

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/07

Date: 29 April 2008

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

PUBLIC

**Prosecution's Report regarding Review Criteria and
Lifting Procedures for Information under Article 54(3)(e)**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

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Unrepresented Victims

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Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. Pursuant to the request of the Single Judge, following a status conference held on 22 April 2008, the Prosecution herein provides a report to the Chamber on the criteria applied to determine potential disclosure of and the procedure applied by the Prosecution to request lifting of restrictions on information in the possession of the Prosecution that falls under the rubric of Article 54(3)(e).

A. Article 67(2) and Rule 77 disclosure review criteria

2. The Prosecution has established six category-based criteria used to analyze whether material within its control and possession must be disclosed to the Defence as required under Article 67(2). The Prosecution has established similar criteria used to review information that must be provided for inspection pursuant to Rule 77 of the Rules of Procedure and Evidence. These criteria are applied uniformly, and none *inclusively to one another, to all material in the Prosecution's control or possession, regardless of whether that material is protected by Article 54(3)(e).* The Prosecution has established these categories based on an internal analysis of the case. The Prosecution reiterates its invitation to the Defence teams to communicate their input to better define and refine these criteria or categories for review of material for disclosure/inspection under Article 67(2) and Rule 77.¹

3. The review criteria established by the Prosecution for the purpose of Article 67(2) are as follows:

a. Potentially exonerating evidence for the crimes as charged in the Document Containing the Charges (formerly as alleged in the Application for the Warrant for Arrest): Information contradicting or undermining the case theory that the suspects planned, ordered, solicited or induced crimes in the Document Containing the Charges, or had knowledge of the commission of these crimes; or were present during the attack.

¹ ICC-01/04-01/07-T-26-ENG RT 22-04-2008, p.28, lines1-13.

b. Lack of authority of suspects: Information that the suspects lacked authority over their respective groups, e.g. insufficient authority, command and control over target groups. Also information portraying the suspects as political actors only, with no ties to military commands, operations.

c. Use of children in hostilities: Information that the suspects lacked knowledge that children were used in hostilities or were under the age of 15 years.

d. War Crimes: Information suggesting that the suspects lacked the intent of the attack at the planning stage or that its execution was to primarily target a military position (e.g. an order not to kill civilians).

e. Measures taken by suspects to punish or prevent crimes: Information demonstrative of steps taken by the suspects to punish or prevent crimes of same nature as those alleged in the Document Containing the Charges.

f. Other: Any information not covered by previous categories that would undermine or mitigate the case against the suspects, including positive defenses for excluding criminal responsibility under Article 31. This category also includes information relating to involvement in any peace process, efforts made to demobilize troops, information impeaching or discrediting Prosecution evidence (e.g. the criminal record of a witness, or that the evidence was obtained by unlawful means), information suggesting that FNI/FRPI were heterogeneous ethnic groups and were formed with the objective of pursuing peace, that the FNI/FRPI and/or suspects were controlled and regulated by foreign actors.

4. The following criteria are applied for the purpose of determining whether information in the possession or control of the Prosecution must be provided to the Defence for inspection under Rule 77:

- Books, documents, photographs and other tangible objects that contain information concerning Uganda / Rwanda's role and/or Kinshasa's support (via the EMOI or RCD-K/ML) of the Ituri armed groups

- Books, documents, photographs and other tangible objects that contain information presenting the suspects as political actors, as opposed to military commanders
- Books, documents, photographs and other tangible objects that were obtained from or belong to the suspects
- Books, documents, photographs and other tangible objects contained in the files of the *Auditeur Militaire* or from the *Tribunal de Grande Instance* (TGI) in Bunia

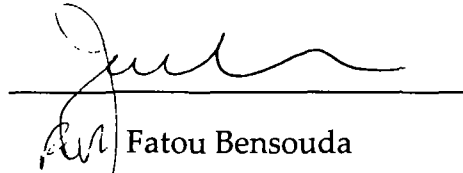
B. Procedure for lifting of Article 54(3)(e) confidentiality restriction

5. When material of a potentially evidentiary value is identified as (i) falling within the scope of Article 54(3)(e) and (ii) meeting criteria for disclosure, an internal recommendation is made for making a request to the concerned information provider for the lifting of article 54(3)(e) restrictions. As part of this process a number of internal verifications are undertaken, in particular to ascertain the identity of the original source; the nature and scope of restrictions applicable under the relevant 54(3)(e) agreement; and an internal duplication review to check whether the item is available in identical form from another source or is otherwise publicly available.

6. In terms of timing, as a general practice, the Prosecution endeavours to seek the provider's consent at the earliest possible occasion in order to enable the timely processing of requests for the lifting of restrictions on disclosure, so as to bear in mind the need of information providers to be provided sufficient time to consider and respond to requests for the lifting of restrictions, and in the light of the Prosecution's obligation to fulfil its disclosure obligations under the Statute.

7. If the information provider informs the Prosecution that it is not able to grant the lifting restrictions, the Prosecution will consult with the information provider to ascertain whether the items concerned can be disclosed subject to any alternative measures: such as by way of summaries or redactions; limitations on disclosure; the

use of in camera or ex parte proceedings; or other protective measures permissible under the ICC Statute and Rules.



Fatou Bensouda
Deputy Prosecutor
on behalf of
Luis Moreno-Ocampo
Prosecutor

Dated this 29th day of April 2008

At The Hague, The Netherlands