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**International
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PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Public

Prosecution Response to “Defence Request for an in-depth analysis chart”

Source: The Office of the Prosecutor

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The Office of the Prosecutor

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) hereby responds to the Bemba Defence’s request that the Single Judge of Pre-Trial Chamber II order the Prosecution to file an in-depth analysis chart (IDAC) of the incriminating evidence the Prosecution intends to rely on for the confirmation proceedings (“Request”).

2. For the reasons set out below, the Prosecution opposes the Request. The Defence fails to demonstrate a legal basis for the requested relief and, given the factual and legal straightforwardness of the case, the written confirmation process, and the planned comprehensive Document Containing the Charges (DCC), an IDAC is unwarranted and likely to result in unnecessary delay. As such, the Request should be rejected.

II. Procedural background

3. On 27 November 2013, during the Initial Appearance for suspects Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba and Fidèle Babala Wandu, the Single Judge announced the Chamber’s decision ordering: (i) a written confirmation process, pursuant to Rule 165(3); (ii) the Prosecution’s filing of the Document Containing the Charges and the List of Evidence on 18 March 2014; and (iii) the filing of written submissions for the confirmation of charges on 18 April 2014 (“Decision”).¹

4. During Mangenda’s 5 December 2013 Initial Appearance, the Single Judge reiterated the Decision.²

¹ ICC-01/05-01/13-T-1-ENG, 27 November 2013, page 14, lines 20-25 to page 15, lines 1-15.

² ICC-01/05-01/13-T-3-Red-ENG, 5 December 2013, page 6, lines 5-22.

5. On 13 January 2014, the Bemba Defence filed its Request³ seeking, *inter alia*, that the Prosecution file an IDAC by at most one month after its final disclosure prior to its submissions on the confirmation of the charges.⁴ The Request also seeks that the Chamber disregard any evidence not accounted for in the IDAC when deciding on whether to confirm the charges.⁵

6. On 15 January, the Single Judge ordered the Prosecution to file its response to the Request by 24 January.⁶

III. Submissions

A. The Request is unsubstantiated

7. The Request should be dismissed outright, as it fails to set out any legal basis, or otherwise establish the propriety of the relief sought, in view of the particular circumstances of the case.

8. The Chamber should disregard the Defence's unsubstantiated claim of inequality of arms, as such. It is without any factual support in the record of the proceedings, and manifestly devoid of merit.

9. Surprisingly, the Defence points to the Prosecution's knowledge of its case and timely disclosure of incriminatory material on 20 December 2013 to illustrate its claimed disadvantage.⁷ However, neither the fact of the Prosecution's timely disclosure nor its knowledge of its case is a cognizable, let alone, reasonable ground

³ ICC-01/05-01/13-84, Defence request for an in-depth analysis chart, 13 January 2014.

⁴ The Request, first paragraph.

⁵ The Request, para. 5.

⁶ ICC-01/05-01/13-100, Decision shortening the time limit for the Prosecutor's response to the "Defence request for an in-depth analysis chart", 15 January 2014.

⁷ The Request, paras. 2-4.

to support the Request. To the contrary, it is hardly unforeseen in the Court's procedural framework that the Prosecution would know its case, which cannot reasonably amount in and of itself to an inequality of arms. Additionally, contrary to the Request, the Prosecution's timely disclosure in compliance with the Chamber's order assists the Defence's preparation, negating the grounds advanced in the Request.

10. The production of an IDAC is a matter of practice and is determined on a case-specific basis. Factors bearing on this determination include: the scope of the case, the expeditiousness of the proceedings, the nature of the evidence, the factual and legal complexity of the case, as well as the availability of other documents or instruments that may assist to explain the Prosecution's case and make the supporting evidence more accessible and comprehensible. The Request addresses none of these substantive considerations.

11. The Defence's request that the Chamber disregard any evidence not accounted for in an IDAC when determining the confirmation of charges is equally anemic. The preclusion sought by the Defence is a wildly disproportionate and severe sanction wholly unsupported by any statutory provision, rule, regulation or the Court's jurisprudence.⁸

12. Further, as a creature of practice, an IDAC must be implemented consistently with the Statute and Rules.⁹ Both favour the general admissibility of evidence,¹⁰ and

⁸ See *e.g.*, ICC-01/09-01/11-300-Conf, paras. 31 and 32.

⁹ Pursuant to Rule 121 (3), the Prosecution is required to submit a detailed description of the charges together with a list of the evidence which it intends to present at the confirmation hearing 30 days before the date of the confirmation hearing. Rule 121 does not preclude supplementing the list of evidence after its submission either to amend the charges (Rule 121(4)) or to introduce new evidence (Rule 121(5)) within the prescribed time-frame. Accordingly, if the list of evidence required by the statutory legal framework is subject to amendment, an IDAC, which is not expressly provided for in the Statute or the Rules, should not be more difficult to amend or update.

¹⁰ See, Article 69 (3)(4) and (7) of the Statute, in particular, which empowers the Court to rule on the relevance or admissibility of *any* evidence. Further, even when evidence is obtained in violation of the Statute or internationally recognized human rights, evidence will not be categorically rendered inadmissible unless specific conditions are met as stipulated in Article 69 (7) (a) and (b).

neither countenance the exclusion of relevant evidence not expressly referenced in an instrument unknown to either.¹¹

13. In light of the above, the Request is not substantiated and should be rejected on this ground alone. However, should the Chamber further consider the Request, it nevertheless fails to establish any plausible necessity for an IDAC, given the specific circumstances of this case.

B. An IDAC is unnecessary within the specific circumstances of this case

14. This case is distinguishable from any other case before the Court. It is straightforward, limited in scope and strictly confined to offences against the administration of justice under Article 70. It involves a narrow factual basis and limited charges, neither of which gives rise to any particularly complex theories of liability. Nor does it require a discussion of highly complex contextual elements, which typically characterise Article 5 cases.¹²

15. The core evidence in this case comprises recordings of telephone conversations to which the suspects are parties. This alone provides the suspects with unique familiarity of the chief evidentiary elements of the Prosecution's case. In addition, comprehensive reports of key audio intercepts prepared by the Independent Counsel will assist defence. These reports analyse in detail the content of the recorded telephone conversations and their relevance and significance to the Prosecution's

¹¹ In the same vein, Trial Chamber III held that: "[...] trials are essentially organic in nature and it is inevitable that as the evidence and the issues in the case develop, the prosecution may in due course seek to argue that the probative value of significance of one or more areas of evidence described in the in-depth analysis chart have changed or developed. The prosecution will not be limited by this document as to the submissions that it is entitled to advance on the ultimate probative significance of any of the testimony of the witnesses it has called or the other materials it has introduced." ICC-01/05-01/08-682, Decision on the "Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth -Analysis Chart", 29 January 2010, para. 27. See also, ICC-01/09-01/11-300-Conf, paras. 31 and 32.

¹² Reference is made to the common contextual elements as set forth in the chapeau of Articles 6, 7 and 8 of the Statute.

case.

16. As noted, the Chamber has decided to conduct the confirmation process by way of written submissions. Proceeding in this way, affords the parties and the Chamber the benefit of a structured and detailed exposition of the legal, factual and evidential basis of the Prosecution's case. The level of detail with which each element of the case will be outlined — which an oral confirmation process could not provide — will substantially buttress the information provided in the DCC, making the Prosecution's theory of the case and its supporting evidence more easily accessible and comprehensible.

17. In addition to written submissions expanding upon the DCC, the Prosecution will also construct its DCC in a form that will be footnoted and hyperlinked to the extent possible. This will readily direct the Chamber and Defence to the relevant supporting evidence uploaded in the electronic system of the Court. The Prosecution will further provide a list of the referenced evidence.

18. The close and clear nexus between this case and *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Main Case") requires that the proceedings in the instant case be conducted in a reasonably expeditious manner.¹³

19. In light of the directness of the case and the modality of the confirmation procedure, the burdensome and time-consuming process of producing an IDAC easily outweighs any anticipated marginal utility.

20. An IDAC is a complex document routinely comprising hundreds or even

¹³ See ICC-01/05-01/13-1-Red2, *Version publique expurgée du Mandat d'arrêt à l'encontre de Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu et Narcisse Arido*, 20 November 2013, para. 8 and ICC-01/05-01/13-93, Decision on the "Requête en autorisation d'appel (art. 82.1.d)" submitted by the Defence for Mr Mangenda, 14 January 2014, p. 6.

thousands of pages.¹⁴ Even in a case as well circumscribed as this one, producing an IDAC with referencing, cross-referencing and reproducing each relevant segment of all evidentiary items, and breaking them down across the constituent elements of the case, is a highly resource-intensive process. In the best case and despite the utmost diligence, it will prove to be overly burdensome and redundant. Moreover, the process will necessarily and adversely affect the expeditious conduct of the proceedings.

21. Although intended to clarify the evidentiary basis of the Prosecution's case for the Defence and the Chamber, in practice IDACs are often of very limited utility. On occasion, they are altogether deserted, providing no practical benefit. Defence counsels have described them, *inter alia*, as "a confusing point of reference",¹⁵ and the Prosecution's objection to producing IDACs, *inter alia*, for similar reasons, has been consistent. Principally, the Prosecution's objection has been that IDACs are not warranted when balancing the competing interests at stake; taking into consideration their limited use to the parties concerned; considering practical difficulties and impediments involved in their production; considering the potential adverse effect on the expeditious conduct of the proceedings; and in view of the limited categorisation of evidence, which potentially interferes with the Chamber's free assessment and the Defence's understanding thereof.

22. Notwithstanding these general observations, the fact remains that the

¹⁴ In the *Katanga et al.* case, the IDAC was approximately 1,000 pages, ICC-01/04-01/07-1643-Conf-AnxB to N. In the *Bemba* case, the updated IDAC exceeds 500 pages, ICC-01/05-01/08-781, annex A. In the *Kenyatta et al.* case, the IDAC exceeded 6,600 pages, ICC-01/09-02/11-257, annexes C1-C5. In the *Ruto et al* case the IDAC exceeds 12,000 pages, ICC-01/09-01/11-241, annexes A-E.

¹⁵ Counsel for the Defence in the *Katanga* case stated that: "To some extent, the in-depth analysis chart has proved less useful, ran I think to 1300 pages in the Katanga case, less useful because it's such a confusing point of reference." ICC-01/09-01/11-T-15-ENG ET, p. 32, lines 15-17. Also, Honourable Judge Van Den Wyngaert stated that: "I agree that what we must achieve is to have something that is useful both for the Defence and for the Trial Chamber. Now, as Judge Ozaki has said, we have to learn from the experience. I am a Judge in the Katanga case, so also in a trial where a chart has been asked from the Prosecutor, and it remains to be seen how useful this chart is for the Trial Chamber; and that applies to all the other cases where charts have been asked, but where the judgment still needs to be written" (ICC-01/09-02/11-T-18-ENG ET, p.50, lines 5-12).

circumstances of this case simply do not warrant such an exacting undertaking.

23. Further, updating an IDAC to reflect the development of the evidence in a case is “a significant task”¹⁶ similar in scope to its original production. Significantly, it is an exercise for which the extension of time is understandably routinely required and allocated.¹⁷

24. Here, the written submissions filed regarding the confirmation proceedings detailing the evidential underpinnings of the Prosecution’s case would be more readily digestible and understandable to the individual suspects, as well as provide an effective and clear guide to the Chamber.¹⁸

25. In complex cases involving crimes against humanity, it is accepted practice that the Defence may be furnished with written submissions *in lieu* of an IDAC. For instance, during the pre-trial phase of the *Kenyatta et al.* case, Trial Chamber V found that an IDAC was unnecessary and that the updated DCC filed in addition to the written submissions was sufficient to ensure that the accused were informed of the charges against them and would not be prejudiced in their preparation for trial.¹⁹

The Chamber noted:

“although both defence teams submit that the IDAC would be a useful tool, there is no reference to this document in the core legal texts of the Court, and in light of the provision of the two documents just described, the Chamber is of the view that the additional provision of such a document is unnecessary.”²⁰

¹⁶ ICC-01/05-01/08-682, Decision on the “Prosecution’s Submissions on the Trial Chamber’s 8 December 2009 Oral Order Requesting Updating of the In-Depth -Analysis Chart”, 29 January 2010, para. 29.

¹⁷ ICC-01/05-01/08-682, para. 29.

¹⁸ These have also been the views of members of the Defence. See ICC-01/09-01/11-T-15-ENG ET, p. 32, line 20 to page 33, line 3.

¹⁹ See ICC-01/09-02/11-451, para. 11. Similarly in *Ruto et al.* case, the Defence was only provided with an updated DCC and detailed written submissions, see ICC-01/09-01/11-440, notably after the Defence submitted that IDAC is “less useful” and indicated that a document detailing the Prosecution’s case “Summary of the Charges” would be a preferable form of presenting the Prosecution’s case. See ICC-01/09-01/11-T-15-ENG ET, p. 32, line 20 to p. 33, line 3.

²⁰ ICC-01/09-02/11-451, para. 11.

26. In the *Gbagbo* case, another case-specific alternative to an IDAC was found to be appropriate.²¹

27. Irrespective of other cases, a case-specific evaluation here underscores that no greater benefit would be obtained by producing an IDAC in this case. Given the attendant circumstances, an IDAC presents no discernable advantage in terms of informing the Defence or apprising the Chamber of the salient evidentiary and legal basis of the Prosecution's case, when compared to other required documents and instruments. This comprises a comprehensive DCC (as noted above), a list of evidence, detailed written submissions explaining the Prosecution's case for confirmation purposes. Taken together with certain evidentiary elements and other factors, such as the reports prepared by the Independent Counsel and the suspects' intimate familiarity with the core evidence in the case (i.e., intercepted conversations to which they are parties), there is decidedly no need for an IDAC in this case.

IV. Conclusion

28. For all of the reasons above, the Request should be denied in all respects.



Fatou Bensouda, Prosecutor

Dated this 24th Day of January 2014
At The Hague, The Netherlands

²¹ ICC-02/11-01/11-432 and ICC-02/11-01/11-592 (which, upon the agreement of the parties included a hyperlinked DCC and List of Evidence, and element-based chart).