



Original: English

No.: ICC-02/04-01/15

Date: 14 April 2015

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR* v. *DOMINIC ONGWEN*

Public

**Decision on the Prosecutor's application for leave to appeal decision
ICC-02/04-01/15-203 with respect to the imposition of a duty to file
"in-depth analysis charts" of the disclosed evidence**

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Benjamin Gumpert

Counsel for the Defence

Krispus Ayena Odongo

Legal Representatives of the Victims

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

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

**Other
Appeals Chamber**

Judge Cuno Tarfusser, Single Judge exercising the functions of Pre-Trial Chamber II in the present case, issues this decision on the “Prosecution’s application for leave to appeal the ‘Decision Setting the Regime for Evidence Disclosure and Other Related Material’ and for interim stay of a discrete portion of the Decision” filed on 9 March 2015 (ICC-02/04-01/15-207), whereby the Prosecutor seeks leave to appeal a decision issued by the former Single Judge in the present case in the part in which it orders the Prosecutor to produce and submit in-depth analysis charts of the evidence disclosed to the Defence.

1. The order that the Prosecutor seeks to appeal is contained in the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (ICC-02/04-01/15-203) issued on 27 February 2015 by Judge Ekaterina Trendafilova, in her capacity, at that time, as Single Judge in the present case. In this decision, by points g), h) and i) of the operative part, the former Single Judge ordered the Prosecutor and the Defence to file an “in-depth analysis chart” with each batch of disclosure of evidence and a “consolidated in-depth analysis chart” no later than 30 days and 15 days, respectively, prior to the commencement of the confirmation hearing. The reasoning underlying this order is contained at paragraphs 37 to 42 of that decision.

2. By way of the application under consideration, the Prosecutor seeks leave to appeal this order on the issue:

[W]hether the Single Judge exceeded her discretionary power under article 61(3) of the Rome Statute (“Statute”) and rule 121(2) of the Rules of Procedure and Evidence (“Rules”) when imposing on the Prosecution a duty to file, together with each disclosure batch, an in-depth analysis chart that includes an analysis of each piece of disclosed incriminating evidence reflecting its relevance, as described in paragraphs 37-42 of the Decision, and a consolidated in-depth analysis chart no later than 30 days prior to the commencement of the confirmation of charges hearing. (Application, para. 2)

3. The Defence did not file a response to the Prosecutor’s application.

4. The Single Judge notes article 82(1)(d) of the Statute, rule 155 of the Rules of Procedure and Evidence, and regulation 65 of the Regulations of the Court, as well as the established case law of the Court in the matter of interlocutory appeals pursuant to article 82(1)(d) of the Statute.

5. The impugned order was made not in application of a straightforward provision of the Statute or the Rules but as a result of contentious legal reasoning, in relation to which the present Single Judge expressed the opposite view in another case,¹ where he stated that the “in-depth analysis chart” is “a creature of judicial practice, not envisaged or supported as such by the statutory instruments”(para. 5) and that “it is for the Prosecutor to decide whether she wishes to make use of a tool such as the in-depth analysis chart for the presentation of her case” (para. 7). In particular, the Single Judge held (para. 6):

[T]he preparation and submission of an appropriately drafted document containing the charges (including all the elements listed in Regulation 52) and of an exhaustive list of evidence by the Prosecutor, and of a list of evidence, if any, by the defence, fully satisfy the parties’ statutory duties and requirements as regards the presentation of their respective case. The Pre-Trial Chamber has no power to order or otherwise impose on either the Prosecutor or the defence additional duties or requirements in this respect. Whilst several provisions entrust the Pre-Trial Chamber with the duty and power to “issue orders” regarding the disclosure of information for the purposes of the confirmation hearing (most notably, article 61(3) and rule 121(2) of the Rules), nowhere it is stated that such orders may include specific, binding directions as to the particular *format* in which the parties shall present their evidence or argue their case.

6. Nonetheless, the Single Judge considers that, in the absence of any change of material circumstances, the judicial effect of a decision validly issued can only be set aside through appellate intervention in case the requirements under article 82(1)(d) of the Statute are satisfied. The present decision (which only addresses whether any such appellate intervention is

¹ “Decision on the ‘Defence request for an in-depth analysis chart’ submitted by the Defence for Mr Jean-Pierre Bemba Gombo”, 28 January 2014, ICC-01/05-01/13-134.

warranted) is not influenced by the Single Judge's own views on the merits of the issue identified by the Prosecutor which are irrelevant to the disposal of the matter under consideration.

7. By way of the impugned order, the former Single Judge ordered both the Prosecutor and the Defence to produce and submit "in-depth analysis charts", relying on her power to issue orders regarding disclosure of evidence under article 61(3) of the Statute and rule 121(2) of the Rules. The issue identified by the Prosecutor of whether, in making this precise order, the former Single Judge exceeded her discretionary power therefore qualifies as "a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination" as per the jurisprudence of the Appeals Chamber, and merits consideration under the criteria of article 82(1)(d) of the Statute.

8. The Single Judge is also satisfied that the issue identified by the Prosecutor has the potential to significantly affect the fair and expeditious conduct of the proceedings within the meaning of article 82(1)(d) of the Statute. The Single Judge agrees with the Prosecutor's submission to the effect that the issue for which leave to appeal is sought revolves around the Prosecutor's independent exercise of her statutory functions and, in particular, her prerogative to present and argue her case, including to explain its narrative and analyse the evidence presented in its support, in the manner she considers suitable. This is even the more so considering that it is the Prosecutor's own submissions that "[a] 'law driven', preliminary and partial assessment of the incriminating evidence that is presented in a format that may amount to thousands of pages is not an effective tool to analyse the evidence or persuade the Chamber" (Prosecutor's Application, paragraph 15).

9. In addition, the issue is of particular significance insofar as the impugned decision requires an analysis of the relevance of each piece of evidence disclosed at a time when the Prosecutor's investigations and disclosure of evidence are still in progress, and the charges are yet to be presented. The Single Judge also notes that, according to the impugned decision, the "in-depth analysis chart" is an "auxiliary document next to the document containing the charges and the list of evidence", which also "avert[s] exchanges of copious but irrelevant pieces of evidence between the parties" as it, *inter alia*, permits the Chamber "to know the reason for a party to rely on a particular piece of evidence" (Impugned Decision, paragraphs 39-40). Whether or not the imposition and use of "in-depth analysis charts" for these purposes are in accord with the nature, purpose and structure of the confirmation of charges proceedings as conceived by article 61 of the Statute and rule 121 of the Rules (entailing an adversarial oral hearing on the basis of the charges brought by the Prosecutor against the suspect, the parties' written submissions pursuant to rule 121(9) of the Rules and the evidence included in the parties' lists of evidence) is a matter that goes to the core of the procedural architecture of the Court.

10. The Single Judge is also satisfied that an interlocutory appeal immediately resolving the matter may materially advance the proceedings. Indeed, should the Appeals Chamber ultimately determine that the imposition of "in-depth analysis charts" on the Prosecutor is incorrect, the system for disclosure and analysis of evidence would be flawed and tainted by this error, with significant adverse consequences on the fair conduct of the confirmation proceedings, of which this system is a fundamental part.

11. Considering that all the criteria of article 82(1)(d) of the Statute are met, the Prosecutor's application must be granted.

12. Finally, the Single Judge addresses the Prosecutor's request for a temporary stay of the order to produce and submit "in-depth analysis charts" with each batch of disclosure. Having found that the matter concerning the presentation of such charts is of particular importance for the general architecture of the Court's system and the independent role of the Prosecutor in pursuing her case, and that the imposition of these charts bears the potential to taint the present confirmation proceedings, the Single Judge agrees that, pending disposal of the matter by the Appeals Chamber, the order to submit "in-depth charts" must be stayed. This relates exclusively to the presentation of "in-depth analysis charts" reflecting the relevance of the disclosed evidence. Disclosure of evidence between the parties shall proceed unaffected.

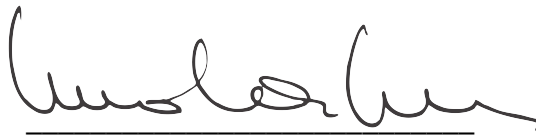
13. The Single Judge recalls that the impugned decision orders that "in-depth analysis charts" be presented also by the Defence. While noting that the Defence did not request leave to appeal this order, the Single Judge considers that, depending on the outcome of the Prosecutor's appeal hereby granted, there may be the need to reconsider this order to the Defence. It is therefore appropriate that, pending the Appeals Chamber's determination, also the order to the Defence to submit "in-depth analysis charts" with each batch of disclosure be stayed.

FOR THESE REASONS, THE SINGLE JUDGE

GRANTS the Prosecutor's application for leave to appeal decision ICC-02/04-01/15-203 in the part in which it orders the Prosecutor to produce and submit in-depth analysis charts of the evidence disclosed to the Defence; and

SUSPENDS, pending disposal of the matter by the Appeals Chamber, the parties' duty to provide, with each batch of disclosure of evidence, an "in-depth analysis chart" reflecting the relevance of the disclosed evidence.

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

A handwritten signature in dark ink, appearing to read 'Cuno Tarfusser', written over a horizontal line.

Judge Cuno Tarfusser
Single Judge

Dated this 14 April 2015

At The Hague, The Netherlands