

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 12 March 2014

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

Prosecution's Response to the "*Requête en rejet in limine des sept annexes au soutien de la « Prosecution's Response to the "Requête de la Défense relative à l'admissibilité de certains éléments de preuve que le Procureur entend présenter à l'audience de confirmation des charges et en radiation de certaines parties du Document contenant les charges" (ICC-01/04-02/06-250-Conf) » (ICC-01/04-02/06-269-Conf)"*

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Defence requests that the Single Judge reject *in limine* seven charts submitted by the Prosecution as annexes to its response to the Defence's challenge to the admissibility of evidence. The Defence argues that these charts are argumentative in nature and that the Prosecution therefore exceeded the number of pages allowed under regulation 37 of the Regulations of the Court ("Regulations").
2. The Defence's Request should be rejected. The seven annexes submitted by the Prosecution are descriptive in nature and are aimed at providing a factual description of the documents at issue, as detailed in the Prosecution's Response. The annexes do not constitute submissions and should not be counted when determining whether the Prosecution's Response complies with the page limits set in the Regulations.
3. Moreover, the charts submitted by the Prosecution are entirely in line with a consistent and well-established practical approach adopted by the Chambers of this Court in matters of admissibility of evidence. The provision of detailed charts, such as the ones appended to the Prosecution's Response, has been accepted and encouraged by Chambers finding in them a useful tool which enables a proper determination on the admissibility of the disputed evidence.
4. Accordingly, the Defence's Request should be dismissed and the annexes should be considered in the Single Judge's assessment on the admissibility of the evidence.

Procedural History

5. On 17 June 2013, the Single Judge issued a decision setting a calendar for the disclosure of evidence between the parties.¹ Pursuant to this decision, the

¹ ICC-01/04-02/06-73.

Prosecution disclosed to the Defence the evidence upon which it intended to rely for the purposes of the confirmation hearing.

6. On 10 January 2014, the Prosecution filed the document containing the charges ("DCC") and List of Evidence upon which it intended to rely for confirmation.² On 17 January 2014, the Prosecution filed a consolidated in-depth analysis chart of incriminating evidence (the "IDAC").³
7. On 6 February 2014, the Defence filed a request to exclude a number of documents on which the Prosecution relies for confirmation and to strike several paragraphs of the DCC.⁴
8. On 3 March 2014, the Prosecution filed its response to the Defence's Request ("Prosecution's Response"), providing seven detailed charts which individually describe the relevance of each document in order to assist the Single Judge in making her assessment on their admissibility.⁵
9. On 7 March 2014, the Defence requested that the Single Judge reject these charts *in limine* ("Defence's Request").⁶

Prosecution's Submissions

10. The Defence erroneously characterises the seven annexes as argument. On the contrary, these annexes are descriptive and outline information contained in the documents.
11. Moreover, the Defence's Request conflicts with a well-established practice of this Court in matters which require Chambers to proceed to detailed factual assessments, such as disputes as to the admissibility of evidence, applications for

² ICC-01/04-02/06-203-Conf-AnxB.

³ ICC-01/04-02/06-217-Conf-AnxC.

⁴ ICC-01/04-02/06-250-Conf, para. 3.

⁵ ICC-01/04-02/06-269-Conf.

⁶ ICC-01/04-02/06-274-Conf.

redactions or submissions on alternative evidence. In such matters, Chambers have consistently accepted and encouraged the provision of detailed charts as a tool aimed at enabling a proper ruling.

The annexes are not submissions

12. *First*, the annexes appended to the Prosecution's Response are *not* argumentative in nature.
13. The Prosecution recalls that, for the calculation of the number of pages of a document filed with the Registry, "appendix[es] containing references, authorities, copies from the record, exhibits and other relevant, non-argumentative material" are not to be counted. The annexes to the Prosecution's Response *are* appendices that contain relevant, non-argumentative material.
14. The Prosecution submitted seven charts listing each item of evidence challenged by the Defence⁷ and providing the documents' Evidence Registration Number (ERN), date and a neutral description of the contents. Annexes A1 to A6 additionally describe the relevance of the item to the charges, thereby providing information already on the record of this case through the IDAC. Annex A3 also provides a reference to the specific page(s) of the IDAC where the relevant evidence is included. Lastly, Annex A5 also provides a description of the indicia of reliability of the 18 documents challenged by the Defence in this category (such as whether the document is typed, signed or on letterhead).

⁷ For the Single Judge's reference, the Prosecution provides the category of Defence challenge addressed in each of the Prosecution's seven annexes: A1: Documents listed by the Defence as referring to events after the period of the charges; A2: Documents listed by the Defence as not sufficiently connected to the charges; A3: Documents listed by the Defence as not contained in the IDAC or for which the Defence considers that the relevance is not explained in the IDAC; A4: Documents listed by the Defence as undated, not signed and with no source; A5: Documents listed by the Defence as altered, not authentic or a draft; A6: Documents listed by the Defence as internal work products or opinions; A7: Documents listed by the Defence as documents relating to deceased witnesses.

15. The Prosecution submits that the content of Annexes A1 to A7 to the Prosecution's Response is factual, is presented in a neutral manner and does not constitute argument. The seven annexes merely describe the factual elements on the face of the documents, whereas the Prosecution's *submissions* – that the documents challenged by the Defence are relevant, probative and not unfairly prejudicial – are contained in the main filing, the Prosecution's Response itself.
16. The Appeals Chamber decision cited by the Defence in fact *denied* a challenge to strike an annex on the basis that it violated regulations 37 and 36(2)(b), finding: "The annex to the Document in Support of the Appeal contains a table which illustrates Mr Ntaganda's arguments under the first ground of appeal by linking the specific factual findings of the Pre-Trial Chamber with the type of evidence relied upon to support those findings and Mr Ntaganda's objection to that evidence. Thus the annex to the Document in Support of the Appeal contains a more detailed and specific presentation of Mr Ntaganda's arguments under the first ground of appeal [...] Furthermore, the annex does not contain any additional arguments, but merely a table which explains in more detail Mr Ntaganda's arguments under the first ground of appeal."

The annexes are in line with a well-established practical approach

17. *Second*, the Defence's Request to reject the seven annexes goes against a well-established practice of Chambers of this Court which accepts and even encourages the provision of detailed descriptive charts in matters which require Chambers to individually assess specific items of evidence.
18. When having to make document specific, in-depth analysis and determinations on specific factual issues, Chambers have adopted a practical and realistic approach, accepting or even requiring the parties to provide detailed charts such as the ones appended to the Prosecution's Response. This is the case with respect

to requests to have evidence admitted from the bar table. It is also the case in other matters such as applications for redactions or submissions on alternative evidence.

19. The Prosecution notes, for instance, that the Single Judge in this case has accepted this practical and realistic approach with respect to the Prosecution's applications for redactions as well as its submissions on evidence collected under article 54(3)(e). In the latter case, the Prosecution initially submitted its "Prosecution's Information of the Status of Disclosure",⁸ accompanied by a chart describing the documents collected by the Prosecution under article 54(3)(e) and listing references to alternative evidence already disclosed to the Defence.⁹ The Single Judge found that the Prosecution "failed to explain how the information contained in these items of evidence is analogous to the information contained in [...] documents" collected under article 54(3)(e) and, consequently, ordered the Prosecution to provide her with "a chart detailing what alternative evidence has been provided to the Defence and in what manner the alternative evidence is claimed to be analogous to the [...] documents".¹⁰ Thereby, the Single Judge required the Prosecution to supplement its main submissions with detailed factual descriptions of the evidence to assist her in her independent assessment of the materials. The seven annexes to the Prosecution's Response follow the same principle.

20. Similarly, with respect to the admissibility of evidence, the Prosecution refers to the detailed requests to have evidence admitted from the bar table which are routinely submitted by the Prosecution before this Court.¹¹

⁸ ICC-01/04-02/06-201.

⁹ ICC-01/04-02/06-201-Conf-Exp-AnxA.

¹⁰ ICC-01/04-02/06-210.

¹¹ ICC-01/04-01/06-2070; ICC-01/04-01/06-2379; ICC-01/04-01/06-2456-Red; ICC-01/04-01/06-2631-Conf; ICC-01/04-01/06-2666; ICC-01/04-01/07-2290; ICC-01/04-01/07-2623-Red; ICC-01/05-01/08-2147 and ICC-01/05-01/08-2147-AnxA-Red; ICC-01/05-01/08-2854 and ICC-01/05-01/08-2854-AnxA-Red; ICC-01/05-01/08-

21. In *Lubanga*, Trial Chamber I endorsed the practical approach taken by the Prosecution. Subsequent to the testimony of a witness, the Trial Chamber requested the Prosecution to specify which video excerpts shown to the witness it sought to have admitted as well as the relevance of each excerpt. In response, the Prosecution filed its submissions and appended an annex individually describing the relevance and reliability of each excerpt.¹² The Trial Chamber commented the Prosecution's annex in the following manner: "[the] annex [...] to the present application is a useful demonstration of the kind of document that should be provided in this context: Its detail ensures that the stance of the party or participant introducing the material is clear, and at any relevant stage any other party or participant may file additional submissions".¹³
22. By nature, assessments on the admissibility of evidence require the provision of detailed factual information which is specific to each item. In such matters, it is in the interest of the efficiency of the proceedings to provide Chambers with charts, addressing in detail each item of evidence. This approach allows a precise understanding of the parties' respective positions and enables a proper determination of the admissibility of the relevant evidence.
23. Conversely, general submissions on categories of documents do *not* assist in making a determination on the admissibility of evidence, as such submissions deny the specificity of the content, nature and situation of each item of evidence.
24. In line with the practice of the Court, the Prosecution submits that the seven charts appended to the Prosecution's Response should not be counted in calculating the page limit. The Prosecution's Response squarely complies with the

2868 and ICC-01/05-01/08-2868-AnxA-Red; ICC-01/05-01/08-2909; ICC-01/09-01/11-819; ICC-01/09-01/11-1121.

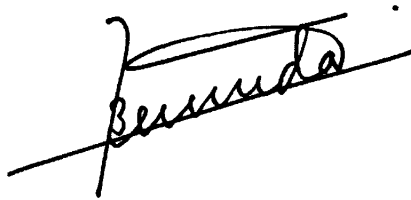
¹² ICC-01/04-01/06-1730-Conf.

¹³ ICC-01/04-01/06-T-179-Red2-ENG, page 33, lines 12-17.

Regulations and, accordingly, its annexes should be taken into account in the Single Judge's assessment of the evidence.

Relief

25. For the reasons set out above, the Prosecution requests that the Chamber dismiss the Defence's Request.

A handwritten signature in black ink, appearing to read 'Bensouda', is written over a horizontal line.

Fatou Bensouda,
Prosecutor

Dated this 12th day of March 2014
At The Hague, The Netherlands