



THE TRIAL CHAMBER

Case No.: STL-11-01/T/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge
Judge Nicola Lettieri, Alternate Judge

Registrar: Mr Daryl Mundis

Date: 9 May 2014

Original language: English

Classification: Public

THE PROSECUTOR

v.

SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

DECISION ON MERHI DEFENCE REQUEST FOR A 'TABLE OF INCRIMINATING EVIDENCE'

Office of the Prosecutor:

Mr Norman Farrell, Mr Graeme Cameron
& Mr Alexander Milne

Victims' Legal Representatives:

Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra

Counsel for Mr Salim Jamil Ayyash:

Mr Eugene O'Sullivan, Mr Emile Aoun
& Mr Thomas Hannis

Counsel for Mr Mustafa Amine Badreddine:

Mr Antoine Korkmaz, Mr John Jones
& Mr Iain Edwards

Counsel for Mr Hassan Habib Merhi:

Mr Mohamed Aouini, Ms Dorothee Le Fraper
du Hellen & Mr Jad Khalil

Counsel for Mr Hussein Hassan Oneissi:

Mr Vincent Courcelle-Labrousse, Mr Yasser
Hassan & Mr Philippe Laroche

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaél Mettraux
& Mr Geoffrey Roberts



INTRODUCTION

1. Counsel for the Accused, Hassan Habib Merhi, requested an order compelling the Prosecution to prepare and disclose to them an analytical table—entitled ‘table of incriminating evidence’—showing, for each element of the crime alleged by the Prosecution, the material facts underpinning it and the incriminating evidence the Prosecution intends to present at trial. The Prosecution opposes the motion and counsel for the other four Accused neither joined nor supported the motion.
2. The Special Tribunal’s legal framework contains no provision obliging the Prosecution to prepare such a table. The motion is to a large extent based on the case-law of the International Criminal Court (ICC) as it concerns ‘in-depth analysis charts’ (also termed ‘IDACs’) prepared, in several cases, by the ICC Prosecution.
3. The motion has been dismissed. At this stage in the proceedings it would be unfairly burdensome to order the Prosecution to prepare and submit the requested table. The considerable time needed to prepare a table of thousands of pages now is outweighed by its minimal practical utility, and in particular, considering the detailed relevant information already contained in Annex C to the consolidated indictment of 7 March 2014. Moreover, the Trial Chamber has previously found that the indictment, pre-trial brief and the disclosed evidence provide counsel for Mr Merhi, and counsel for the other four Accused, with enough detail to allow them to prepare a defence of the case at trial.

BACKGROUND TO THE MOTION

4. On 24 June 2013, the Prosecutor filed an indictment, signed 5 June 2013, against Mr Merhi,¹ confirmed by the Pre-Trial Judge on 31 July 2013,² and made public on 10 October 2013.³ On 20 December 2013, and after being seised of the issue on 25 November 2013, the Trial Chamber decided that the trial against Mr Merhi should proceed *in absentia*.⁴ Defence counsel were assigned to represent Mr Merhi on 20 December and 30 December 2013.⁵ On 8 January 2014, the Prosecution

¹ *Prosecutor v. Hassan Habib Merhi*, STL-13-04/I/PTJ, Prosecution’s Submission of an Indictment for Confirmation and Order to Keep this Filing and its Annexes Confidential and *Ex Parte*; and Motion for an Arrest Warrant, Order for Transfer and Detention; and Order for Non-Disclosure (confidential and *ex parte*), 5 June 2013.

² Decision Relating to the Examination of the Merhi Indictment, 31 July 2013, paras 10-11.

³ Order on Partially Lifting the Confidentiality of the Indictment against Mr Hassan Habib Merhi, 10 October 2013.

⁴ STL-13-04/I/TC, Decision to Hold Trial *In Absentia*, 20 December 2013.

⁵ Assignment of a Counsel for the *In Absentia* Proceedings Held Pursuant to Rule 106 of the Rules, 20 December 2013; Commission d’Office de Co-Conseils, 30 December 2013.

filed its pre-trial brief outlining its case against Mr Merhi.⁶ All Prosecution pre-trial disclosure was complete as of 7 February 2014—with the exception of the ongoing obligation of disclosure of material under Rule 113 of the Special Tribunal’s Rules of Procedure and Evidence and any new evidence.⁷

5. On 11 February 2014, the Trial Chamber joined the *Merhi* case to the *Ayyash* case,⁸ and, on 12 February 2014, ordered the Prosecution to file a consolidated indictment in the two cases.⁹ On 14 February 2014, counsel for Mr Merhi filed a motion alleging defects in the form of the indictment under Rule 90 (A) (ii)¹⁰—subsequently dismissed by the Trial Chamber.¹¹ On 7 March 2014, the Prosecution filed its consolidated indictment,¹² and on 4 April 2014, the Trial Chamber declared that consolidated indictment to be the operative indictment in the proceedings.¹³

6. On 3 March 2014, counsel for Mr Merhi wrote to the Prosecution in a letter termed ‘Request for Assistance’ asking it to prepare a table linking—for each charge—the elements of the crimes to the alleged facts underpinning each element.¹⁴ The Prosecution responded on 10 March 2014 rejecting the request, stating that its list of witnesses in Annex C to the consolidated indictment¹⁵ contains ‘(b) a summary of the facts on which each witness is expected to testify;’ and ‘(c) the points in the indictment as to which each witness is expected to testify, including specific references to counts and relevant paragraphs in the indictment.’¹⁶ The Prosecution also stated that it had no statutory or regulatory obligation to comply with a request to prepare such a table.¹⁷

7. One full month later, at the status conference on 10 April 2014, co-counsel for Mr Merhi orally requested the Trial Chamber to order the Prosecution to prepare the requested table.¹⁸ Counsel cited a 2009 decision of the ICC Trial Chamber in the *Katanga* case ordering the Prosecution to prepare and

⁶ Prosecution’s Pre-Trial Brief annexed to Prosecution’s Submission Pursuant to the Pre-Trial Judge’s Order of 24 December 2013 (confidential), 8 January 2014. The French version of the Brief was filed on 3 February 2014.

⁷ STL-11-01/T/TC, Reasons for Order on Date for Filing Merhi Pre-Trial Brief, 17 April 2014, para. 11.

⁸ STL-11-01/T/TC and STL-13-04/PT/TC, Joint Hearing, Official Public English transcript of 11 February 2014, pp 91-96 in relation to the joinder of the cases of *Prosecutor v Merhi* with *Prosecutor v Ayyash, Badreddine, Oneissi and Sabra*, with written reasons in Decision on Trial Management and Reasons for Decision on Joinder, 25 February 2014.

⁹ STL-11-01, Official Public English transcript of 12 February 2014, pp 27, 47-49, 120.

¹⁰ Preliminary Motion on Defects in the Form of the Indictment, 14 February 2014.

¹¹ Decision on Alleged Defects in the Form of the Indictment Against Hassan Habib Merhi, 28 March 2014.

¹² Prosecution Submission of Consolidated Indictment, Witness and Exhibit Lists, 7 March 2014.

¹³ Decision on Prosecution Motion on a Consolidated Indictment and Amending Witness and Exhibit Lists, 4 April 2014.

¹⁴ Version publique expurgée de l’annexe A à la requête de la défense de Merhi relative à la communication d’un tableau des éléments de preuve à charge, 22 April 2014 (‘Annex A to Merhi Defence motion’).

¹⁵ Prosecution Submission of Consolidated Indictment, Witness and Exhibit Lists, 7 March 2014.

¹⁶ Annex A to Merhi Defence motion.

¹⁷ Annex A to Merhi Defence motion.

¹⁸ Official Public English transcript of 10 April 2014, pp 38-41.

submit an in-depth analysis chart.¹⁹ Defence counsel, however, had not, in advance of the status conference, informed either the Prosecution or the Trial Chamber that they would be making the application nor did they provide the Trial Chamber with the copies of the legal authorities they were citing. Nor did they make any submissions about the number of cases at the ICC in which such orders had been made. The Trial Chamber therefore asked Defence counsel to submit any motion on this issue in writing, to allow any interested party to make appropriate submissions referring to any relevant case-law.²⁰

8. It was only a week later, and some five and a half weeks after the Prosecution had originally informed them that it would not be preparing the requested table, that Defence counsel filed a motion requesting the Trial Chamber, pursuant to Articles 16 (4) and 21 (1) of the Statute and Rules 70 (C) and 89 (B) of the Rules, to order the Prosecutor to disclose a ‘Table of Incriminating Evidence’ against Mr Merhi. This chart should include, for each count: (i) each element of the crime; (ii) the material facts alleged underpinning each element of crime; and (iii) the relevant witnesses and incriminating evidence in support of each element of crime.²¹

9. Counsel submit that such a table would ensure a fair and expeditious trial by providing the Defence with access to ‘a simplified, structured and more comprehensible record’ of the case. Such a table represents a ‘facility’ which is necessary for counsel to prepare their case within the meaning of Article 16 (4) of the Statute and is all the more justified at this stage in the proceedings since counsel have a very short timeframe in which to prepare for trial and to submit their pre-trial brief. The requested table, according to Defence counsel, is a well-established practice before the ICC.²²

10. The Prosecution responded opposing the motion and arguing that Defence counsel did not identify any valid legal basis demonstrating that it had any obligation to prepare such a table.²³ It added that the requested table is not a consistent practice in the international criminal courts and tribunals and that Defence counsel have not demonstrated that it is necessary to provide such a table in addition to all the disclosed evidence, the pre-trial brief and the witnesses and exhibits lists.²⁴ As the Prosecution does not have its evidence organised in the manner requested by counsel for Mr

¹⁹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol’, 13 March 2009, para. 11.

²⁰ Official Public English transcript of 10 April 2014, pp 39, 46.

²¹ Requête de la défense de Merhi relative à la communication d’un tableau des éléments de preuve à charge, 17 April 2014, paras 11-12.

²² Merhi Defence motion, paras 13, 14, 16.

²³ Prosecution Response to “Requête de la défense de Merhi relative à la communication d’un tableau des éléments de preuve à charge”, 1 May 2014, paras 7-11.

²⁴ Prosecution response, paras 12-17.

Merhi, it would take months to prepare such a table. This task is ‘a highly resource-intensive process’, thus defeating its asserted purpose of facilitating the timely preparation of Defence counsel.²⁵

11. On 5 May 2014, counsel for Mr Merhi replied to the Prosecution’s response, arguing that the Prosecution’s obligation to prepare the requested table is not disproportionate given the tight deadlines in which counsel have to prepare for the resumption of the trial. It is inconceivable, in their view, that the Prosecution would require months to prepare such a table, while the Merhi Defence is expected to be prepared for the resumption of the trial within less than six months.²⁶

DISCUSSION

A. Is there a statutory requirement to prepare a ‘Table of Incriminating Evidence’?

12. Counsel for Mr Merhi use the expression ‘disclosure of a Table of Incriminating Evidence’ (*communication d’un Tableau des éléments de preuve à charge*). This is potentially misleading as it suggests that the Prosecution should disclose information or material already in its possession; on the contrary, as the motion makes clear, the request contemplates the Prosecution creating a new product that it does not have, and then disclosing this work product in the form of a ‘table of incriminating evidence’. In this sense, the motion could be understood as asking the Trial Chamber to order disclosure of Prosecution work product despite the clear wording of Rule 111, which excludes from disclosure ‘[r]eports, memoranda, or other internal documents prepared by a Party ... in connection with the investigation or preparation of a case’. On this basis alone, the Trial Chamber might have dismissed the motion.

13. Article 16 of the Special Tribunal’s Statute, ‘Rights of the Accused’, outlines the rights of the Accused to a fair trial including that to ‘a fair and public hearing’.²⁷ International human rights instruments mandate that accused persons have the right to be informed of the charges against them²⁸

²⁵ Prosecution response, paras 18-19.

²⁶ Réplique de la Défense de Merhi à la "Prosecution Response to ‘Requête de la Défense de Merhi relative à la communication d’un tableau des éléments de preuve à charge’", 5 May 2014, paras 2-6.

²⁷ Decision on Alleged Defects in the Form of the Amended Indictment, 12 June 2013, paras 10-15; Decision on Alleged Defects in the Form of the Amended Indictment of 21 June 2013, 13 September 2013, paras 13-18.

²⁸ See e.g., Article 6 (3) (a) of the European Convention on Human Rights and Article 14 (3) (a) of the International Covenant on Civil and Political Rights which provide the right ‘to be informed promptly, and in detail in a language which he understands of the nature and cause of the accusation against him’; see also Article 8 (2) (b) American Convention on Human Rights which provides the right to ‘prior notification in detail to the accused of the charges against him’. The case-law of the ECtHR holds that a fair trial requires that indictments include the charges and form of liability alleged; see e.g., *Penev v. Bulgaria*, Appl. 20494/04, 7 January 2012, para. 44; *Varela Geis v. Spain*, Appl. 61005709, 5 March 2013, para. 42.

and to have adequate time and facilities for the preparation of their defence. Article 16 (4) (a) and (b) mirrors these rights by providing:

In the determination of any charge against the accused pursuant to this Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
- (b) To have adequate time and facilities for the preparation of his or her defence...

14. Article 21 (1) provides that the Special Tribunal shall confine the trial strictly to an expeditious hearing of the issues raised by the charges. It shall take strict measures to prevent any action that may cause unreasonable delay. Rule 89 (D) read in conjunction with Rule 70 (C) provides that the Trial Chamber shall ensure that the proceedings are not unduly delayed and shall take any measures necessary to prepare the case for a fair and expeditious trial. This is essentially akin to the Trial Chamber's powers under Rule 130 permitting it to give directions on the conduct of the proceedings as necessary and desirable to ensure a fair, impartial, and expeditious trial.

15. The Special Tribunal's Statute and Rules of Procedure and Evidence—like those of the other international criminal courts and tribunals—contain no provision that would mandate the Prosecution providing the table requested by Defence counsel. In the absence of such an explicit rule, can one be inferred in Articles 16 (4) and 21 (1) of the Statute and Rules 70 (C) and 89 (B), as the Defence submissions suggests? In other words, should the Trial Chamber exercise its discretion and order the Prosecution to prepare such a table under the general provisions on the conduct of the proceedings?

B. Should the Trial Chamber exercise its discretion and order a table of incriminating evidence?

The discretionary powers of the Trial Chamber

16. Counsel for Mr Merhi suggest that the considerations favouring the Trial Chamber exercising its discretion to order the Prosecution to create and disclose such a table are essentially three: (i) providing a simplified, structured, and more comprehensible record; (ii) in light of the relatively short timeframes in which counsel must prepare for trial; and (iii) considering the well-established practice at the ICC in this respect. The Prosecution, on the other hand, submits that Trial Chamber should not make the order because (i) the information sought by counsel for Mr Merhi is already

there, albeit in a different format; and (ii) it would take too much time and resources to prepare such a table for it to be actually useful for the preparation of Mr Merhi's case.

17. While the Special Tribunal's Statute and Rules are silent on the creation and disclosure of a table of incriminating evidence, the Trial Chamber—based on the experience of the other international criminal courts and tribunals—accepts that, in exceptional circumstances, it could order a party to actively engage in substantial work to create and disclose work product for the benefit of the opposing party. In deciding how to exercise its discretion, the Trial Chamber will consider the history of the case, the arguments of the Parties and the applicable law.

The disclosure of evidence to date

18. In its decision of 28 March 2014 on the alleged defects in the form of the consolidated indictment, the Trial Chamber dismissed that part of the Merhi Defence motion seeking to order the Prosecution to clarify the consolidated indictment by incorporating into it, for each count, a specific and exhaustive list of the paragraphs setting out the supporting material facts.²⁹ There, the Trial Chamber held—as it did in its previous decisions³⁰—that the totality of the case against the five Accused is contained in the combination of the indictment, the Prosecution's pre-trial brief and the evidence intended to be used at trial. These have all been disclosed to Defence counsel. The Trial Chamber observed that it is this combination of information that provides Defence counsel with the particulars necessary to allow them to properly prepare for trial.³¹

19. Furthermore, as the Prosecution noted in its letter to counsel for Mr Merhi on 10 March 2014, its list of witnesses in Annex C to the consolidated indictment³² contains 'a summary of the facts on which each witness is expected to testify' and 'the points in the indictment as to which each witness is expected to testify, including specific references to counts and relevant paragraphs in the indictment.'³³

20. The Prosecution is therefore correct in stating that the information sought by counsel for Mr Merhi has already been provided to them. However, specific references to counts only appear in the Prosecution's list of witnesses and not in the list of exhibits. The question remains whether the Trial Chamber should order the Prosecution to create a new work product, the requested table, for the

²⁹ Decision on Alleged Defects in the Form of the Indictment Against Hassan Habib Merhi, 28 March 2014, para. 22.

³⁰ Decision on Alleged Defects in the Form of the Amended Indictment, 12 June 2013, para. 64; Decision on Alleged Defects in the Form of the Amended Indictment of 21 June 2013, 13 September 2013, para. 27.

³¹ Decision on Alleged Defects in the Form of the Indictment Against Hassan Habib Merhi, 28 March 2014, para. 45.

³² Prosecution Submission of Consolidated Indictment, Witness and Exhibit Lists, 7 March 2014, Annex C.

³³ Annex A to Merhi Defence motion.

benefit of counsel for Mr Merhi, and in circumstances where counsel for the other four Accused have not joined the motion.

The practice of other international courts and tribunals and its relevance to the Special Tribunal

21. At the International Criminal Tribunal for the Former Yugoslavia (ICTY), as at the Special Tribunal, the Prosecution must specify in its witnesses list ‘the points in the indictment as to which each witness will testify, including specific references to counts and relevant paragraphs in the indictment’.³⁴ 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.³⁵

22. The ICC Rules contain no provision obliging either the Prosecution or Defence to file pre-trial briefs but the Prosecution must file ‘a document explaining its case with reference to the evidence it intends to rely on at trial’; this document is referred to as the ‘pre-trial brief’.³⁶ However, several ICC Chambers have ordered the Prosecution to file an in-depth analysis chart, similar in scope to the table sought here, although it has no explicit legal basis in the ICC’s Statute, Rules of Procedure and Evidence or Regulations. The preparation of such charts has thus developed in judicial practice, firstly in the *Bemba* Pre-Trial Chamber in 2008. That Chamber ordered the disclosed evidence to be accompanied by a sufficiently detailed legal analysis relating the alleged facts with the constituent elements corresponding to each crime charged.³⁷

³⁴ Rule 65 *ter* (E) of the ICTY’s Rules of Procedure and Evidence.

³⁵ See *e.g.*, ICTY, *Prosecutor v. Prlić*, 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’); SCSL, *Prosecutor v. Brima*, Official transcript of 30 April 2004, p. 24, lines 23-37, p. 25, line 1 (‘proofing-chart ... to focus on the count system indicating specifically for every count, paragraph, the testimonial or primary documentary evidence that supports those counts’).

³⁶ ICC, *Prosecutor v. Muthaura and Kenyatta*, Decision on the schedule leading up to trial, 9 July 2012, para. 20.

³⁷ ICC, *Prosecutor v. Bemba*, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, ICC-01/05-01/08-55, 31 July 2008, para. 66; see also ICC, *Prosecutor v. Bemba*, Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence, 10 November 2008; ICC, *Prosecutor v. Bemba*, Decision on the Disclosure of Evidence by the Defence, 5 December 2008. See also ICC, *Prosecutor v. Bemba*, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, para. 69 (‘Each piece of evidence must be analysed - page by page or, where required, paragraph by paragraph - by relating each piece of information contained in that page or paragraph with one or more of the constituent elements or 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 person is charged.’).

23. The *Katanga*³⁸ and *Bemba*³⁹ Trial Chambers also ordered the Prosecution to prepare similar charts. In *Katanga*, the Trial Chamber held that an in-depth analysis chart was intended to ensure that the accused have adequate time and facilities to prepare their defence by providing them with a clear and comprehensive overview of all incriminating evidence and how each item of evidence relates to the charges against them.⁴⁰

24. Counsel for Mr Merhi submitted—referring only to decisions in *Katanga and Bemba*—that the requested table is a well-established practice before the ICC.⁴¹ The ICC’s practice, however, is not as clear-cut as the Defence motion asserts, and reveals that using such a table is far from uncontroversial. The current—and limited—ICC practice to date shows that such a table has been used in one⁴² of the four cases in pre-trial confirmation or in trial proceedings, and in two of the three cases in which the trials had concluded.⁴³ They are not universally accepted.⁴⁴

25. For example, in making pre-trial orders in *Kenyatta*, the Trial Chamber ordered the Prosecution to file a pre-trial brief and witness list which ‘should include a bullet-pointed summary of the main facts’ of their testimony.⁴⁵ Counsel for both accused had sought an in-depth analysis chart, but the Trial Chamber held that the Court’s core legal texts made no reference to such a document. It concluded that, with an updated ‘document containing the charges’ (*i.e.* an ICC indictment) and a pre-trial brief, an in-depth analysis chart was unnecessary for trial.⁴⁶

³⁸ ICC, *Prosecutor v. Katanga and Ngudjolo*, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, 13 March 2009.

³⁹ ICC, *Prosecutor v Bemba*, Decision on the “Prosecution’s Submissions on the Trial Chamber’s 8 December 2009”, 29 January 2010.

⁴⁰ ICC, *Prosecutor v. Katanga and Ngudjolo*, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, 13 March 2009, paras 6 and 8.

⁴¹ Merhi Defence motion, para. 16. In footnote 11 of the Motion, counsel refer to the ICC case *Prosecutor v. Katanga and Ngudjolo*, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, 13 March 2009, para. 12 (“The Table of Incriminating Evidence should be considered as nothing more than a tool to structure the presentation of the evidence and to ensure that the Prosecution’s evidentiary case is easily accessible and comprehensible.”) and para. 15 (“[The Pre-Trial Chamber] is convinced that the supplementary investment of time and resources, required by the Prosecution for preparing the Table of Incriminating Evidence, will facilitate the subsequent work of the accused and the Chamber and thereby expedite the proceedings as a whole.”). See also ICC, *Prosecutor v. Katanga and Ngudjolo*, Table of Incriminating Evidence appended to the Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, 13 March 2009. See also ICC, *Prosecutor v. Bemba*, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, paras 66-70.

⁴² ICC, *Prosecutor v. Bemba*.

⁴³ ICC, *Prosecutor v. Katanga; Prosecutor v. Ngudjolo*.

⁴⁴ See *e.g.*, ICC, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on the “Defence request for an in-depth analysis chart” submitted by the Defence for Mr Jean-Pierre Bemba Gombo, (‘Bemba contempt decision’), 28 January 2014, para 5.

⁴⁵ This is similar to the requirements of the Special Tribunal’s Rule 91 (G) (ii) (c) and the ICTY’s Rule Rule 65 *ter* (E) (ii).

⁴⁶ ICC, *Prosecutor v. Muthaura and Kenyatta*, Decision on the schedule leading up to trial, 9 July 2012, paras 11, 16.

26. Further, in *Ruto and Sang*—where the Prosecution had prepared an in-depth analysis chart—counsel for the defence stated in court that the chart had ‘proved less useful’.⁴⁷ And, most recently, in the *Bemba* contempt proceedings, the Pre-Trial Judge refused to order an IDAC holding that the Pre-Trial Chamber had no power to order the creation of such a document, and it was for the Prosecutor to decide whether she wished to use such a tool.⁴⁸

27. Additionally, the in-depth analysis chart in the *Katanga* case was approximately 1000 pages long; the two documents in the *Kenyatta* case 6,600 pages; and, in the *Ruto and Sang* case, the IDAC exceeded 12,000 pages.⁴⁹

28. Preparing such a table—potentially of thousands of pages—would evidently require several months of work and would divert substantial resources from the Prosecution’s trial preparation.

29. Technically, the ICC and ICTY Prosecution have produced these charts using software different to that used by the Special Tribunal’s Prosecution.⁵⁰ The ICC software program was specifically developed to produce Prosecution internal work-product charts of the elements of offences within the ICC’s jurisdiction. But without exploring further these technical details, the OTP of the Special Tribunal uses a different type of software and, according to the Prosecution, attempting to do so now would involve a huge amount of manual work at this advanced stage of the proceedings.

30. The Trial Chamber observes that the trial has already commenced and has been adjourned following the joinder of the *Ayyash* and *Merhi* cases to allow counsel for Mr Merhi to prepare for the resumption of the trial proceedings. Further, the Prosecution submitted its last pre-trial brief, for Mr Merhi, on 8 January 2014 and by 7 February 2014 had disclosed all the evidence intended to be used at trial. Moreover, the ICC decisions relating to these charts were made well in advance of the commencement of the trial.

⁴⁷ ICC, *Prosecutor v. Ruto and Sang*, official transcript of 11 June 2012, p. 32, lines 15-17.

⁴⁸ Bemba contempt decision, paras 5, 7.

⁴⁹ Prosecution response, para. 19. See also ICC, *Prosecutor v. Jeane-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Prosecution Response to “Defence Request for an in-depth analysis chart,” 24 January 2014, fn. 14. The relevant case-law of the ICC—including the authorities counsel for Mr Merhi cited in their motion—shows that the Prosecution had been ordered to prepare such tables well in advance of the hearings on the confirmation of charges or the date of the commencement of the trial:

- *Katanga and Ngudjolo*: Trial Chamber decision—13 March 2009; start of trial—24 November 2009;
- *Bemba*: Trial Chamber decision—29 January 2010; start of trial—22 November 2010;
- *Muthaura and Kenyatta*: Pre-Trial Chamber decision (table for confirmation of charges)—12 July 2011; start of confirmation of charges hearing—21 September 2011; decision (IDAC is ‘unnecessary’ for trial)—9 July 2011;
- *Ruto and Sang*: Pre-Trial Chamber decision (table for confirmation of charges)—6 April 2011; start of confirmation of charges hearing—1 September 2011; decision (omitting to order IDAC for trial)—9 July 2011;
- *Ntaganda*: Pre-Trial Chamber decision (table for confirmation of charges)—12 April 2013; start of confirmation of charges hearing—10 February 2014.

⁵⁰ CaseMatrix at the ICC, CaseMap at the ICTY.

31. The Trial Chamber believes that a chart of the complexity and scale sought here—and especially one prepared at this stage—will inevitably contain clerical mistakes and errors, leading to further litigation, requests for clarification, and thus causing uncertainty in the proceedings. It is also significant that, in the two years and three months since their assignment as Defence counsel for the other four Accused, none has asked for such a table—the table requested relates only to the alleged role of Mr Merhi as charged in the consolidated indictment. The Trial Chamber could not realistically order the creation of such a table in relation to only one of five Accused persons charged with participating in the same alleged conspiracy.

32. The Trial Chamber is not convinced that, on balance, Defence counsel have demonstrated that the benefits of creating such a table will outweigh the burden on the Prosecution and the possible complications involved in preparing one and adhering to it throughout the proceedings. Although the charges related to the events of 14 February 2005 may not be as factually complex as some ICTY and ICC cases, providing a simplified and better structured table of the incriminating documentary evidence might be more useful in the circumstances of the case.

CONCLUSION

33. The Trial Chamber considers that in balancing the competing interests here—and in particular considering counsel for Mr Merhi's need to prepare for trial—it would not be expedient to order the Prosecution to prepare the requested table *at this stage of the proceedings*.

34. The consolidated indictment, including the information in Annex C, the pre-trial brief and the disclosed evidence provide counsel for Mr Merhi with sufficient detail to prepare their case for trial. It would not advance the interests of justice *now* to order the Prosecution to create and provide the Defence with such an additional table that is not explicitly provided for in the Special Tribunal's Statute or Rules.

35. Further, if the trial is to resume in the coming months, ordering the Prosecution to prepare such a table will not assist the Trial Chamber in ensuring the rights of the Accused to a fair and expeditious proceedings in accordance with Article 21 (1) of the Statute and Rule 89 (B) of the Rules

36. For these reasons, the Trial Chamber will not exercise its discretion and grant the request of counsel for Mr Merhi. The motion is dismissed.

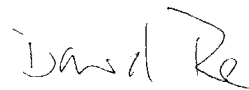
DISPOSITION

FOR THESE REASONS, the Trial Chamber:

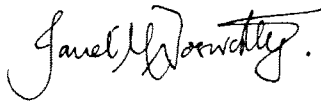
DISMISSES the motion.

Done in Arabic, English, and French, the English version being authoritative.
Leidschendam,
The Netherlands

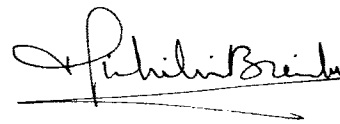
9 May 2014



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

