Option 1. In the case of a key finding, the reasoning/analysis supporting the finding precedes or follows the finding in the body of the text with a footnote citation to the transcript sections/exhibits. The reasoning, which will need to describe the evidence considered and the assessment made to reach the conclusion, will be easily distinguishable from the finding by drafting style. For the many other relevant but less significant findings the analysis/reasoning is set out in a footnote along with the citations to the transcript or exhibit.[4]

9. The advantage of this method is that the finding, analysis and citations are immediately associated eliminating the need for any duplication in the text. For the reader, there is a clear division between the findings, key analysis and the details of the reasoning allowing for a choice to follow just the narrative or review the footnotes. This self-contained section of the judgment will not require any further explanation or cross referencing.

10. The problem with this approach is that some Trial Chamber's may consider that it does not sufficiently isolate the factual findings so as to bring the required clarity.

11. A practical disadvantage is that the text structure may be difficult to work with for the drafters. However this drafting challenge can be alleviated if the planned approach is used from the beginning of the trial. In that case it will not be necessary to draft in the text/footnote style at the start. Instead an intermediary document can be used with drafting in the traditional form – finding followed by analysis or vice versa. Then in the latter stages of the trial, the division between text and footnote can be made. This will also make it easier to determine where the analysis should be placed (body of the text or footnote) because the importance of the issue and length of the discussion will be clear from the intermediary document.

4 For an illustration of this approach *see* ICTY, Trial Chamber II, *The Prosecutor v. Vujadin Popović et al.*, Judgement, 10 June 2010, IT-05-88-T; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Judgment, 8 July 2019, ICC-01/04-02/06-2359. Although in a context that is different from that of Article 74 decisions, *see* Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Reasons of Judge Eboe-Osuji *in* Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, ICC-01/09-01/11-2027.

12. One final disadvantage which is unavoidable with this approach is that ultimately the text will have a considerable number of lengthy footnotes which can be challenging for the reader.

13. Both options achieve the goal of identifying the findings of the Trial Chamber within a readable narrative with a separated analysis/reasoning linked to each of those findings. Each method has its advantages/disadvantages which will be more or less significant depending on the size and nature of the case and the views of the Trial Chamber. The difference to the overall structure of the judgment as a result of the two options is not significant – one section or two addressing findings of fact/assessment of evidence. For these reasons both options are recommended and each Trial Chamber can decide on their preferred option in a particular case.

B. Credibility findings

14. Credibility findings form an integral part of the evidence assessment which leads to the findings of fact. Whichever structure option is followed, in the course of analysis and assessment, each Trial Chamber will need to carefully address the issue of credibility and to set out not only the credibility findings, but the reasons for them. Generally this will be done throughout the course of considering the various issues in the case. However, there are different approaches that can be used structurally to detail these findings.

15. In some cases it may be possible to discuss the credibility of each witness, particularly if a witness by witness approach is being used in assessing the evidence and finding facts.

16. However in larger cases where many witnesses are heard this won't be possible or necessary. In those instances the Trial Chamber will need to determine where and how to reflect key credibility findings in terms of the judgment structure.

17. One method is to use an issue based style where findings are made in the course of considering particular issues in dispute. For example, if witnesses have given different accounts as to whether the accused was present at a particular place and time, the decisions taken on the credibility of the witnesses and the reasons for them can be set out in the evidentiary analysis and finding as to whether the accused was present or not. This approach is particularly useful when dealing with witnesses whose general credibility is not in issue but rather it is their recollection of particular events which is relevant. With this approach the credibility of the witness will be considered to the extent necessary to address particular issues. It is quite common with this approach for the credibility of one witness to be considered at several different junctures of the judgment and for different findings to be made depending on the circumstances.

18. For other witnesses a more general analysis of their credibility as a whole may be needed in addition to consideration of their evidence on specific issues. For example there may be key witnesses who are "insiders" or collaborators whose

overall credibility has been attacked on the basis of bias or self-interest. Or there could be witnesses who purport to testify to particular events when their presence in the relevant area is challenged or their capacity to recount policy in place is contested on the basis of their level or role in the organization. For such "macro" credibility challenges there is a need to address the arguments in one place before considering the evidence of that witness on particular issues. This raises a question of placement of that analysis.

19. Options structurally for these more detailed credibility findings would include considering the question the first time the witness is referenced. This is a straightforward approach if the Trial Chamber is using Option 1 for structure and the analysis is in a separate part. If using Option 2 the inclusion of a detailed discussion as to the credibility of a key witness in the course of the narrative description of the facts as found is structurally difficult. An alternative, so as to not break the narrative, is to address the overall credibility of key witnesses, especially when challenged, in the section on evidentiary issues at the start of the judgment.

20. Whichever option the Trial Chamber elects, what is essential is to make sure that there is a consistent approach whereby credibility assessments and the basis for them are comprehensively addressed in the judgment. None of the options necessitate a variation in the overall judgment structure. It is solely a question of where in the structure the findings will be placed.

IV. Applicable law

21. For clarity the judgment should set out the applicable law of relevance to the case. The practice as to placement of applicable law and even its inclusion has been varied at the ICC.

22. In broad terms, the judgments have ranged between having a stand- alone section on applicable law which covers all of the legal issues and discussions of law in different sections proximate to specific related findings.[5]

23. This is an area where agreement on a single style would significantly enhance the consistency and predictability of ICC judgments. While there can be merit to incorporating the applicable law into different sections, it is not a practice which is easily transportable across the different types and sizes of ICC cases. Moreover, taking into account the broad ICC audience, many of whom are focused solely on the legal principles at issue, it is much more user friendly to have a single

5 For example In the *Bemba*, *Bemba et al* and *Al-Mahdi* cases there was a stand- alone section on applicable law covering all relevant law. In the *Katanga* case there was no separate section on applicable law or on factual findings/facts. Instead the legal and factual findings were made under sections which considered the group evolution and structure, the attack, the crimes, contextual elements and criminal responsibility. The law was dealt with in sections dealing with particular issues - conscription and enlistment of children and individual criminal responsibility.

section which details the applicable law in each case as decided upon by the Trial Chamber. Further, this style is easily implemented in each case whatever its size or circumstance. For these reasons it is recommended that ICC judgments should contain a stand- alone section on applicable law which covers all of the relevant law for the case, following after the section on fact finding/assessment of evidence.

24. As a general point the examination of the applicable law and the jurisprudence related to it should be restricted to that which is necessary and relevant for the issues in the case.

V. Assessment of facts and conduct *vis-à-vis* the law

25. The legal findings of the Trial Chamber will be made through an assessment of the facts found with reference to the law. There should be a discrete section of the judgment which details this assessment and makes determinations as to individual criminal responsibility for the charges in the case.

26. For Article 70 cases as there are no contextual or underlying crime findings the analysis will focus on assessing the conduct of the accused with reference to the law including the relevant modes of liability.

27. For Rome Statue core crime cases there will be additional legal findings on the contextual elements which need to be clearly addressed in this section.

VI. Optional additions (discretionary – will depend on case)

28. In each case there may be other issues which need to be addressed. One of the most common is cumulative convictions. For consistency, these final or additional issues should be addressed after the main sections outlined above.

VII. Disposition

29. This section will set out in summary terms the conclusion of the Trial Chamber and is consistently placed at the end of the judgment.