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APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng
Judge Christine Van den Wyngaert
Judge Howard Morrison
Judge Olga Herrera Carbuca
Judge Piotr Hofmański

SITUATION IN UGANDA

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

Public

**Prosecution's appeal against the "Decision Setting the Regime for Evidence
Disclosure and Other Related Material"**

Source: The Office of the Prosecutor

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Introduction

1. This appeal concerns a discrete portion of the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (“Decision”),¹ in which the Single Judge of Pre-Trial Chamber II (“Single Judge”) ordered the Office of the Prosecutor (“Prosecution”) to prepare and submit, together with each disclosure batch, an in-depth analysis chart (“IDAC”) that includes an analysis of each piece of incriminating evidence reflecting its relevance, and a consolidated IDAC no later than 30 days prior to the commencement of the confirmation of charges hearing.²
2. The Decision involves the following errors:³
 - a. The Single Judge erred in law by exceeding her powers 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 prepare and submit IDACs of disclosed incriminating information before the confirmation hearing (“First Ground of Appeal”); and
 - b. In the alternative, even if the Single Judge had discretion to order the Prosecution to prepare and submit IDACs, she erred in the exercise of her discretion by entering a decision which is so unfair and unreasonable as to constitute an abuse of discretion (“Second Ground of Appeal”).
3. Although the Prosecution is appealing the Single Judge’s order for it to prepare and submit IDACs, the Prosecution is not opposed to providing the Chamber and the Defence, before the confirmation of charges hearing, with an analysis of the evidence on which it intends to rely at the hearing. However, this should be done by way of a properly footnoted document containing the charges (“DCC”), as was provided to the Defence in the cases

¹ ICC-02/04-01/15-203.

² Decision, p.21, item g(3); see also paras.37-42.

³ See ICC-02/04-01/15-220 (“Decision granting leave to appeal”), paras.2 and p.8.

against Mr Gbagbo⁴ and Mr Blé Goudé.⁵ Such a document would be “fact-driven” in the sense of precisely identifying and hyperlinking all items of evidence that the Prosecution intends to rely on to establish each of the factual allegations contained in the DCC, and could be filed once the charges and its list of evidence have been finalised. Such a footnoted DCC would be in a format capable of providing the Defence with further notice of the charges pursuant to article 67(1)(a) in a practical, concise and user-friendly way. The Prosecution could also accompany this document with a simplified version of a “law-driven” analytical chart, which may be automatically generated once the footnoted DCC has been prepared. Such a chart would indicate, for each legal element, the facts in the DCC from which it can be derived, as well as the evidence that proves the relevant facts.⁶

Submissions

A. The challenged portion of the Decision

4. The Single Judge ordered the Prosecution, when submitting incriminating evidence to the Registry, to provide “[a]n analysis of each piece of evidence reflecting its relevance as described in [paragraphs 37-42 of the Decision]”.⁷

In this respect, the Decision endorsed the requirement that:

“[The Prosecution must] present[...] each piece of evidence according to its relevance in relation to the constituent elements of the crimes presented by the Prosecutor in his application under article 58 of the Statute and taken into account by the Chamber in its [decision on the said application]. Each piece of evidence must be analyzed [...] by relating each piece of information contained in that page or paragraph with one or more of the constituent elements of one or more of the crimes with which the person is charged, including the contextual elements of those crimes, as well as the constituent elements of the mode

⁴ ICC-02/11-01/11-592-Conf-Anx2-Corr2-tENG.

⁵ ICC-02/11-02/11-124-Anx2-Corr-Red.

⁶ See for instance ICC-02/11-01/11-592-Conf-Anx3-Corr; ICC-02/11-01/11-592-Conf-Anx4-Corr; ICC-02/11-02/11-130-Conf-Anx1.

⁷ Decision, p.21, item g(3).

of participation in the offence with which the person is charged [...]. [This] analysis should be presented in the form of a summary table which shows the relevance of the evidence presented in relation to the constituent elements of the crimes with which the person is charged.”⁸

5. The Single Judge considered that her power to instruct the Parties to provide such IDACs “derive[d] directly from article 61(3), second sentence, of the Statute [and] rule 121(2), first sentence, of the Rules [...]”,⁹ and that by these two provisions, “the in-depth analysis chart [...] is embedded in the statutory documents of the Court.”¹⁰
6. The Single Judge instructed the Prosecution to present its IDACs of incriminating evidence following the sample draft model chart attached to the Decision.¹¹ She emphasised that “it is essential that the parties indicate in the in-depth analysis chart the relevant information *as specific as possible* by referring to the document ID number, the page, paragraph and/or lines, which provide the factual allegation contained in the evidence supporting the particular legal requirement”.¹²
7. The Single Judge further required the Parties to “file with each disclosure batch an analytical chart of the evidence disclosed between the parties and communicated to the Court. A consolidated in-depth analytical chart shall be submitted by the Prosecutor no later than 30 days prior to the commencement of the confirmation of charges hearing pursuant to rule 121(3) of the Rules [...]”.¹³
8. The Single Judge noted that one of the IDAC’s objectives is for the Chamber to “know the underlying reasons for a party to rely on a particular piece of

⁸ Decision, para.37, adopting ICC-01/05-01/-8-55, paras.66-77; ICC-01/09-01/11-44, para.21; ICC-01/09-02/11-48, para.22.

⁹ Decision, para.39.

¹⁰ Decision, para.39.

¹¹ Decision, para.38. See also Decision, Annex2.

¹² Decision, para.41.

¹³ Decision, para.42; p.21, item h.

evidence”.¹⁴ She observed that the disclosure system adopted in the Decision¹⁵—of which the IDAC forms a part¹⁶—assists the Pre-Trial Chamber “to take an informed decision in accordance with its statutory mandate under article 61(7) of the Statute”.¹⁷ This, according to the Single Judge, “ultimately aims at reaching a proper decision as to whether or not to send the case *sub judice* to trial”.¹⁸

B. First Ground of Appeal: The Single Judge erred in law by exceeding her powers under article 61(3) and rule 121(2), when ordering the Prosecution to prepare and file IDACs before the confirmation hearing

9. The ICC’s procedural framework does not oblige the Prosecution to prepare and file IDACs such as those ordered by the Single Judge before a confirmation hearing. The Prosecution need only file a document containing the charges and a list of evidence.¹⁹ Neither the Statute nor the Rules contain any express reference to a document akin to the IDACs ordered by the Single Judge.
10. The Single Judge found that her power to order the Prosecution to submit IDACs derived directly from the Pre-Trial Chamber’s powers in article 61(3) (second sentence) and rule 121(2) (first sentence) to make disclosure orders.²⁰ However, these provisions do not empower the Pre-Trial Chamber to order the Prosecution to prepare and submit such IDACs; accordingly, the Single Judge erred by issuing such an order.²¹

¹⁴ Decision, para.40.

¹⁵ Decision, para.9.

¹⁶ Decision, para 40.

¹⁷ Decision, para.10.

¹⁸ Decision, para.11.

¹⁹ Article 61(3)(a) and (b), and rule 121(3).

²⁰ Decision, para.39.

²¹ For the purposes of this appeal, the Prosecution has confined its analysis to article 61(3) and rule 121(2) since the Single Judge grounded her decision on these provisions and this was also the basis upon which leave to appeal was granted.

(i) *The express terms of article 61(3) and rule 121(2) do not empower the Pre-Trial Chamber to order the Prosecution to prepare and submit IDACs*

11. As the Single Judge acknowledged, article 61(3) and rule 121(2) relate to the Pre-Trial Chamber's general discretionary power to regulate the disclosure process. As she stated, these provisions empower her "to ensure that disclosure takes place under satisfactory conditions"²² and is "efficient";²³ to "prevent [...] disclosure from taking place in a disorganized manner [which is] unnecessarily time-consuming";²⁴ and, through a smooth disclosure process, to "ensure the overall efficiency and fairness of the proceedings".²⁵ The Prosecution does not dispute the Single Judge's powers and discretion in that respect.
12. However, these disclosure provisions do not empower the Single Judge to order the Prosecution to prepare and submit IDACs. The preparation of IDACs accompanying each disclosure batch goes far beyond the mere disclosure of evidence, and instead involves the production of analytical work that explains the relevance of each piece of evidence in relation to the charges. If the Decision were to stand, the Prosecution would need to expend considerable time producing such analytical IDACs, prior to submitting them together with the disclosed information.²⁶
13. Moreover, according to the Single Judge, one of the purposes of disclosure, of which the IDACs form a part, is to inform the Pre-Trial Chamber as to why a party is relying on a particular piece of evidence,²⁷ and to help it reach an informed decision under article 61(7) of the Statute.²⁸ Accordingly, the Decision envisages that an IDAC will not only assist the Parties and the

²² Decision, para.10.

²³ Decision, para.39.

²⁴ Decision, para.39.

²⁵ Decision, para.39.

²⁶ *Prosecutor v. Salim Jamil Ayyash et al.*, STL-11-01/T /TC, Decision on Merhi Defence Request for a "Table of Incriminating Evidence", 9 May 2014, ("STL Decision"), para.12.

²⁷ Decision, para.40.

²⁸ Decision, para.10.

Pre-Trial Chamber to organise the disclosure of evidence, but also to assist the Prosecution to present evidence before the Pre-Trial Chamber under article 61(5), and the Pre-Trial Chamber to reach an informed decision under article 61(7) on whether to confirm charges. However, this appears to conflate the (possible) function of an IDAC as a tool for disclosure, with the Prosecution's role *at the confirmation hearing* to support its charges with sufficient evidence and with the role of the Pre-Trial Chamber, *based on the confirmation hearing*, to determine whether the evidence is sufficient to confirm the charges under article 61(7).²⁹

14. Contrary to the Single Judge's view in this case, the Single Judge in *Bemba et al.* considered that the Pre-Trial Chamber did not have the power to order such IDACs according to article 61(3) and rule 121(2). The Defence in that case had sought a similar order imposing on the Prosecution a duty to submit IDACs. Having found that IDACs are "a creature of judicial practice, not envisaged or supported as such by the statutory instruments,"³⁰ the Single Judge observed that:

the preparation and submission of an appropriately drafted document containing the charges [...] and of an exhaustive list of evidence by the Prosecutor [...] fully satisfy the [Prosecution's] statutory duties and requirements as regards the presentation of [its] case. The Pre-Trial Chamber has no power to order or otherwise impose on [...] the Prosecutor [...] 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.³¹

- (ii) *A contextual interpretation of article 61(3) and rule 121(2) does not support the Pre-Trial Chamber's power to instruct the Prosecution to submit IDACs*

²⁹ See para.16 below.

³⁰ ICC-01/05-01/13-134, para.5.

³¹ ICC-01/05-01/13-134, para.6.

15. The express terms of article 61(3) and rule 121(2) do not give the Pre-Trial Chamber the power to instruct the Prosecution to prepare and submit IDACs. Nor can such a power be derived from a broader interpretation of these provisions in the context of the Statute as a whole. In fact, the IDAC is inconsistent with several provisions of the Statute.
16. First, the Decision is inconsistent with the procedural regime for confirmation proceedings under article 61. The Decision envisages the preparation and submission of IDACs as a tool for the Prosecution to present evidence before the Pre-Trial Chamber, and which could inform the Pre-Trial Chamber's decision under article 61(7) on whether to confirm charges.³² This is inconsistent with article 61(5) that provides that the Prosecution shall support each charge with sufficient evidence "at the hearing", and article 61(7), according to which the Pre-Trial Chamber must determine whether to confirm charges "on the basis of the hearing". The Statute should not be interpreted to effectively allow the Single Judge to order the Prosecution to anticipate its analysis and presentation of evidence, or for the Pre-Trial Chamber to base its decision on any prior Prosecution analysis of disclosed information. This is particularly the case since any such analysis is preliminary and incomplete,³³ and may not necessarily reflect the charges brought by the Prosecution³⁴ or the "evidence" adduced by the Prosecution during the hearing.³⁵
17. Second, the Decision unlawfully interferes with the Prosecution's powers under article 61. Pursuant to article 61(5), the Prosecution has the burden of providing sufficient evidence to establish substantial grounds to believe that the suspect committed the charged crimes.³⁶ Accordingly, article 61

³² Decision, para.40; see also paras.10-11; see further para.8 above.

³³ See para.25 below.

³⁴ See paras.23-24 below.

³⁵ See para.26 below.

³⁶ See also ICC-01/04-01/06-2205 OA15 OA16, para.77; ICC-01/09-01/11-1123 OA6, para.30; ICC-01/04-01/10-514 OA4, 30 May 2012, para. 47.

implicitly empowers the Prosecution to select the evidence upon which it intends to rely, and to decide the best manner and form in which such evidence should be analysed and presented to the Chamber. It is within the Prosecution's discretion to determine how best to persuade the Chamber that, based on the evidence, there are substantial grounds to believe that the person committed the crimes charged. The Prosecution should not be compelled to make this evidentiary assessment at a premature point in the proceedings and in a particular prescribed format. As the Single Judge in *Bemba et al* noted, "it is for the Prosecutor to decide whether she wishes to make use of a tool such as [an] in-depth analysis chart for the presentation of her case".³⁷ The Decision imposing on the Prosecution the specific format of an IDAC for analysing its evidence and presenting its case interferes with its prerogatives under the Statute.

18. Third, the Decision violates the Prosecution's independence under article 42(1) in exercising its functions. As the Appeals Chamber noted in an interlocutory appeal in the *Lubanga* case, "it is the Prosecutor who, pursuant to article 54(1) of the Statute, is tasked with the investigation of crimes under the jurisdiction of the Court and who, pursuant to article 61(1) and (3) of the Statute, proffers charges against suspects."³⁸ The Decision not only affects the Prosecution's independence in presenting its case before the Pre-Trial Chamber, but also its independence in *preparing* its case. This is because the Decision imposes a significant extra-statutory duty on the Prosecution before the confirmation hearing by compelling it to direct resources towards the burdensome preparation of an IDAC, and away from other tasks that it believes are necessary to investigate and prosecute this and other cases.³⁹ The Prosecution's autonomy to select, analyse and present its evidence, in conformity with its statutory duties and powers, and to

³⁷ ICC-01/05-01/13-134, para.7.

³⁸ ICC-01/04-01/06-2205 OA15 OA16, para.94.

³⁹ The Trial Chamber at the STL also recognised this factor. See STL Decision, para.3, see also para.28.

ensure the best use of its resources to perform its functions, guarantees the Prosecution's and the Pre-Trial Chamber's independent exercise of their respective functions. As the Appeals Chamber found in an appeal concerning the Prosecution's prerogative to amend the charges, to extend a Chamber's power to the tasks assigned to the Prosecutor under the Statute "would be contrary to the distribution of powers under the Statute."⁴⁰

C. Second Ground of Appeal: assuming, *arguendo*, that the Single Judge had discretion to impose on the Prosecution a duty to prepare and submit IDACs, she erred in the exercise of such discretion

19. Neither the express terms nor a contextual interpretation of article 61(3) and rule 121(2) empowered the Single Judge to order the Prosecution to prepare and submit IDACs when disclosing its evidence. However, even assuming, *arguendo*, that she had discretionary power to make such an order, she erred in the exercise of such discretion, warranting appellate intervention.
20. The Appeals Chamber has repeatedly found that it "will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to [include] where the decision is so unfair and unreasonable as to constitute an abuse of discretion."⁴¹
21. The Decision's effects are so unfair and unreasonable as to constitute an abuse of discretion amounting to a procedural error. First, the Decision creates a real risk that the Pre-Trial Chamber will arrive at a wrong conclusion in its decision under article 61(7) by relying on IDACs that do not properly express the Prosecution's case or the Prosecution's final

⁴⁰ ICC-01/04-01/06-2205 OA15 OA16, para.94.

⁴¹ ICC-02/04-01/05-408 OA3, para.80; ICC-01/09-01/11-307 OA, paras.89, 98, 110; ICC-01/09-02/11-274 OA, paras.87, 96, 108; ICC-01/09-01/11-1066 OA5, para.60; ICC-02/05-03/09-632-Red OA5, para.30.

assessment of the relevance and probity of the evidence. Second, the Decision affects the Prosecution's ability to act within the scope of its delegated functions and powers to present its case and evidence at the confirmation hearing in the manner it believes most conducive to proving its case. Third, the Decision imposes an unfair burden on the Prosecution without providing any tangible benefit to the fair and efficient conduct of the proceedings.

(i) *The Decision creates a risk that the Pre-Trial Chamber, in its decision under article 61(7), will arrive at a wrong conclusion by relying on IDACs*

22. One of the reasons the Single Judge gave for ordering the Prosecution to produce and submit IDACs in this case was to allow the Chamber to understand why a party was relying on a particular piece of evidence, and to assist it in reaching a decision under article 61(7).⁴² However, the Prosecution's analysis of the disclosed evidence in any IDAC accompanying an individual disclosure batch⁴³ would not, in any event, properly express the Prosecution's charges or case theory, or the Prosecution's final assessment of relevance and probity of the evidence that it will present at the confirmation hearing pursuant to article 61(5). As such, the Chamber cannot rely on the Prosecution's IDAC as representing the Prosecution's final and considered analysis of the evidence or as the basis for its decision under article 61(7).

23. First, any IDAC and its analysis would not properly reflect the charges brought by the Prosecution under article 61(3). At the time when it discloses individual batches of incriminating information, the Prosecution will not yet have finalised its charging document. Accordingly, it will not know the

⁴² Decision, para.40; see also paras.10-11.

⁴³ Decision, para.42. See also Decision, para.19, referring to disclosure of incriminating evidence "on a rolling basis".

exact charges (and legal requirements thereof) which will appear in the DCC.

24. The Decision requires the Prosecution to “present[...] each piece of evidence according to its relevance in relation to the constituent elements of the crimes presented by the Prosecutor in [her] application under article 58 of the Statute and taken into account by the Chamber in its decision on the said application.”⁴⁴ However, preparing an IDAC by reference to the charges set out in the arrest warrant application is unhelpful for the purposes of the confirmation of charges. As the Single Judge noted in a separate Decision, there is “no requirement that the formulation of charges in the [DCC] strictly follow the factual and legal foundations of the warrant of arrest”.⁴⁵ If the Prosecution chooses to deviate from the charges as initially framed in the article 58 application in its DCC—something the Prosecution is considering in this case—the utility of any IDAC prepared on the basis of the arrest warrant will be rendered obsolete.
25. Second, the Prosecution’s analysis of evidence in an IDAC will necessarily be preliminary and incomplete. Due to ongoing investigations, such analysis will be based on the content of each item of evidence in isolation. The Prosecution will only be able to fully assess the relevance and probity of individual pieces of disclosed evidence once it has been able to consider and appreciate *the whole* of the evidence. The Prosecution’s final and contextual assessment of the disclosed evidence is likely to result in different assessments than those made in the IDACs accompanying the batches of disclosed evidence. Even the consolidated IDAC ordered to be filed with the charging document⁴⁶ will not remedy this shortcoming, as it would simply

⁴⁴ Decision, para.37.

⁴⁵ ICC-02/04-01/15-206, para.32, relying on ICC-01/04-01/10-465-Red, para.88.

⁴⁶ Decision, paras.38, 42.

replicate and consolidate in one document the previous (and potentially misleading) preliminary and incomplete analyses.

26. Third, the information analysed in the IDACs will not necessarily correspond to the Prosecution's evidence at the confirmation hearing. Under article 61(5), the Prosecution must support each charge with sufficient evidence "at the hearing". The Prosecution will select the evidence it intends to present at the hearing *not* when disclosing incriminating information to the Defence, but only when presenting its list of evidence 30 days prior to the hearing pursuant to rule 121(3). In this latter stage, after making a full and contextual assessment of the evidence, the Prosecution may decide not to rely on some of the information previously disclosed. Moreover, the Prosecution may also call witnesses to testify during the hearing. If so, the Chamber's decision must be based on the evidence they give in court rather than on their prior witness statements or any analysis thereof in an IDAC. Since witnesses sometimes deviate from their prior statements in their oral evidence, including during cross-examination, prior analyses of such statements may be somewhat misleading and should in principle not inform the Chamber's determination under article 61(7).

(ii) *The Decision encroaches on the Prosecution's ability to present its case and evidence at the confirmation hearing*

27. The Decision ordering the Prosecution to prepare and submit IDACs also encroaches on the Prosecution's ability to properly and efficiently present its case—and the evidence it chooses to rely on—at the confirmation hearing. As noted above, the IDACs will not necessarily represent the actual charges included in the DCC, as they will contain only a preliminary and partial assessment of the disclosed information, and the information analysed in the IDACs may not necessarily correspond to the evidence that the

Prosecution intends to present at the hearing.⁴⁷ In addition, the analysis contained in an IDAC is presented in a non-user-friendly format that may amount to thousands of pages.⁴⁸

28. Furthermore, due to the “law-driven” structure⁴⁹ of the analysis of evidence contained in an IDAC, the Prosecution will be unable to use such a document at the confirmation hearing to present its evidence and analysis thereof and to inform the Chamber’s determination on whether the material facts pleaded in the DCC have been established. According to the Decision, “[e]ach piece of evidence must be analysed [...] by relating each piece of information contained in that page or paragraph with one or more of the constituent elements of one or more of the crimes with which the person is charged, including the contextual elements of those crimes, as well as the constituent elements of the mode of participation in the offence with which the person is charged.”⁵⁰ Annex 2 of the Decision further illustrates how the evidence in the IDAC must be related to the “legal elements” of the crimes and the modes of liability in accordance with the Statute and the Elements of Crimes, as opposed to the underlying facts alleged in the DCC.⁵¹
29. This approach circumvents the established fact-finding process used by the UN *ad hoc* Tribunals and by national courts, according to which *factual* findings with respect to the material facts contained in the charging document are a pre-requisite to a court’s *legal* conclusions on whether the facts that survive the court’s evidentiary scrutiny establish each of the legal elements of the crimes and modes of liability charged by the Prosecution.⁵²

⁴⁷ See paras.23-26 above.

⁴⁸ See for instance the in-depth analysis chart in the *Kenyatta et al.* case, which amounted to 6,644 pages (ICC-01/09-02/11-257-Conf-Anxs C1 to C5). See also the equivalent chart in the *Ntaganda* case, which amounted to 1,205 pages (ICC-01/04-02/06-217-Conf-AnxC).

⁴⁹ Decision, para.39.

⁵⁰ Decision, para.37. See also para.41 providing that for each piece of evidence the Prosecution must indicate “the factual allegation contained in the evidence supporting the particular legal requirement”.

⁵¹ Decision, para.38.

⁵² *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Decision, 7 July 2006, para.174 *Prosecutor v. Halilovic*, IT-01-48-A, Decision, 16 October 2007, para.125; *R v. Morin* [1988] 2 S.C.R., File No.: 20449,

Under this approach—which the Prosecution submits is the correct one—a Chamber must first determine the relevant facts and only then verify whether those facts may be properly subsumed under one or more legal provisions. The IDAC effectively inverts this logic.

30. Finally, the Decision’s “law-driven” approach to the format of the IDACs could also constrain the Prosecution in explaining how the alleged material facts may be interpreted together to establish each of the elements of the crimes and the modes of liability. In contrast, the Prosecution could make more effective use of a DCC, prepared and footnoted in the manner described above,⁵³ to efficiently present its evidence and analysis thereof at the confirmation of charges hearing.

(iii) *The Decision is unfairly burdensome on the Prosecution, while not providing a tangible benefit to the fair and efficient conduct of the proceedings*

31. Shortly after the Single Judge issued the Decision, she granted the Prosecution’s request to postpone the commencement of the confirmation hearing until 21 January 2016.⁵⁴ This allows the Prosecution time to comply with its statutory obligations, such as conducting further investigations, providing for the protection of witnesses, preparing the charges, reviewing the 18,073 items of evidence (95,576 pages) currently in its possession in the *Uganda* collection and any additional evidence collected, and disclosing the relevant information to the Defence.⁵⁵

at p.349 (Judges Lamer and Wilson). See also *R v JMH* [2011] 3 R.C.S., paras.31, 32. The Appeals Chamber of this Court has implicitly accepted the different stages of fact-finding in its judgment ICC-01/04-02/12-271, paras.194, 227-228. See also paras.124-125, where the Appeals Chamber emphasised that the standard of proof “must be applied to establish the *facts* forming the elements of the crime or the mode of liability alleged against the accused, as well as with respect to the *facts* which are indispensable for entering a conviction” (emphasis added).

⁵³ See para.3 above.

⁵⁴ ICC-02/04-01/15-206.

⁵⁵ ICC-02/04-01/15-206, paras.27, 31-33.

32. However, by ordering the Prosecution to prepare and submit IDACs, the Decision imposes an additional and inordinately cumbersome duty on the Prosecution not contemplated under the Statute or the Rules. The Decision does not consider the scale of the exercise involved in preparing IDACs, even taking the strictest possible approach to the incriminating information to be disclosed.⁵⁶ Although the Single Judge postponed the commencement of the confirmation hearing in part to enable the Prosecution to prepare IDACs,⁵⁷ experience has shown that the Prosecution will not be able to comply with this duty within the allocated time by relying on the resources currently available to it in this case.⁵⁸ The Prosecution estimates that to complete this task before January 2016, it would have to recruit additional staff, or divert resources in this or other cases from performing other necessary investigative or prosecutorial tasks.
33. This unfairly affects the Prosecution's independence under article 42(1) to determine how best to use its resources to comply with its statutory duties to investigate and prosecute. This unfairness is exacerbated by the fact that the IDACs will not assist the Prosecution to present its case and evidence at the confirmation hearing.⁵⁹ The Trial Chamber of the Special Tribunal for Lebanon similarly concluded that to instruct the Prosecution to produce an IDAC akin to the one ordered in the Decision "would be unfairly burdensome".⁶⁰

⁵⁶ The Single Judge ruled that "the Prosecutor should not 'disclose the greatest volume of evidence, but (...) disclose the evidence which is of true relevance to the case'" (Decision, para.20). Nevertheless, as the Decision acknowledged, "a typical feature in cases brought before this Court" is that the Prosecution will need to disclose a "voluminous amount of evidence" (Decision, para.40). This is the reason why the Single Judge sought to "streamlin[e] the disclosure process" (Decision, para.40).

⁵⁷ ICC-02/04-01/15-206, para.36.

⁵⁸ For instance, in *Kenyatta et al*, eight legal reviewers worked full time for three months to insert the relevant information into Casemap, which is a preliminary step to producing the in-depth analysis chart. Thereafter, three lawyers, two legal assistants and four legal reviewers worked for two weeks' full time to produce the chart.

⁵⁹ See paras.27-30 above.

⁶⁰ STL Decision, para.3, see also paras.16-32.

34. While the Decision aims at “ensur[ing] the overall efficiency and fairness of the proceedings” through a smooth disclosure process,⁶¹ it could in fact delay rather than expedite the confirmation hearing. In the absence of unlimited resources, the additional duty to prepare IDACs could likely necessitate the Prosecution to request a further substantial postponement of the commencement of the confirmation of charges hearing. Moreover, since the IDAC cannot effectively assist the Prosecution to present its case at the hearing, the Prosecution will require significantly more time during the hearing to “support each charge with sufficient evidence”.⁶² This is because the Prosecution would need to fully explain at the hearing how its contextual analysis of the evidence presented at the hearing establishes each of the material facts included in the DCC. Much less time would be required if the Prosecution could refer to its analysis of the evidence included in a footnoted DCC. Moreover, an IDAC of the complexity and scale ordered by the Decision may also inevitably contain clerical mistakes and errors. This could lead to litigation and requests for clarification, thus causing further delays and uncertainty in the proceedings.⁶³

35. IDACs are also not particularly helpful to the Defence. At least one defence team in a case where similar charts were required found that the chart had “proved less useful”.⁶⁴ This is not surprising, bearing in mind that a preliminary, incomplete and law-driven analysis of information which does not necessarily correspond to the evidence included in the Prosecution’s list of evidence or reflect the charges in the DCC⁶⁵ does not provide proper notice to the Defence as to how the Prosecution intends to prove the facts (and thereby, the crimes) in the DCC.

⁶¹ Decision, para.39.

⁶² Article 61(5).

⁶³ This was a factor acknowledged by the STL. See STL Decision, para.31.

⁶⁴ ICC-01/09-01/11-T-15, p.32, lns.15-17.

⁶⁵ See paras.23-26 above.

36. Finally, the Decision significantly deviates from the practice of pre-trial disclosure in other cases, where no such IDACs have been required.⁶⁶ It also departs from the system adopted by other international tribunals, where the Prosecution has not been required to provide an IDAC-type document but rather simpler and more user-friendly “fact-driven” analyses of the evidence, comparable to the footnoted DCC referred to above.⁶⁷ At the ICTY, the Prosecution must specify in its witness lists “the points in the indictment as to which each witness will testify, including specific references to counts and relevant paragraphs in the indictment”.⁶⁸ Moreover, several Trial Chambers at the ICTY and the Special Court for Sierra Leone have ordered the Prosecution to prepare—in addition to the pre-trial brief—a chart linking witnesses and exhibits to counts of the indictment and to the accused.⁶⁹
37. The systems used in other cases before this Court and at the other international tribunals have no disadvantages *vis-à-vis* the one imposed in the Decision. To the contrary, such practices would allow the Prosecution to use its resources effectively, and to prepare any analysis of the evidence to be presented at the confirmation hearing in a manner and format most suited to assist in the presentation of its case in court.
38. The use of IDACs generates no discernible advantage. Rather, ordering their use unfairly intrudes into the Prosecution’s powers and ability to properly present its case at the confirmation hearing and could potentially delay proceedings. Ultimately, requiring their preparation and use is likely to significantly and negatively impact on the Court’s resources. For all these

⁶⁶ See for instance, cases against *Lubanga* (ICC-01/04-01/06-102); *Katanga and Ngudjolo* (ICC-01/04-01/07-259); *Gbagbo* (ICC-02/11-01/11-30); *Blé Goudé* (ICC-02/11-02/11-57); *Bemba et al.* (ICC-01/05-01/13-134).

⁶⁷ See para.3 above.

⁶⁸ Rule 65 *ter*(E) of the ICTY’s Rules of Procedure and Evidence.

⁶⁹ See *e.g.*, ICTY, *Prosecutor v. Prlic*, Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, 28 April 2006, para.9(t) (“chart linking witnesses and exhibits to counts of the indictment and to the Accused”); ICTR, *Sylvestre Gacumbitsi v. Prosecutor*, Judgment, 7 July 2006, para.57 (“chart that shows the charges to which each witness’s testimony was expected to correspond”).

reasons, when the Single Judge ordered the Prosecution to prepare and submit IDACs in this case, she exercised her discretion so unfairly and unreasonably as to constitute an abuse of discretion.

Conclusion

39. The Single Judge did not have the power under article 61(3) or rule 121(2) to order the Prosecution to prepare and submit IDACs. In the alternative, if she was so empowered, by ordering the preparation and submission of such analytical documents, she exercised her discretion so unfairly and unreasonably as to amount to an abuse of discretion.
40. Accordingly, the Prosecution requests the Appeals Chamber to overturn the Decision to the extent that it ordered the Prosecution, when submitting any evidence to the Registry, to provide “[a]n analysis of each piece of evidence reflecting its relevance as described in [paragraphs 37-42 of the Decision]”.⁷⁰



Fatou Bensouda, Prosecutor

Dated this 28th day of April 2015

At The Hague, The Netherlands

Word Count:5,708⁷¹

⁷⁰ Decision, p.21, item g(3), and paras 41-42.

⁷¹ It is certified that this document contains the number of words specified and complies in all respects with the requirements of regulation 36 of the RoC. This statement (51 words), not itself included in the word count, follows the Appeals Chamber’s direction to “all parties” appearing before it: ICC-01/11-01/11-565 OA6, para.32.