



Original: English

No. ICC-02/04-01/15 OA 3

Date: 17 June 2015

THE APPEALS CHAMBER

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

SITUATION IN UGANDA

IN THE CASE OF THE PROSECUTOR v. DOMINIC ONGWEN

Public document

Judgment

**on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II
entitled “Decision Setting the Regime for Evidence Disclosure and Other Related
Matters”**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Krispus Ayena Odongo

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” of 27 February 2015 (ICC-02/04-01/15-203),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” is reversed to the extent that the operative parts (g) (3), (h) and (i) order the production and submission of in-depth analysis charts.

REASONS

I. KEY FINDINGS

1. Article 61 (3) of the Statute and rule 121 (2) of the Rules of Procedure and Evidence accord the Pre-Trial Chamber broad discretion in regulating the disclosure process, as borne out by the use of the words “may issue orders regarding the disclosure of information” in article 61 (3) of the Statute and “shall take the necessary decisions regarding disclosure” in rule 121 (2) of the Rules of Procedure and Evidence. The Appeals Chamber is of the view that no express or implied limitation on the powers of the Pre-Trial Chamber to issue orders regarding disclosure may be derived from the ordinary meaning of these provisions. Such orders may address various aspects of the disclosure process, including the production and submission of aids or tools such as in-depth analysis charts.

2. The Appeals Chamber considers that in the circumstances of this case, it was incumbent on the Single Judge to receive submissions from the parties on the utility

and practical implications of this additional disclosure requirement prior to imposing it, given that the imposition of an obligation to prepare and submit in-depth analysis charts may place a disproportionate burden on the parties and may ultimately lead to delays in the proceedings.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

3. On 8 July 2005, Pre-Trial Chamber II (hereinafter: “Pre-Trial Chamber”) issued a warrant of arrest for Dominic Ongwen (hereinafter: “Mr Ongwen”) for his alleged responsibility for crimes against humanity and war crimes.¹

4. On 21 January 2015, after consenting to appear voluntarily before the Court, Mr Ongwen was transferred to the Court’s detention centre.²

5. On 26 January 2015, Mr Ongwen made his initial appearance before the former Single Judge responsible for carrying out the functions of the Pre-Trial Chamber with respect to the case of *The Prosecutor v. Dominic Ongwen*, Judge Ekaterina Trendafilova (hereinafter: “Single Judge”),³ during which, *inter alia*, the date of the confirmation of charges hearing was provisionally set for 24 August 2015.⁴

6. On 28 January 2015, the Single Judge convened an *ex parte*, Prosecutor only, status conference, during which issues “related to [the] disclosure of the Prosecutor’s evidence, protection of witnesses and other related matters” were discussed.⁵

¹ “[Warrant of Arrest for Dominic Ongwen](#)”, ICC-02/04-01/15-6; the document was copied and transferred from the case of *The Prosecutor v. Joseph Kony et al.* pursuant to “[Decision Severing the Case Against Dominic Ongwen](#)”, 6 February 2015, ICC-02/04-01/05-424. This document was originally filed confidentially but was reclassified as public pursuant to Pre-Trial Chamber II’s instructions dated 28 January 2015. *See also* “[Decision on the Prosecutor’s Application for the Warrants of Arrest under Article 58](#)”, 8 July 2005, ICC-02/04-01/15-5; the document was unsealed pursuant to “[Decision on the Prosecutor’s Application for Unsealing of the Warrants of Arrest](#)”, 13 October 2005, ICC-02/04-01/15-34.

² Report of the Registry on the voluntary surrender of Dominic Ongwen and his transfer to the Court, ICC-02/04-01/15-189-Conf-Exp, paras 4, 18.

³ “[Decision Designating a Single Judge](#)”, 21 January 2015, ICC-02/04-01/15-185.

⁴ [Transcript of Hearing, 26 January 2015](#), ICC-02/04-01/15-T-4-ENG, p. 14, lines 7-9.

⁵ “[Decision on Setting the Date for the Initial Appearance of Dominic Ongwen and the Date for a Status Conference](#)”, 21 January 2015, ICC-02/04-01/15-188 (hereinafter: “Decision Convening a Status Conference”), para. 8. *See also* [Transcript of Hearing, 28 January 2015](#), ICC-02/04-01/15-T-5-ENG. This document was originally filed confidentially but was reclassified as public pursuant to the “[Order reclassifying documents in the record of the case](#)”, 22 May 2015, ICC-02/04-01/15-238.

7. On 27 February 2015, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”⁶ (hereinafter: “Impugned Decision”) in which the Prosecutor and the Defence were each ordered to file, *inter alia*, an “in-depth analysis chart” with each disclosure batch⁷ and a further consolidated in-depth analysis chart no later than 30 days for the Prosecutor and 15 days for the Defence, prior to the commencement of the confirmation of charges hearing.⁸

8. On 9 March 2015, the Prosecutor sought leave to appeal the Impugned Decision on the basis that the Single Judge exceeded her discretionary power under article 61 (3) of the Statute and rule 121 (2) of the Rules of Procedure and Evidence when she imposed a duty on the Prosecutor to file in-depth analysis charts.⁹ The Prosecutor also sought a stay in the execution of the order to produce in-depth analysis charts pending the outcome of the appeal.¹⁰

9. On 14 April 2015, the single judge responsible for carrying out the functions of the Pre-Trial Chamber with respect to the case of *The Prosecutor v. Dominic Ongwen*, Judge Cuno Tarfusser,¹¹ issued the “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”¹² (hereinafter: “Decision on Leave to Appeal”) granting the Prosecutor’s requests.¹³

B. Proceedings before the Appeals Chamber

10. On 28 April 2015, the Prosecutor filed the “Prosecution’s appeal against the ‘Decision Setting the Regime for Evidence Disclosure and Other Related Material’”¹⁴

⁶ [ICC-02/04-01/15-203](#).

⁷ [Impugned Decision](#), p. 21, para. g; paras 37-42.

⁸ [Impugned Decision](#), p. 21, paras h, i.

⁹ “[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](#)”, 9 March 2015, ICC-02/04-01/15-207 (hereinafter: “Request for Leave to Appeal”).

¹⁰ [Request for Leave to Appeal](#), paras 28-31.

¹¹ “[Decision designating a Single Judge](#)”, dated 25 March 2015 and registered on 26 March 2015, ICC-02/04-01/15-213.

¹² [ICC-02/04-01/15-220](#).

¹³ [Decision on Leave to Appeal](#), p. 8.

¹⁴ [ICC-02/04-01/15-225](#) (OA 3).

(hereinafter: “Document in Support of the Appeal”) in which she alleges an error of law and in the alternative an error of procedure.¹⁵

11. On 8 May 2015, Mr Ongwen filed the “Defence Response to ‘Prosecution’s Appeal against the “Decision Setting the Regime for Evidence Disclosure and Other Related Material””¹⁶ (hereinafter: “Response to the Document in Support of the Appeal”).

III. MERITS

A. Preliminary Issue

12. The Appeals Chamber notes that at paragraphs 17-19 of the Response to the Document in Support of the Appeal, Mr Ongwen raises arguments objecting to the part of the Impugned Decision that requires him to file in-depth analysis charts.¹⁷ The Appeals Chamber notes that Mr Ongwen did not seek leave to appeal this issue before the Pre-Trial Chamber in accordance with rule 155 of the Rules of Procedure and Evidence. Furthermore, the Appeals Chamber notes that pursuant to regulation 65 (5) of the Regulations of the Court, as a participant in these proceedings, Mr Ongwen may only respond to the arguments raised in the Document in Support of the Appeal as prescribed in regulation 64 (4) of the Regulations of the Court. Consequently, the Appeals Chamber shall disregard these arguments entirely. Notwithstanding this ruling, the Appeals Chamber is aware of the impact that the resolution of the issue on appeal may have on Mr Ongwen. The Appeals Chamber will therefore address any such impact in this judgment on its own motion.

B. Relevant part of the Impugned Decision

13. In the context of regulating the *inter partes* disclosure of information prior to the confirmation of charges hearing, the Single Judge applied principles of disclosure, previously developed in the jurisprudence of the Pre-Trial Chamber, to the case at hand.¹⁸ In particular, the Single Judge at paragraphs 37-42 of the Impugned Decision requested the parties to produce and submit in-depth analysis charts mirroring the

¹⁵ [Document in Support of the Appeal](#), paras 9-18, 19-38.

¹⁶ [ICC-02/04-01/15-232](#) (OA 3).

¹⁷ [Response to the Document in Support of the Appeal](#), paras 17-19.

¹⁸ [Impugned Decision](#), para. 9.

format of the draft model chart annexed to the Impugned Decision.¹⁹ More specifically, the parties were requested to “update and file with each disclosure batch an analytical chart of the evidence disclosed between the parties and communicated to the Chamber”.²⁰ In addition, the Single Judge ordered the Prosecutor to submit a “consolidated in-depth analytical chart” no later than 30 days prior to the commencement of the confirmation of charges hearing.²¹ In the event that the Prosecutor decided to present new evidence at the hearing, a “supplement in-depth analysis chart” was to be submitted.²² With respect to the Defence, a “consolidated analytical chart” was to be submitted no later than 15 days before the confirmation of charges hearing.²³

14. In prescribing the content of the in-depth analysis chart, the Single Judge envisaged a so-called “law-driven” approach whereby the parties were required 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]”.²⁴

15. The Single Judge reasoned that the in-depth analysis chart would serve to ensure the “efficient disclosure of evidence which is relevant to the subject-matter of the case”.²⁵ In her view, the power to order such an “auxiliary document” alongside the document containing the charges and the list of evidence is derived directly from

¹⁹ [Impugned Decision](#), para. 38, [Annex 1 to the Impugned Decision](#) (ICC-02/04-01/15-203-Anx1).

²⁰ [Impugned Decision](#), para. 42.

²¹ [Impugned Decision](#), para. 42.

²² [Impugned Decision](#), para. 42.

²³ [Impugned Decision](#), para. 42.

²⁴ [Impugned Decision](#), para. 37, referring to Pre-Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, “[Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties](#)”, 31 July 2008, ICC-01/05-01/08-55 (hereinafter: “Bemba Decision on Disclosure Regime”), paras 66-70; Pre-Trial Chamber II, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)”, 6 April 2011, ICC-01/09-01/11-44 (hereinafter: “Ruto and Sang Decision on Disclosure Regime”), para. 21; Pre-Trial Chamber II, *Prosecutor v. Uhuru Muigai Kenyatta*, “[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)”, 6 April 2011, ICC-01/09-02/11-48 (hereinafter: “Kenyatta Decision on Disclosure Regime”), para. 22.

²⁵ [Impugned Decision](#), para. 39.

article 61 (3), second sentence, of the Statute as well as rule 121 (2), first sentence, of the Rules of Procedure and Evidence.²⁶

C. Prosecutor's submissions before the Appeals Chamber

16. Under the first ground of appeal, the Prosecutor alleges that the Single Judge erred in law by exceeding her powers under article 61 (3) of the Statute and rule 121 (2) of the Rules of Procedure and Evidence when she ordered the preparation and submission of in-depth analysis charts before the confirmation of charges hearing.²⁷

17. The Prosecutor challenges the Single Judge's reliance on article 61 (3) of the Statute and rule 121 (2) of the Rules of Procedure and Evidence as the basis on which she is empowered to order the production and submission of in-depth analysis charts.²⁸ In the Prosecutor's view, these provisions by their express terms relate to the Pre-Trial Chamber's "general discretionary power to regulate the disclosure process" and do not empower the Single Judge to order in-depth analysis charts.²⁹ The Prosecutor submits further that the preparation and submission of in-depth analysis charts with each batch of disclosure "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".³⁰

18. In addition, the Prosecutor argues that even a broader interpretation of these provisions in the context of the Statute as a whole fails to establish the Single Judge's power to instruct the Prosecutor to submit in-depth analysis charts.³¹

19. Under the second ground of appeal, the Prosecutor argues that, assuming, *arguendo*, that the Single Judge had the requisite discretionary power to order the preparation and submission of in-depth analysis charts, she nevertheless erred in the exercise of such discretion.³²

²⁶ [Impugned Decision](#), para. 39.

²⁷ [Document in Support of the Appeal](#), paras 9-18.

²⁸ [Document in Support of the Appeal](#), paras 9-12.

²⁹ [Document in Support of the Appeal](#), paras 11-12.

³⁰ [Document in Support of the Appeal](#), para. 12.

³¹ [Document in Support of the Appeal](#), para. 15.

³² [Document in Support of the Appeal](#), paras 19-38.

20. The Prosecutor submits that the in-depth analysis charts will not necessarily reflect the exact charges included in the document containing the charges³³ and the evidence the Prosecutor will present at the confirmation of charges hearing.³⁴ She contends that in light of the ongoing investigations, the “analysis of evidence in an [in-depth analysis chart] will necessarily be preliminary and incomplete”.³⁵

21. The Prosecutor alleges that the Impugned Decision violates her independence under article 42 (1) of the Statute.³⁶ She argues that it affects her preparation of the case in that the Impugned Decision “imposes a significant extra-statutory duty on the [Prosecutor] before the confirmation hearing by compelling [her] to direct resources towards the burdensome preparation of an [in-depth analysis chart], and away from other tasks that [she] believes are necessary to investigate and prosecute this and other cases”.³⁷ In her view, she will not be able to comply with this cumbersome duty before January 2016 (the date set for the confirmation of charges hearing, having been postponed until 21 January 2016),³⁸ unless additional staff is recruited or resources are diverted from necessary tasks in this or other cases.³⁹

22. The Prosecutor submits that the preparation and submission of in-depth analysis charts “could in fact delay rather than expedite the confirmation hearing” and “could likely necessitate [a] request [for] a further substantial postponement of the commencement of the confirmation of charges hearing”.⁴⁰

23. The Prosecutor further submits that the in-depth analysis charts are “not particularly helpful to the [d]efence”.⁴¹

³³ [Document in Support of the Appeal](#), paras 23, 27.

³⁴ [Document in Support of the Appeal](#), paras 26-27.

³⁵ [Document in Support of the Appeal](#), paras 25.

³⁶ [Document in Support of the Appeal](#), paras 18, 33.

³⁷ [Document in Support of the Appeal](#), para. 18. *See also* [Document in Support of the Appeal](#), paras 32-33.

³⁸ “[Decision Postponing the Date of the Confirmation of Charges Hearing](#)”, 6 March 2015, ICC-02/04-01/15-206.

³⁹ [Document in Support of the Appeal](#), para. 32.

⁴⁰ [Document in Support of the Appeal](#), para. 34. *See also* [Document in Support of the Appeal](#), para. 38.

⁴¹ [Document in Support of the Appeal](#), para. 35, referring to ICC-01/09-01/11-T-15, p. 32, lines 15-17.

D. Mr Ongwen’s submissions before the Appeals Chamber

24. Mr Ongwen disagrees with the Prosecutor’s assertion that the Single Judge was not empowered by virtue of article 61 (3) of the Statute and rule 121 (2) of the Rules of Procedure and Evidence to order the production and submission of in-depth analysis charts.⁴² In his view, the Single Judge’s “discretionary power is underpinned by the dictates imposed on the Pre-Trial Chamber under rule 121(2)(b) ‘to ensure that the disclosure takes place under satisfactory conditions’”.⁴³ This duty of the Pre-Trial Chamber, Mr Ongwen avers, limits the Prosecutor’s independence under articles 42 (1) and 61 of the Statute.⁴⁴ In addition, Mr Ongwen points out that article 61 (3), second sentence, of the Statute gives the Chamber the “discretionary power to ‘issue orders regarding the disclosure of information for the purpose of the hearing’” (emphasis in original) and “is not restricted to evidence or potential evidence”.⁴⁵

25. In relation to the second ground of appeal, Mr Ongwen submits that he has a right to be tried within a reasonable time⁴⁶ and notes with concern the Prosecutor’s submissions in the Document in Support of the Appeal regarding the amount of time that the preparation of in-depth analysis charts would demand.⁴⁷ By reference to the extent of disclosure in the case of the *Prosecutor v. Uhuru Muigai Kenyatta et al.*, Mr Ongwen estimates that the in-depth analysis chart in this case could amount to over 26,000 pages which “[i]f read at a rate of 50 pages per day, [...] would take one person two full business years to read [...]”⁴⁸ (emphasis omitted). Mr Ongwen submits that this document, “which is supposed to aid the Pre-Trial Chamber and Defence, would do absolutely nothing except for waste space on the [Court]’s server”.⁴⁹ According to Mr Ongwen, as a result of the order to produce and submit in-depth analysis charts, the proceedings would be unreasonably delayed infringing upon his “right provided for under [a]rticles 61(1), 64(2) and 67(1)(c) of the [...] Statute”.⁵⁰ Mr Ongwen agrees with the Prosecutor that in-depth analysis charts for the instant

⁴² [Response to the Document in Support of the Appeal](#), paras 20-24.

⁴³ [Response to the Document in Support of the Appeal](#), para. 22.

⁴⁴ [Response to the Document in Support of the Appeal](#), para. 23.

⁴⁵ [Response to the Document in Support of the Appeal](#), para. 22.

⁴⁶ [Response to the Document in Support of the Appeal](#), para. 11.

⁴⁷ [Response to the Document in Support of the Appeal](#), paras 12-16.

⁴⁸ [Response to the Document in Support of the Appeal](#), para. 15.

⁴⁹ [Response to the Document in Support of the Appeal](#), para. 15.

⁵⁰ [Response to the Document in Support of the Appeal](#), para. 16.

case “would amount to thousands of pages of analysis in a less useful, non-user friendly format”.⁵¹

E. Determination by the Appeals Chamber

1. *First Ground of Appeal*

26. At the outset, the Appeals Chamber notes that a large part of the Prosecutor’s arguments are premised on an understanding that the Single Judge intended to rely on the in-depth analysis charts for her decision on the confirmation of charges under article 61 (7) of the Statute, and in so doing infringe on the Prosecutor’s power to present her case at the confirmation of charges hearing. Specifically, the Prosecutor states that

according to the Single Judge, one of the purposes of disclosure, of which the [in-depth analysis charts] form a part, is to inform the Pre-Trial Chamber as to why a party is relying on a particular piece of evidence, and to help it reach an informed decision under article 61(7) of the Statute. Accordingly, the [Impugned] Decision envisages that an [in-depth analysis chart] will not only assist the [p]arties and the 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.⁵²

27. This argument is reiterated elsewhere under the first ground of appeal⁵³ and under the second ground of appeal, where the Prosecutor argues that the Impugned Decision “creates a real risk that the Pre-Trial Chamber will arrive at a wrong conclusion in its decision under article 61(7) [of the Statute] by relying on [in-depth analysis charts] that do not properly express the Prosecution’s case or the Prosecution’s final assessment of the relevance and probity of the evidence”.⁵⁴ Again the Prosecutor prefaces this argument with an assertion that

⁵¹ [Response to the Document in Support of the Appeal](#), para. 16.

⁵² [Document in Support of the Appeal](#), para. 13, referring to [Impugned Decision](#), paras 10, 40.

⁵³ See [Document in Support of the Appeal](#), paras 16-17, where the Prosecutor submits that: (i) the Impugned Decision envisages the preparation and submission of in-depth analysis charts “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”; and (ii) the Prosecutor should not be compelled to make her “evidentiary assessment at a premature point in the proceedings and in a particular prescribed format” and that the Impugned Decision, in imposing the specific format of an in-depth analysis chart “for analysing [her] evidence and presenting [her] case interferes with [her] prerogatives under the Statute”.

⁵⁴ [Document in Support of the Appeal](#), para. 21.

[o]ne of the reasons the Single Judge gave for ordering the Prosecution to produce and submit [in-depth analysis charts] 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). [Footnotes omitted].⁵⁵

28. The Appeals Chamber has carefully reviewed and considered the Impugned Decision in light of the Prosecutor’s arguments and finds that there is no indication that the Single Judge intended to rely on the in-depth analysis charts for the purpose of the Pre-Trial Chamber’s determination under article 61 (7) of the Statute or infringe on the Prosecutor’s power to present her case at the hearing. Paragraphs 10 and 11 of the Impugned Decision, on which the Prosecutor relies, explain the Single Judge’s finding that “all evidence disclosed between the parties [must] be communicated to the Chamber, regardless of whether the parties intend to rely on or present said evidence during the confirmation hearing”.⁵⁶ This approach, the Single Judge opined, “places the Chamber in a position to discharge its responsibilities under article 69(3) of the Statute and to take an informed decision in accordance with its statutory mandate under article 61(7) of the Statute”.⁵⁷ In this regard, the Appeals Chamber notes that the Single Judge expressly stated that information disclosed could, “after it is submitted by dint of article 69 (3) of the Statute, be discussed, contested and analyzed by both the Prosecutor and the Defence during the confirmation of charges hearing”.⁵⁸ She further indicated that it would be permissible “for the Chamber to base its determination, or parts thereof, on such evidence namely, after the Chamber has requested its submission at the confirmation of charges hearing and after the parties have made their observations, if any, at the hearing”.⁵⁹ The finding that all material disclosed *inter partes* must be communicated to the Chamber has not been appealed and will not be addressed by the Appeals Chamber in this context. For present purposes, it suffices to say that these paragraphs do not reveal any intention on the part of the Single Judge to rely on information disclosed between the parties, but not subsequently presented at the confirmation of charges hearing for the purposes of its determination under article 61 (7) of the Statute nor does it curtail

⁵⁵ [Document in Support of the Appeal](#), para. 22, referring to [Impugned Decision](#), paras 10-11, 40.

⁵⁶ [Impugned Decision](#), para. 11.

⁵⁷ [Impugned Decision](#), para. 10.

⁵⁸ [Impugned Decision](#), para. 12.

⁵⁹ [Impugned Decision](#), para. 12.

the Prosecutor's power to present her case. Furthermore, the Appeals Chamber considers that the Impugned Decision gives no indication that the Prosecutor will be bound by the analysis presented in the in-depth analysis chart if an item referenced therein is ultimately submitted as evidence for the purposes of the confirmation of charges hearing. Accordingly, the Appeals Chamber finds the abovementioned arguments of the Prosecutor to be speculative and it shall not consider them further in the present judgment.

29. Turning to the remaining arguments under the first ground of appeal, the Prosecutor, in essence, alleges an error of law, in that the relevant provisions of the Statute and Rules of Procedure and Evidence do not vest the Single Judge with the discretionary power to order the Prosecutor to produce and submit in-depth analysis charts of disclosed information before the confirmation hearing.⁶⁰

30. In relation to the standard of review with respect to alleged legal errors, the Appeals Chamber has previously found that it "will not defer to the Trial (or Pre-Trial) Chamber's legal interpretation, but 'will arrive at its own conclusions as to the appropriate law and determine whether or not [that] Chamber misinterpreted the law'".⁶¹ If the Single Judge committed such an error, "the Appeals Chamber will only intervene if the error materially affected the Impugned Decision".⁶²

31. In the context of proceedings leading up to the confirmation of charges hearing before the Pre-Trial Chamber, article 61 (3) of the Statute provides that

[w]ithin a reasonable time before the hearing, the person shall:

⁶⁰ [Document in Support of the Appeal](#), paras 9-18.

⁶¹ See e.g. *The Prosecutor v. Jean-Pierre Bemba Gombo*, "[Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 23 December 2014 entitled 'Decision on 'Defence Urgent Motion for Provisional Release''](#)", 20 May 2015, ICC-01/05-01/08-3249-Red (OA 11), para. 19; *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, "[Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled 'Decision on the "Requête de mise en liberté" submitted by the Defence for Jean-Jacques Mangenda'](#)", 11 July 2014, ICC-01/05-01/13-560 (OA 4), para. 26; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "[Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements \(ICC-02/05-03/09-199\) and additional instructions on translation'](#)", 17 February 2012, ICC-02/05-03/09-295 (OA 2) (hereinafter: "*Banda and Jerbo OA 2 Judgment*"), para. 20.

⁶² [Banda and Jerbo OA 2 Judgment](#), para. 20.

- (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and
- (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

Rule 121 (2) of the Statute states:

In accordance with article 61, paragraph 3, the Pre-Trial Chamber shall take the necessary decisions regarding disclosure between the Prosecutor and the person in respect of whom a warrant of arrest or a summons to appear has been issued.

32. The Appeals Chamber concurs with the arguments of Mr Ongwen⁶³ that these provisions accord the Pre-Trial Chamber broad discretion in regulating the disclosure process as borne out by the use of the words “may issue orders regarding the disclosure of information” in article 61 (3) of the Statute and shall “take the necessary decisions regarding disclosure” in rule 121 (2) of the Rules of Procedure and Evidence. The Appeals Chamber is of the view that no express or implied limitation on the powers of the Pre-Trial Chamber to issue orders regarding disclosure may be derived from the ordinary meaning of these provisions. It is notable in this regard that the Prosecutor herself indicates that she does not dispute the Pre-Trial Chamber’s “general discretionary power to regulate the disclosure process”.⁶⁴

33. In light of the foregoing, the Appeals Chamber considers that the Single Judge did not err in law in determining that she had the discretion to issue orders to ensure that disclosure takes place under satisfactory conditions. Such orders may address various aspects of the disclosure process, including the production and submission of aids or tools such as in-depth analysis charts. Accordingly, the first ground of appeal is rejected as the Prosecutor has not established a legal error.

2. *Second Ground of Appeal*

34. Under this ground of appeal, the Prosecutor argues that, assuming, *arguendo*, that the Single Judge had the requisite discretionary power to order the preparation

⁶³ [Response to the Document in Support of the Appeal](#), paras 22-23.

⁶⁴ [Document in Support of the Appeal](#), para. 11.

and submission of in-depth analysis charts, she nevertheless erred in the exercise of such discretion.⁶⁵

35. The Appeals Chamber has previously set out its standard of review for discretionary decisions in the following terms:

[The Appeals Chamber] will not interfere with the Pre-Trial Chamber's exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber.

[...] [T]he Appeals Chamber's functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion [...], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber 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 be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.⁶⁶

This standard of review will guide the analysis of the Appeals Chamber.

36. For the reasons that follow, the Appeals Chamber finds that in the case at hand the Single Judge did not properly exercise her discretion when she ordered the production and submission of in-depth analysis charts without first receiving submissions from the parties.

37. The Appeals Chamber notes that one of the reasons advanced by the Single Judge for issuing the order to produce in-depth analysis charts was "to ensure the overall efficiency and fairness of the proceedings, including that disclosure takes

⁶⁵ [Document in Support of the Appeal](#), paras 19-38.

⁶⁶ *Prosecutor v. Abdallah Banda Abakaer Nourain*, "[Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV's issuance of a warrant of arrest](#)", 3 March 2015, ICC-02/05-03/09-632-Red (OA 5) (hereinafter: "*Banda OA 5 Judgment*"), para. 30, referring to *Prosecutor v. Joseph Kony et al.*, "[Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 \(1\) of the Statute' of 10 March 2009](#)", 16 September 2009, ICC-02/04-01/05-408 (OA 3), paras 79-80.

place under satisfactory conditions within the meaning of rule 121 (2) (b) of the Rules so that the parties can prepare adequately for the confirmation of charges hearing”.⁶⁷ The Single Judge placed “particular emphasis” on the need to provide the Defence with “[a]ll necessary tools to understand the reasons why the Prosecutor relies on any particular piece of evidence”.⁶⁸

38. The Appeals Chamber observes that approximately one month prior to issuing the Impugned Decision, the Single Judge convened an *ex parte*, Prosecutor only status conference to discuss, *inter alia*, issues related to disclosure.⁶⁹ Attached to the Decision Convening a Status Conference, the Single Judge transmitted to the Prosecutor a list of questions “deemed important by [the Single Judge]”⁷⁰ so that the disclosure process could take place under satisfactory conditions.⁷¹ In this document the Single Judge requested the Prosecutor to provide answers to numerous questions. In particular, under the heading “Evidence to be disclosed/Redactions”, the Single Judge posed questions in relation to the amount of material in the Prosecutor’s possession, required time to review it, redactions to documents and other disclosure-related matters.⁷² However, no submissions were requested from the Prosecutor regarding the production of in-depth analysis charts. The Single Judge was apprised by the Prosecutor of *inter alia* the extent of the material collected in relation to the situation in Uganda that she would have to analyse before disclosure could take place. The Prosecutor also indicated that, given the available resources and the need to review all of the material “for potential incriminating value [...], for potential

⁶⁷ [Impugned Decision](#), para. 40.

⁶⁸ [Impugned Decision](#), para. 37, referring to [Bemba Decision on Disclosure Regime](#), paras 66-70; [Ruto and Sang Decision on Disclosure Regime](#), para. 21; [Kenyatta Decision on Disclosure Regime](#), para. 22.

⁶⁹ [Decision Convening a Status Conference](#), para. 8. *See also* [Transcript of Hearing, 28 January 2015](#), ICC-02/04-01/15-T-5-ENG. This document was originally filed confidentially but was reclassified as public pursuant to the “[Order reclassifying documents in the record of the case](#)”, 22 May 2015, ICC-02/04-01/15-238.

⁷⁰ [Decision Convening a Status Conference](#), para. 8.

⁷¹ [Annex to the Decision Convening a Status Conference](#), 21 January 2015, ICC-02/04-01/15-188-Anx. This document was originally filed confidentially but subsequently reclassified as public pursuant to “[Order reclassifying documents in the record of the case](#)”, 22 May 2015, ICC-02/04-01/15-238.

⁷² [Annex to the Decision Convening a Status Conference](#), 21 January 2015, ICC-02/04-01/15-188-Anx. This document was originally filed confidentially but subsequently reclassified as public pursuant to “[Order reclassifying documents in the record of the case](#)”, 22 May 2015, ICC-02/04-01/15-238, p. 2.

exculpatory value and for potential value to the Defence in mounting their defence”, a proper review and disclosure process was likely to take a year.⁷³

39. The Appeals Chamber notes that the need for the Prosecutor to provide an additional tool to facilitate the Defence’s understanding of the disclosed information or to prepare in-depth analysis charts was not discussed or foreshadowed at the aforementioned status conference on issues related to disclosure. No submissions were requested from the parties before the Impugned Decision was rendered regarding the feasibility or desirability of producing in-depth analysis charts. In particular, Mr Ongwen was not consulted as to whether he would find this tool useful in facilitating his preparation for the confirmation of charges hearing.

40. The Appeals Chamber has previously held that “the disclosure process is essential in ensuring the fairness of the proceedings and that the rights of the defence are respected, in particular the principle of equality of arms. This must remain paramount in decisions that are taken in relation to disclosure”.⁷⁴

41. The Pre-Trial Chamber’s duty to ensure that the disclosure process takes place under satisfactory conditions requires that the full circumstances of each individual case must be considered in making orders and decisions regarding disclosure. To this end, rule 121 (2) (b) of the Rules of Procedure and Evidence provides that the “Pre-Trial Chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions”. The Appeals Chamber considers that this rule highlights the importance of receiving the submissions of the parties, to the extent possible, on issues relevant to the disclosure process.

42. In the circumstances of the present case, the Appeals Chamber considers that it was incumbent on the Single Judge to receive submissions from the parties on the utility and practical implications of this additional disclosure requirement prior to imposing it, given that the imposition of an obligation to prepare and submit in-depth analysis charts may place a disproportionate burden on the parties and may ultimately lead to delays in the proceedings.

⁷³ [Transcript of hearing, 28 January 2015](#), ICC-02/04-01/15-T-5-ENG, p. 8, line 4 to p. 16, line 3.

⁷⁴ [Banda OA 5 Judgment](#), para. 34.

43. In the absence of such submissions, it appears that the Single Judge's conclusion that this "approach minimizes any detrimental effects on the effective and timely preparation for the confirmation hearing"⁷⁵ was informed exclusively by a practice developed in past cases rather than by the exigencies of the case before her.⁷⁶ In particular, the Single Judge failed to seek observations from the parties on the scale of the work involved in the preparation of the in-depth analysis charts, the time that this would take, the potential delay this could cause to the proceedings and the corresponding impact that these circumstances would have upon the right of Mr Ongwen to "be tried without undue delay" under article 67 (1) (c) of the Statute. For the foregoing reasons, the Appeals Chamber finds that by failing to seek observations from the parties before ordering the production and submission of in-depth analysis charts in the present case, the Single Judge failed to exercise her discretion in a fair and reasonable manner.

44. The Appeals Chamber notes that the first opportunity for the Prosecutor and Mr Ongwen to make submissions on the approach envisaged by the Single Judge in the Impugned Decision arose in the context of the present appeal. Both parties appear to argue that in-depth analysis charts will be of little use in the present case.⁷⁷ They also express concerns about the time and resources required for the Prosecutor to produce in-depth analysis charts and the potential for delays in the proceedings as a result.⁷⁸

45. The Appeals Chamber does not find it appropriate to address these arguments in substance as they were raised for the first time on appeal and the Single Judge did not have an opportunity to consider them at first instance. As such, the Appeals Chamber considers that it would exceed the scope of its review function to pronounce on the

⁷⁵ [Impugned Decision](#), para. 40.

⁷⁶ [Impugned Decision](#), paras 37-42, referring to [Bemba Decision on Disclosure Regime](#), paras 66-70; [Ruto and Sang Decision on Disclosure Regime](#), paras 21-23; [Kenya Decision on Disclosure Regime](#), paras 22-24; Pre-Trial Chamber II, *Prosecutor v. Bosco Ntaganda*, "[Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#)", 12 April 2013, ICC-01/04-02/06-47, paras 29-32; Pre-Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, "[Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence](#)", 10 November 2008, ICC-01/05-01/08-232, paras 5-9; *See also* Pre-Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, "[Decision on the Disclosure of Evidence by the Defence](#)", 5 December 2008, ICC-01/05-01/08-311, paras 9-10.

⁷⁷ [Document in Support of the Appeal](#), paras 23-26, 35; [Response to the Document in Support of the Appeal](#), para.15.

⁷⁸ [Document in Support of the Appeal](#), para. 34; [Response to the Document in Support of the Appeal](#), paras 15-16.

question of whether ordering in-depth analysis charts “enhances the overall efficiency and fairness of proceedings” in the present case. It suffices to say that the Appeals Chamber is of the view that these submissions are of clear relevance to a decision on whether to order the submission of in-depth analysis charts in the case at hand and should have been heard and considered by the Single Judge before rendering the Impugned Decision.

46. The Appeals Chamber thus finds that the Single Judge did not properly exercise her discretion when she ordered the production and submission of in-depth analysis charts with each batch of disclosure and a consolidated chart no later than 30 days prior to the confirmation of charges hearing without first receiving submissions from the parties. In the Appeals Chamber’s view, the exercise of her discretion in this regard was unfair and unreasonable and had a material effect on the Impugned Decision.

IV. APPROPRIATE RELIEF

47. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case it is appropriate to reverse operative parts (g) (3) and (h) of the Impugned Decision to the extent that it orders the Prosecutor to produce and submit in-depth analysis charts alongside the disclosure of information and a consolidated chart no later than 30 days prior to the confirmation of charges hearing. For the reasons articulated above, the Appeals Chamber considers it appropriate to also reverse operative part (i) of the Impugned Decision to the extent that it orders Mr Ongwen to submit an in-depth analysis chart 15 days prior to the confirmation of charges hearing.

48. In the circumstances of this case, the Appeals Chamber deems it unnecessary to remand the matter to the Pre-Trial Chamber for a new determination. This, of course, is without prejudice to the Pre-Trial Chamber exercising its discretion to re-examine the matter in accordance with the findings of the Appeals Chamber outlined above.

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



Judge Christine Van den Wyngaert
Presiding Judge

Dated this 17th of June 2015

At The Hague, The Netherlands