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

Date: **8 June 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

Decision on Admissibility of Evidence and Other Procedural Matters

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for the Defence

Marc Desalliers
Caroline Buteau

Legal Representatives of the Victims

Sarah Pellet
Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Other

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court,¹ hereby renders the decision on admissibility of evidence and other procedural matters. This decision is issued together with the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda”.

PROCEDURAL HISTORY

1. On 22 August 2006² and on 13 July 2012,³ two warrants of arrest were issued against Bosco Ntaganda (“Mr. Ntaganda”).
2. On 22 March 2013, Mr. Ntaganda voluntarily surrendered to the Court⁴ and on 26 March 2013, the suspect made his first appearance before the Chamber.⁵
3. On 10 January 2014, the Prosecutor filed the Document Containing the Charges (the “DCC”),⁶ together with the list of evidence,⁷ and, on 17 January 2014,⁸ the consolidated in-depth analysis chart.⁹

¹ Pre-Trial Chamber II, “[Decision Designating a Single Judge](#)”, 21 March 2013, ICC-01/04-02/06-40.

² Pre-Trial Chamber I, “Decision on the Prosecution Application for a Warrant of Arrest”, 22 August 2006, ICC-01/04-02/06-1-US-Exp-tEN; a redacted version is also available, see Pre-Trial Chamber I, “[Decision on the Prosecution Application for Warrant of Arrest](#)”, 6 March 2007, ICC-01/04-02/06-1-Red-tENG. A warrant of arrest was issued alongside this decision, see Pre-Trial Chamber I, “[Mandat d’arrêt](#)”, 22 August 2006, ICC-01/04-02/06-2; and “[Warrant of Arrest](#)”, 22 August 2006, ICC-01/04-02/06-2-Anx-tENG. The warrant of arrest was initially issued under seal. On 28 April 2008, Pre-Trial Chamber I decided to unseal the warrant of arrest, see “[Decision to unseal the warrant of arrest Against Bosco Ntaganda](#)”, ICC-01/04-02/06-18. A redacted version of the initially under seal warrant of arrest had also been issued by Pre-Trial Chamber I at the time. The redacted warrant of arrest was made public upon instruction of Pre-Trial Chamber I dated 29 September 2010, see “[Mandat d’arrêt – Corrigendum](#)”, 7 March 2007, ICC-01/04-02/06-2-Corr-Red; an English version is also available, see “[Warrant of arrest – Corrigendum](#)”, 7 March 2007, ICC-01/04-02/06-2-Corr-tENG-Red.

³ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application under Article 58”, 13 July 2012, ICC-01/04-02/06-36-Conf-Exp; a public redacted version is also available, see Pre-Trial Chamber II, “[Decision on the Prosecutor’s Application under Article 58](#)”, 13 July 2012, ICC-01/04-02/06-36-Red.

⁴ Pre-Trial Chamber II, “[Decision on Setting the Date for the Initial Appearance and Related Issues](#)”, 22 March 2013, ICC-01/04-02/06-41, para. 7.

⁵ Pre-Trial Chamber II, [Transcript of Hearing](#), 26 March 2013, ICC-01/04-02/06-T-2-ENG.

⁶ DCC, [ICC-01/04-02/06-203-AnxA](#).

⁷ [ICC-01/04-02/06-203-AnxB](#).

⁸ Pre-Trial Chamber II, “[Decision on the Defence Urgent Request of 14 January 2014](#)”, 14 January 2014, ICC-01/04-02/06-209.

4. On 24 January 2014, the Defence filed its list of evidence¹⁰ and in-depth analysis chart,¹¹ as amended on 7 February 2014.¹²

5. On 6 February 2014, the Defence submitted 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” (the “6 February 2014 Request”).¹³

6. The confirmation of charges hearing (the “Hearing”) was held from 10 until 14 February 2014.¹⁴

7. On 3 March 2014, the Prosecutor submitted the “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)” (the “Prosecutor’s Response of 3 March 2014”) to which she appended seven confidential annexes.¹⁵

8. On 7 March 2014, the Defence submitted 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

⁹ ICC-01/04-02/06-217-Conf-AnxC.

¹⁰ [ICC-01/04-02/06-227-AnxA](#).

¹¹ ICC-01/04-02/06-227-Conf-AnxB.

¹² [ICC-01/04-02/06-253](#) with one public and one confidential annex.

¹³ ICC-01/04-02/06-250-Conf.

¹⁴ Pre-Trial Chamber II, “[Decision on the ‘Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing’ and Setting a New Calendar for the Disclosure of Evidence between the Parties](#)”, 17 June 2013, ICC-01/04-02/06-73, p. 19. Pre-Trial Chamber II, [Transcript of Hearing](#), 10 February 2014, ICC-01/04-02/06-T-7-ENG; Pre-Trial Chamber II, [Transcript of Hearing](#), 10 February 2014, ICC-01/04-02/06-T-7Bis-ENG; Pre-Trial Chamber II, [Transcript of Hearing](#), 11 February 2014, ICC-01/04-02/06-T-8-Red-ENG; Pre-Trial Chamber II, [Transcript of Hearing](#), 11 February 2014, ICC-01/04-02/06-T-8Bis-Red-ENG; Pre-Trial Chamber II, [Transcript of Hearing](#), 12 February 2014, ICC-01/04-02/06-T-9-Red-ENG; Pre-Trial Chamber II, [Transcript of Hearing](#), 13 February 2014, ICC-01/04-02/06-T-10-Red-ENG; Pre-Trial Chamber II, [Transcript of Hearing](#), 14 February 2014, ICC-01/04-02/06-T-11-ENG. See also the presentations of evidence of the parties at the Hearing as filed in the case record, see [ICC-01/04-02/06-258](#) with fifteen public annexes and four confidential annexes; [ICC-01/04-02/06-263](#) with two public annexes and four confidential annexes.

¹⁵ ICC-01/04-02/06-269-Conf.

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-10/04-02/06-269-Conf)" (the "7 March 2014 Request").¹⁶

9. On the same day, the Prosecutor filed the "Prosecution's submission on issues that were raised during the confirmation of charges hearing" (the "Prosecutor's Final Submission") to which she appended three confidential annexes.¹⁷

10. On 10 March 2014, the Defence submitted the "Requête urgente en rejet *in limine* des trois annexes déposées au soutien de la 'Prosecution's submission on issues that were raised during the confirmation of charges hearing' datées du 7 mars 2014" (the "10 March 2014 Request").¹⁸

11. On 12 March 2014, the Prosecutor responded to the 7 March 2014 Request by filing the "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-10/04-02/06-269-Conf)"".¹⁹

12. On 13 March 2014, the Prosecutor responded to the 10 March 2014 Request in her filing entitled "Prosecution's Response to the 'Requête urgente en rejet *in limine* des trois annexes déposées au soutien de la 'Prosecution's submissions on issues that were raised during the confirmation of charges hearing', datées du 7 mars 2014'".²⁰

II. The Applicable Law

13. The Single Judge notes article 21, 61, 67, and 69 of the Rome Statute (the "Statute"), rules 63, 64 and 121 of the Rules of Procedure and Evidence

¹⁶ ICC-021/04-02/06-274-Conf.

¹⁷ ICC-01/04-02/06-276-Conf with confidential annexes A, B and C. A public redacted version was filed on 24 March 2014, see [ICC-01/04-02/06-276-Red](#).

¹⁸ [ICC-01/04-02/06-277](#).

¹⁹ [ICC-01/04-02/06-281](#).

²⁰ ICC-01/04-02/06-283-Conf. A public redacted version of this filing is available, see [ICC-01/04-02/06-283-Red](#).

(the “Rules”) and regulations 23bis, 36 and 37 of the Regulations of the Court (the “Regulations”).

14. The Single Judge notes, in particular, article 69(4) of the Statute which reads:

“The Court *may* rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence” (emphasis added).²¹

III. The 6 February 2014 Request and 7 March 2014 Request

The Submissions of the Parties

15. In the 6 February 2014 Request, as amended in the Hearing,²² the Defence seeks the Chamber’s determination on relevance and admissibility of a number of pieces of evidence that have been presented by the Prosecutor. More specifically, the Defence seeks to exclude a number of pieces of evidence on account of their irrelevance²³ as they, as the case may be, (i) relate to facts which occurred outside the temporal scope of the charges, as set out in the DCC;²⁴ (ii) cannot be linked to any of the factual allegations contained in the DCC;²⁵ (iii) are not analysed in the in-depth analysis chart or their relevance is not explained.²⁶

16. The Defence further claims that a certain number of evidence is inadmissible as they, as the case may be, (i) do not indicate the identity of the author, the date they were produced, and/or a signature;²⁷ (ii) are not authentic, have been altered, or exist in draft form, or in relation to which the Prosecutor does not possess the original;²⁸ (iii) are an internal document, a statement or an opinion of a person who will not be called by the Prosecutor to testify as a witness or expert. Reference is made, in

²¹ See also, albeit in the context of trial proceedings, Appeals Chamber, “[Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’](#)”, 3 May 2011, ICC-01/05-01/08-1386, para. 37.

²² See below paragraph 17.

²³ ICC-01/04-02/06-250-Conf, para. 4.

²⁴ ICC-01/04-02/06-250-Conf, paras 5 and 6.

²⁵ ICC-01/04-02/06-250-Conf, paras 8-9.

²⁶ ICC-01/04-02/06-250-Conf, paras 10-11.

²⁷ ICC-01/04-02/06-250-Conf, para. 12.

²⁸ ICC-01/04-02/06-250-Conf, paras 13-15.

particular, to a power point presentation and documents prepared by a staff member of the Office of the Prosecutor.²⁹

17. The Defence also requests the exclusion of certain pieces of evidence relating to witnesses who are deceased.³⁰ In particular, the Defence claims that article 61(5) of the Statute does not authorize the use of statements of witnesses who are deceased but requires that the witnesses will be available to testify in trial.³¹ Consequently, it avers that it would be “unfair” to send a case to trial based on evidence which cannot be used at the trial stage.³² During the Hearing, the Defence added to this particular request the material related to two additional witnesses who are deceased.³³

18. In addition, the Defence seeks to exclude declarations and related investigators’ notes of witnesses on whom the Prosecutor relies but who have not consented that their statement be used for the purposes of the confirmation of charges hearing.³⁴ The Defence informs the Chamber that it does not have any information as to whether the witnesses concerned have given previously their consent. The Prosecutor allegedly informed the Defence that she was not obliged to disclose such information under article 67(2) of the Statute and rule 77 of the Rules.³⁵ Accordingly, the Defence requests that the Prosecutor be ordered to indicate which of the witnesses have consented that their statements or related investigators’ notes be used for the purposes of these proceedings.³⁶

²⁹ ICC-01/04-02/06-250-Conf, paras 16-19.

³⁰ ICC-01/04-02/06-250-Conf, paras 20-28.

³¹ ICC-01/04-02/06-250-Conf, para. 25.

³² ICC-01/04-02/06-250-Conf, para. 27.

³³ Pre-Trial Chamber II, [Transcript of Hearing](#), 10 February 2014, ICC-01/04-02/06-T-7Bis-ENG, p. 2, lines 10-13.

³⁴ ICC-01/04-02/06-250-Conf, paras 29-33. This point was again raised during the Hearing, see Pre-Trial Chamber II, [Transcript of Hearing](#), 10 February 2014, ICC-01/04-02/06-T-7-ENG, p. 11, lines 2-16.

³⁵ ICC-01/04-02/06-250-Conf, para. 31.

³⁶ ICC-01/04-02/06-250-Conf, para. 32.

19. Lastly, the Defence also seeks paragraphs 29 to 33 to be deleted from the DCC as they allegedly refer to events outside the temporal scope of the charges.³⁷

20. In the Prosecutor's Response of 3 March 2014, the Prosecutor provides a comprehensive response to all the arguments raised in the 6 February 2014 Request, together with seven annexes providing detailed information about each piece of evidence that the Defence referred to in its 6 February 2014 Request. The Single Judge has taken note of the arguments and information provided by the Prosecutor and will refrain from rehearsing them here again.

21. In its 7 March 2014 Request, the Defence contends that the annexes contained in the Prosecutor's Response of 3 March 2014 be counted in calculating the page limit pursuant to regulation 37 of the Regulations as they contain, contrary to regulation 36(2)(b), second sentence, of the Regulations, arguments and conclusions in respect to every piece of evidence which the Defence challenged in the 6 February 2014 Request.³⁸ Noting that no extension of page limit was requested under regulation 37(2) of the Regulations,³⁹ the Defence requests, accordingly, that the Chamber dismiss *in limine* the seven confidential annexes (amounting to 150 pages) appended to the Prosecutor's Response of 3 March 2014 (amounting to 20 pages) as they, taken altogether, exceed the limit of 20 pages as established in regulation 37(1) of the Regulations.

22. The Prosecutor denies the Defence allegation summarized above and maintains that the seven confidential annexes are descriptive in nature, providing information about the pieces of evidence at issue, and do not contain any submissions.⁴⁰ She therefore requests that the 7 March 2014 Request be dismissed.⁴¹

³⁷ ICC-01/04-02/06-250-Conf, para. 7.

³⁸ ICC-01/04-02/06-274-Conf, paras 6 and 8.

³⁹ ICC-01/04-02/06-274-Conf, para. 9.

⁴⁰ [ICC-01/04-02/06-281](#), paras 2, 10, 13 and 15.

⁴¹ [ICC-01/04-02/06-281](#), para. 25.

Determinations of the Single Judge

23. The present decision is classified public even though it makes reference to filings which are treated as confidential. However, the Single Judge considers that such references in the present decision are required by the principle of publicity and judicial reasoning. Moreover, those references are not inconsistent with the nature of the documents referred to as they have been kept to a minimum.

24. Before entertaining the merits of the 6 February 2014 Request, it is necessary to determine whether the annexes appended to the Prosecutor's Response of 3 March 2014 can be taken into consideration. Having regard to the content of the annexes concerned, the Single Judge opines that they are in conformity with the requirements of regulation 36(2)(b), second sentence, of the Regulations. All the arguments as to the challenges, which the Defence itself did not identify per item but per category, are contained in the main filing of the Prosecutor's Response of 3 March 2014 which is, consequently, in conformity with the requirements of regulation 37(1) of the Regulations. The 7 March 2014 Request is therefore rejected.

25. Turning now to the 6 February 2014 Request, the Single Judge wishes to clarify at the outset that the Chamber is, as a matter of principle, not obliged to undertake a comprehensive assessment of "relevance" or "admissibility" of each piece of evidence in accordance with article 69(4) of the Statute, save for the application of article 69(7) of the Statute.⁴² The Appeals Chamber has acknowledged the discretion chambers enjoy under article 69(4) of the Statute, which is evident from the clear wording of said provision (see paragraph 14 above).⁴³ Rather, what is required by the Statute is that this Chamber bases its article 61(7) decision on such evidence

⁴² Pre-Trial Chamber II, "[Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo](#)", 15 June 2009, ICC-01/05-01/08-424, para. 46.

⁴³ Appeals Chamber, "[Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence'](#)", 3 May 2011, ICC-01/05-01/08-1386, para. 37.

which it considers relevant⁴⁴ and of sufficient probative value⁴⁵. This understanding of the statutory legal framework explains that in all the cases before it this Chamber has regularly refrained from pronouncing on the “relevance” and “admissibility” of evidence.

26. That said, the Single Judge accepts that individual *challenges* to the evidence can be advanced by the Defence in exercise of its right under article 61(6)(b) of the Statute. In so doing, the Defence must define its challenge specifically and relate it to a particular piece of evidence. This right does not, however, subject the Chamber to the duty to first rule on “relevance” or “admissibility” of the evidence before relying on it in the article 61(7) decision, as suggested by the Defence. Rather, the Chamber will decide on the relevance and probative value to be given to each piece of evidence, if any, in its determination under article 61(7)(a) and (b) of the Statute.

27. This approach finds further support in the language used in article 61 of the Statute which does not establish anywhere that the evidence, upon which the Chamber relies in its article 61(7) decision must previously have been “admitted” or declared as “relevant” pursuant to article 69(4) of the Statute. Rather, the Chamber is invited in article 61(7)(a) of the Statute to “confirm those charges in relation to which it has determined that there is sufficient evidence (...)”. Whether the evidence is relevant, sufficiently connected to the charges, or has probative value is determined by the Chamber on a case-by-case basis in the article 61(7) decision.

28. Lastly, the Single Judge, having regard to the rights of the Defence, is of the view that Mr. Ntaganda does not suffer any prejudice as he can advance any of the challenges regarding the “relevance” or “admissibility” of evidence at the trial stage.

⁴⁴ Pre-Trial Chamber II, “[Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo](#)”, 15 June 2009, ICC-01/05-01/08-424, para. 41.

⁴⁵ Pre-Trial Chamber II, “[Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo](#)”, 15 June 2009, ICC-01/05-01/08-424, para. 42.

The Single Judge notes in agreement the statement of the Defence to avail itself of this right at a later stage, as the case may be.⁴⁶

29. The Single Judge will not, therefore, entertain the Defence requests for the Chamber's determination on "relevance" and "admissibility". That said, the Single Judge will nevertheless address three points which have been raised in the 6 February 2014 Request: (i) the deletion of paragraphs 29 to 33 of the DCC; (ii) the exclusion of material pertaining to or stemming from deceased witnesses; and (iii) the exclusion of evidence which was not included in the in-depth analysis chart.⁴⁷

30. The Defence seeks the deletion of paragraphs 29 to 33 of the DCC because they relate to events which fall purportedly outside the temporal scope of the charges. The Single Judge is not persuaded by this argument. The temporal scope of the charges is clearly delineated in section H of the DCC.⁴⁸ Facts outside the temporal scope may offer useful background information or context, which is useful to understand the facts *within* the temporal scope of the charges, but do not form part of the charges as such. In other words, those facts do not extend the temporal scope of the charges.⁴⁹ Bearing in mind that only the charges as set out in section H of the DCC have informed the Chamber's article 61(7) decision, the Single Judge is of the view that paragraphs 29 to 33 of the DCC must not be deleted.

31. The Defence requests that the Chamber exclude material from the evidence which pertains to or stems from deceased witnesses. Admittedly, the Defence will not be able to examine these witnesses at trial. However, this in and of itself does not warrant the exclusion of the evidence concerned for the purposes of the article

⁴⁶ See ICC-01/04-02/06-250-Conf, para. 34 ("La Défense se réserve par ailleurs le droit de contester l'admissibilité de tout élément de preuve du Procureur à un stade ultérieur des procédures, le cas échéant".)

⁴⁷ The Defence request to order the Prosecutor to indicate to Mr. Ntaganda whether all witnesses have consented to their statements being used at the Hearing, has become moot insofar as the Prosecutor informed the Defence in the meantime that all witnesses have consented, see ICC-01/04-02/06-269-Conf, para. 60.

⁴⁸ DCC, [ICC-01/04-02/06-203-AnxA](#), pp 49-60; regulation 52 of the Regulations.

⁴⁹ This rationale extends to evidence pertaining to facts allegedly falling outside the temporal scope of the charges.

61(7) decision. The Single Judge pays heed to article 61(5) of the Statute which allows the Prosecutor to present at the pre-trial stage documentary or summary evidence. It follows that statements and material pertaining to deceased persons can be considered as any other documentary evidence. Furthermore, article 61(5) of the Statute does not make the presentation of such evidence contingent upon the availability of witnesses concerned at trial. While it would be ideal if the Prosecutor's evidentiary basis of the case stays the same throughout the stages of the proceedings, the Statute does not establish such a stringent requisite. The Single Judge agrees with the Prosecutor⁵⁰ in saying that the rights of the Defence are not infringed, as it could still have challenged the evidence in question during the Hearing through other means.

32. The Defence further requests that 16 pieces of evidence be excluded which are not included in the in-depth analysis chart.⁵¹ The Prosecutor contends that eleven out of those sixteen pieces of evidence are included in the in-depth analysis chart. She concedes that the remaining five pieces of evidence were "inadvertently" not included but avers that this does not render them "inadmissible".⁵² The Single Judge recalls the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (the "Disclosure Decision") in which she elaborated on the purpose, nature and content of the in-depth analysis chart, to be provided by both parties.⁵³ As the Single Judge explicated, the in-depth analysis chart, an *auxiliary instrument* for the benefit of both parties, is aimed at streamlining the process of evidence disclosure, establishing satisfactory conditions for the proper preparation of the Defence and organizing the presentation of evidence during the Hearing.⁵⁴ It follows from the above that the purpose of the in-depth analysis chart is not to inform the Defence of the entirety of the evidence on which the Prosecutor intends to rely. That

⁵⁰ ICC-01/04-02/06-269-Conf, para. 57.

⁵¹ ICC-01/04-02/06-250-Conf, para. 10.

⁵² ICC-01/04-02/06-269-Conf, para. 25.

⁵³ Pre-Trial Chamber II, "[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)", 12 April 2013, ICC-01/04-02/06-47, paras 29-32.

⁵⁴ Pre-Trial Chamber II, "[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)", 12 April 2014, ICC-01/04-02/06-47, paras 31 and 32.

information can be retrieved from the list of evidence, as provided for in article 61(3) of the Statute in conjunction with rule 121(3) of the Rules. As a result, evidence which is not listed in the *list of evidence* cannot be considered for the purposes of the article 61(7) decision and must be excluded. Hence, while the non-reference of *five* pieces of incriminating evidence in the in-depth analysis chart does not conform fully with the order contained in the Disclosure Decision, the Single Judge concludes that this omission cannot go so far as to exclude this evidence for the purposes of the confirmation of charges altogether.⁵⁵

IV. The 10 March 2014 Request

The Submissions of the Parties

33. The Defence recalls that the Prosecutor's Final Submission was not to exceed 120 pages. It argues that the three annexes (amounting to 22 pages) attached to the main filing (amounting to 120 pages) should be counted in calculating the page limit pursuant to regulation 37 of the Regulations as they contain, contrary to regulation 36(2)(b), second sentence, of the Regulations, arguments and conclusions.⁵⁶ As the Prosecutor was given authorization to submit only 120 pages in total, the Defence requests that the three confidential annexes to the Prosecutor's Final Submission be dismissed *in limine*.⁵⁷

34. The Prosecutor denies the Defence allegation summarized above and maintains that the three confidential annexes are descriptive visual representations of aspects of the submissions made and do not contain any argumentative material.⁵⁸ She therefore requests that the 10 March 2014 Request be dismissed.⁵⁹

⁵⁵ See also Pre-Trial Chamber II, "[Decision on the 'Prosecution's Request to Exclude Certain Documents Submitted by the Defence'](#)", 22 September 2011, ICC-01/09-02/11-348, para. 14.

⁵⁶ [ICC-01/04-02/06-277](#), paras 6 and 9.

⁵⁷ [ICC-01/04-02/06-277](#), para. 10.

⁵⁸ [ICC-01/04-02/06-283-Red](#), paras 6, 7 and 11.

⁵⁹ [ICC-01/04-02/06-283-Red](#), paras 12 and 13.

Determination by the Single Judge

35. Having regard to the content of the annexes concerned, the Single Judge finds that they are in conformity with the requirements of regulation 36(2)(b), second sentence, of the Regulations. All arguments and submissions are contained in the Prosecutor's Final Submission. The annexes are non-argumentative in nature but merely seek to ease the understanding of the Final Submission, including for the Defence. It is further noted that all the information contained in annexes A, B, and C of the Prosecutor's Final Submission have already been presented in the evidence, the DCC and/or was discussed during the Hearing. In conclusion, all the arguments are set out in the Prosecutor's Final Submission and, consequently, this document, together with its annexes, is in conformity with the requirements of regulation 37(1) of the Regulations. The 10 March 2014 Request is therefore rejected.

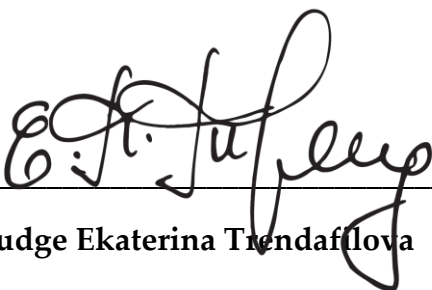
V. Re-classification of Documents

36. The Single Judge notes that some of the underlying filings of the parties were marked "confidential", others were lodged publicly. The Single Judge observes that the Defence, which instigated the classification in the 6 February 2014 Request and 7 March 2014 Request, failed to state the factual and legal basis for the chosen classification as "confidential", as provided for in regulation 23*bis* (1) of the Regulations. With a view to maintaining the case record public, to the extent possible, the Single Judge orders the Defence and the Prosecutor to review their respective filings and re-submit them either publicly, where the basis for the classification no longer exists or re-submit them in redacted form, if necessary.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) rejects** the 6 February 2014 Request;
- b) rejects** the 7 March 2014 Request;
- c) rejects** the 10 March 2014 Request;
- d) orders** the Defence to review the filings ICC-01/04-02/06-250-Conf and ICC-01/04-02/06-274-Conf and re-classify, if possible, as “public” or re-submit them with redactions, as necessary;
- e) orders** the Prosecutor to review the filing ICC-01/04-02/06-269-Conf and re-classify, if possible, as “public” or re-submit it with redactions, as necessary.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Sunday, 8 June 2014

At The Hague, The Netherlands