

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 2 June 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 Document
URGENT**

**Decision Requesting Observations concerning Article 54 (3)(e) Documents
Identified as Potentially Exculpatory or Otherwise Material for the Defence's
Preparation for the Confirmation Hearing**

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mr Éric Macdonald, Senior Trial Lawyer

**Counsel for the Defence
of Germain Katanga**

Mr David Hooper
Ms Caroline Buisman

**Counsel for the Defence of Mathieu
Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of the Victims

Ms Carine Bapita Buyagandu
Mr Joseph Keta
Mr J.L. Gilissen

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I, Judge Sylvia Steiner, judge at the International Criminal Court (the "Court");

NOTING the "Prosecution's Report on the Status of the Procedures Initiated under Articles 54(3)(e), 73 and 93 in Relation to Those Items Identified as of a Potentially Exculpatory Nature under Article 67(2) of the Statute" ("the Prosecution First Report"),¹ filed by the Prosecution on 14 November 2007;

NOTING the 'Second Prosecution's Report on the Status of the Procedures Initiated under Articles 54(3)(e), 73 and 93 in Relation to Those Items Identified as of a Potentially Exculpatory Nature under Article 67(2) of the Statute' ("the Prosecution Second Report"),² filed by the Prosecution on 21 November 2007;

NOTING the "First Prosecution's Report on the Status of the Procedures Initiated under Articles 54(3)(e), 73 and 93 in Relation to Those Items Identified as of a Potentially Exculpatory Nature under Article 67(2) of the Statute" ("the Prosecution Third Report"),³ filed by the Prosecution on 25 March 2008;

NOTING the "Second Prosecution's Report on the Status of the Procedures Initiated under Articles 54(3)(e), 73 and 93 in Relation to Those Items Identified as of a Potentially Exculpatory Nature under Article 67(2) of the Statute" ("the Prosecution Fourth Report"),⁴ filed by the Prosecution on 9 April 2008;

NOTING the "Third Prosecution's Report on the Status of the Procedures Initiated under Articles 54(3)(e), 73 and 93 in Relation to Those Items Identified as of a Potentially Exculpatory Nature under Article 67(2) of the Statute" ("the Prosecution Fifth Report"),⁵ filed by the Prosecution on 24 April 2008;

¹ ICC-01/04-01/07-77

² ICC-01/04-01/07-122

³ ICC-01/04-01/07-338

⁴ ICC-01/04-01/07-381

⁵ ICC-01/04-01/07-438

NOTING the “Prosecution's Report regarding Review Criteria and Lifting Procedures for Information under Article 54(3)(e)”⁶ (“the Prosecution’s Explanatory Report”), filed by the Prosecution on 29 April 2008;

NOTING the “Fourth Prosecution's Report on the Status of the Procedures Initiated under Articles 54(3)(e), 73 and 93 in Relation to Those Items Identified as of a Potentially Exculpatory Nature under Article 67(2) of the Statute” (“the Prosecution Sixth Report”),⁷ filed by the Prosecution on 9 May 2008;

NOTING the “Prosecution's Fifth Report on the Status of the Procedures Initiated under Articles 54(3)(e), 73 and 93 in Relation to Those Items Identified as of a Potentially Exculpatory Nature under Article 67(2) of the Statute or as Material to the Defence under Rule 77 of the Rules” (“the Prosecution’s Seventh Report”),⁸ filed by the Prosecution on 23 May 2008;

NOTING articles 54(3)(e) and 67(2) of the *Rome Statute* (“the Statute”) and rules 77 and 82 of the *Rules of Procedure and Evidence* (“the Rules”);

I. Prosecution Reports on Article 67(2) and Rule 77 Materials Covered by Article 54(3)(e) of the Statute

1. In the 14 November 2007 Prosecution First Report, the Prosecution stated as follows:

The Prosecution has so far reviewed 1000 documents that were collected under the condition of confidentiality as set forth in Article 54(3)(e) of the Statute and that are considered to be relevant for the case of *the Prosecutor v. Germain KATANGA*.⁹

⁶ ICC-01/04-01/07-458.

⁷ ICC-01/04-01/07-473

⁸ ICC-01-04-01/07-502

⁹ ICC-01/04-01/07-77, p. 2.

The Prosecution has identified that, out of these 1000 documents collected, 164 documents are of a potentially exculpatory nature pursuant to Article 67(2) of the Statute.¹⁰

Out of the 164 documents identified as potentially exculpatory, confidentiality has already been lifted for 10 of them. The lifting of confidentiality was refused for 6 documents. A request seeking the lifting of confidentiality of 27 documents belonging to this group has already been submitted and the Prosecution is awaiting a decision from the provider regarding these. We are preparing a request for the remaining documents identified as of a potentially exculpatory nature that will be submitted shortly to the relevant providers.¹¹

2. In the 21 December 2007 Prosecution's Second Report, the Prosecution explained:

The Prosecution has completed its review of materials that were collected under the condition of confidentiality as set forth in Article 54(3)(e) of the Statute and that are considered to be relevant for the case of *the Prosecutor v. Germain Katanga*.¹²

In its previous Status Report, the Prosecution informed the Single Judge it reviewed 1000 documents that were collected under the condition of confidentiality as set forth in Article 54(3)(e) of the Statute and that are considered to be relevant for the case of *the Prosecutor v. Germain Katanga*. An additional 366 documents have now been reviewed by the Prosecution.

¹³

For several documents identified as of potentially exculpatory nature, the OTP has already sent requests for the lifting of confidentiality restrictions to the providers or is preparing to do so.¹⁴

3. In the 25 March 2008 Prosecution's Third Report, the Prosecution stated as follows:

In its Second Status Report in the case of *the Prosecutor v. Germain KATANGA*, the Prosecution informed the Single Judge that, until that date, it reviewed a total of 1366 documents that were collected under the condition of confidentiality as set forth in Article 54(3)(e) of the Statute and that were considered to be relevant for the case of the Prosecutor v. Germain KATANGA. To date, the total number of documents covered by Article 54(3)(e) of the Statute, reviewed and considered to be relevant for the case of *the Prosecutor v. Germain KATANGA and Mathieu NGUDJOLO CHUI* totals a number of 1628 documents.¹⁵

From the set of documents identified as of potentially exculpatory nature or as containing potentially exculpatory elements and covered by Article 54(3)(e) of the Statute, the OTP has sent additional requests for the lifting of confidentiality restrictions to the providers and will send out requests for another set of documents.¹⁶

As to date, the confidentiality restrictions of four documents which contain potentially exculpatory elements have been lifted. Two documents have been lifted without any conditions imposed by the provider and they have already been disclosed to the Defences of Germain KATANGA and Mathieu NGUDJOLO CHUI. For the other two documents, the

¹⁰ ICC-01/04-01/07-77, p. 2.

¹¹ ICC-01/04-01/07-77, p. 2.

¹² ICC-01/04-01/07-122, para. 1.

¹³ ICC-01/04-01/07-122, para. 2.

¹⁴ ICC-01/04-01/07-122, para. 3.

¹⁵ ICC-01/04-01/07-338, para.1.

¹⁶ ICC-01/04-01/07-338, para. 2.

confidentiality restriction was lifted but redactions to the documents were applied by the provider. These documents will be disclosed in the next disclosure packages to the Defences for Germain KATANGA and Mathieu NGUDJOLO CHUI. The Prosecution informs the Single Judge that these two documents are not tagged as potentially exculpatory for the purposes of the disclosure classification, since they are predominantly of incriminating or Rule 77 of the Rules of Procedure and Evidence ("Rules") nature, and only contain certain potentially exculpatory elements. The Prosecution, when disclosing documents, diligently informs the Defence that the material disclosed as incriminating or provided for inspection under Rule 77 of the Rules may also contain elements of potentially exculpatory nature.¹⁷

4. In the 9 April 2008 Prosecution's Fourth Report, the Prosecution explained:

In its First Status Report in the case of *the Prosecutor v. Germain KATANGA and Mathieu NGUDJOLO CHUI*, the Prosecution informed the Single Judge that, until that date, it reviewed a total of 1628 documents that were collected under the condition of confidentiality as set forth in Article 54(3)(e) of the Statute and that were considered to be relevant for the case of *the Prosecutor v. Germain KATANGA and Mathieu NGUDJOLO CHUI*. To date, the total number of documents covered by Article 54(3)(e) of the Statute, reviewed and considered to be relevant for the case of *the Prosecutor v. Germain KATANGA and Mathieu NGUDJOLO CHUI* adds up to a number of 1631 documents. By the time of this report, 177 documents have been identified as of potentially exculpatory nature or containing potentially exculpatory elements.¹⁸

From the documents identified as of potentially exculpatory nature or as containing potentially exculpatory elements and covered by Article 54(3)(e) of the Statute, the OTP either sent requests for the lifting of confidentiality restrictions to the providers or is currently preparing to request the lifting of the confidentiality restrictions.¹⁹

As the Prosecution submitted in its First Report, there are four documents for which the confidentiality restrictions have already been lifted. Two documents have been lifted without any conditions imposed by the provider and they have already been disclosed to the Defences of Germain KATANGA and Mathieu NGUDJOLO CHUI. For the other two documents, the confidentiality restriction was lifted but redactions to the documents were applied by the provider. These documents will be disclosed in the following disclosure packages to the Defences for Germain KATANGA and Mathieu NGUDJOLO CHUI. The Prosecution informs the Single Judge that these two documents are not tagged as potentially exculpatory for the purposes of the disclosure classification, since one document is predominantly of incriminating nature and the other of Rule 77 of the Rules of Procedure and Evidence ("Rules") nature, and only contains certain potentially exculpatory elements. The Prosecution, when disclosing documents, diligently informs the Defence that the material disclosed as incriminating or provided for inspection under Rule 77 of the Rules may also contain elements of potentially exculpatory nature. As to date, there have been no additional documents containing potentially exculpatory elements for which the confidentiality restrictions have been lifted.²⁰

5. In the 25 April 2008 Prosecution's Fifth Report, the Prosecution stated as follows:

¹⁷ ICC-01/04-01/07-338, para. 4.

¹⁸ ICC-01/04-01/07-381, para. 1.

¹⁹ ICC-01/04-01/07-381, para. 2.

²⁰ ICC-01/04-01/07-381, para. 3.

In its Second Status Report in the case of *the Prosecutor v. Germain KATANGA and Mathieu NGUDJOLO CHUI*, the Prosecution informed the Single Judge that, until that date, it reviewed a total of 1631 documents that were collected under the condition of confidentiality as set forth in Article 54(3)(e) of the Statute and that were considered to be relevant for the case of *the Prosecutor v. Germain KATANGA and Mathieu NGUDJOLO CHUI*. To date, the number of such documents amounts to 1632 documents. By the time of this report, 154 documents have been identified as of potentially exculpatory nature or containing potentially exculpatory elements.²¹

During the Public hearing held on 22 April 2008, the Prosecution informed the Single Judge that 158 documents covered by Article 54(3)(e), had been identified as of potentially exculpatory nature or containing potentially exculpatory elements (ICC-01/04-01/07-T-26-ENG ET, p. 26, line 25; p. 27, lines 1-4). The Prosecution submits that it continued to review the documents that were identified as of potentially exculpatory nature or containing potentially exculpatory elements in preparing the requests for the lifting of confidentiality restrictions to be sent to the providers. In its previous report, the Prosecution had identified 177 of such documents. Upon a new review of these documents, it appears that a number of them were listed inaccurately as of potentially exculpatory nature or containing potentially exculpatory elements. The Prosecution continues to apply the same standards to identify potentially exonerating information as stated at the last hearing (ICC-01/04-01/07-T-26-ENG ET, p. 32, lines 3-5); the decrease in the number of documents is due to clerical errors by the reviewers. From the documents identified as of potentially exculpatory nature or as containing potentially exculpatory elements and covered by Article 54(3)(e) of the Statute, the OTP has sent or is about to send requests for the lifting of confidentiality restrictions to the providers for all the documents. The Prosecution submits that this number might decrease in the period between the Third and the Fourth Status Report since it is currently finalising its review of these 154 documents in light of the aforementioned clerical errors. The Prosecution further submits that this number continues to vary since all the documents reviewed to date are being subjected to a secondary review in light of the joinder of the cases against Germain KATANGA and Mathieu NGUDJOLO CHUI, the ongoing investigations and the continuous evaluation of the Prosecution evidence.²²

6. In the 29 April 2008 Prosecution's Explanatory Report, the Prosecution underlined that:

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.²³

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

²¹ ICC-01/04-01/07-438, para. 1.

²² ICC-01/04-01/07-438, para. 1, footnote 4.

²³ ICC-01/04-01/07-458, para. 5.

restrictions, and in the light of the Prosecution's obligation to fulfil its disclosure obligations under the Statute.²⁴

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.²⁵

7. In the 9 May 2008 Prosecution Sixth Report, the Prosecution stated as follows:

By the time of this report, 140 documents have been identified as of potentially exculpatory nature or containing potentially exculpatory elements.²⁶

In its Third Status Report (ICC-01/04-01/07-438), the Prosecution informed the Single Judge that 154 documents covered by Article 54(3)(e), had been identified as of potentially exculpatory nature or containing potentially exculpatory elements. Upon a further review of these documents, it appears that 14 documents within the group of 154 were duplicates, meaning different documents with the exact same content but with a different Evidence Registration Number ("ERN") or excerpts of a larger document with a different ERN.²⁷

The Prosecution is currently reviewing if the potentially exculpatory information contained in these 140 documents has already been disclosed or can be disclosed to the Defence in another form. Additionally, the OTP continues to request the lifting of confidentiality restrictions to the providers for the documents identified as containing potentially exculpatory elements.²⁸

8. In the 23 May 2008 Prosecution Seventh Report, the Prosecution explained:

The Prosecution has identified 140 documents ("Identified PEXO 54(3)(e) Documents") containing potentially exculpatory elements.²⁹

Requests to obtain lifting of confidentiality as applied pursuant to Article 54(3)(e) for all these Identified PEXO 54(3)(e) Documents have been sent to the various information providers. Recently, providers have lifted confidentiality restrictions for seven of these documents, which were promptly disclosed to the Defence.³⁰

To date, lifting has been recently rejected for 28 of the Identified PEXO 54(3)(e) Documents by their providers. The information contained in 16 of these documents is analogous to that of already disclosed material. Furthermore, upon closer analysis, the Prosecution concludes that the information contained in 7 of these documents for which lifting has been rejected, has no exculpatory value.³¹

As requested by the Single Judge to report on the status of documents identified as material to the Defence pursuant to Rule 77, which amount to approximately 94 documents, the Prosecution submits that all requests regarding these documents have been sent to the relevant providers. Similarly to the approach taken to identify documents containing potentially exculpatory material, the Prosecution has broadly interpreted and identified the criteria selected for the category of documents encompassed by Rule 77.³²

²⁴ ICC-01/04-01/07-458, para. 6.

²⁵ ICC-01/04-01/07-458, para. 7.

²⁶ ICC-01/04-01/07-473, para. 1.

²⁷ ICC-01/04-01/07-473, para. 1, footnote 1.

²⁸ ICC-01/04-01/07-473, para. 2.

²⁹ ICC-0104-01/07-502, para. 1.

³⁰ ICC-0104-01/07-502, para. 2.

³¹ ICC-0104-01/07-502, para. 3.

³² ICC-0104-01/07-502, para. 4.

Recently, providers have denied lifting of confidentiality restrictions for 23 of these documents. The information contained in 17 of these documents is analogous to that of already disclosed material.³³

II . Discussion

9. At the outset, the Single Judge notes the considerable number of documents (1632 according to the last indication given by the Prosecution on 25 April 2008) that the Prosecution has collected pursuant to article 54(3)(e) of the Statute, and that, according to the Prosecution, “were considered to be relevant” for the present case. In the view of the Single Judge, this is particularly notable because the present case is confined to the crimes allegedly committed during one attack against one village on a single day.

10. The Single Judge finds this considerable number of documents to indicate that the Prosecution is not resorting to article 54(3)(e) of the Statute only in exceptional or limited circumstances, but rather is extensively gathering documents under such provision.

11. This practice, in the view of the Single Judge, is at the root of the problems that have arisen in the present case, as well as in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, with regard to the disclosure to the Defence of those materials identified as potentially exculpatory (article 67(2) of the Statute) or otherwise material for the Defence’s preparation for the confirmation hearing (rule 77 of the Rules)³⁴ and that have been collected under the conditions of confidentiality set forth in article 54(3)(e) of the Statute.

12. Furthermore, the series of reports filed by the Prosecution in the last six and a half months (i.e. from 14 November 2007 to 23 May 2008) show that the problems posed by the practice of extensively gathering materials pursuant to article 54(3)(e)

³³ ICC-0104-01/07-502, para. 5.

³⁴ ICC-01/04-01/06-102, See also ICC-01/04-01/06-T-9-EN [23 JUN2006 Edited] See also ICC-01/04-01/07-T-26-ENG ET 22-04-2008, pp 26-30

of the Statute are significantly aggravated by the Prosecution's difficulties in securing the consent of the providers.

13. In this regard, the Single Judge observes that by 14 November 2007 (less than a month after the surrender to the Court of Germain Katanga), the Prosecution (i) had already revised more than 1000 documents covered by article 54(3)(e) of the Statute; (ii) had concluded that 164 of out of those 1000 documents were of potentially exculpatory nature; (iii) had secured the consent to lift the confidentiality restrictions for 10 of those documents; (iv) had been refused such consent for 6 of them; and (v) had pending consent requests for 27 additional documents. Moreover, by 21 December 2007, the Prosecution had almost completed its internal review insofar as it had looked at over 1400 documents out of the 1632 documents reviewed throughout the whole process.

14. Since then, however, little to no progress has been made in securing the consent of the providers. This is evidenced by the 9 April 2008 Prosecution's Fourth Report, in which the Prosecution acknowledges that – in addition to the providers' consent for 10 documents that had already been obtained prior to 14 November 2007 – the Prosecution had only been able to secure the providers' consent for 4 documents (for which restrictions were lifted without conditions imposed by the providers for only 2). This was the last time the Prosecution referred in its reports to the number of requests for providers' consent that had been accepted, until the 23 May 2008 Prosecution Seventh Report, in which the Prosecution underlined that providers had granted consent for 7 additional documents.

15. In this regard, the Single Judge observes that, in the Prosecution's last few reports, the Prosecution mainly refers to the number of documents for which consent has been rejected by the providers.

16. In the 23 May 2008 Prosecution Seventh Report, the Prosecution indicates that, to date, providers have rejected consent for 28 potentially exculpatory documents. This means that, as 140 documents have been identified as potentially exculpatory

within the meaning of article 67(2) of the Statute and consent has been granted for only 21 documents, the number of pending requests amounts to 90 to date.

17. Moreover, according to the 23 May 2008 Prosecution Seventh Report, the Prosecution indicates that providers have refused to give their consent for 23 out of 94 documents identified as material to the Defence within the meaning of rule 77 of the Rules. As the Prosecution has not indicated that providers have given consent for any of these documents, the number of pending requests amounts to 70 to date.

18. In conclusion, although during the first two months after the transfer of Germain Katanga to the seat of the Court in The Hague, the Prosecution had almost completed its review of article 54(3)(e) documents, but in the following five months the Prosecution:

- (i) has only been able to secure the providers' consent for 11 documents (excluding the 10 documents for which the providers' consent had already been secured prior to 14 November 2007);
- (ii) has received rejections for requests for such consent for 51 documents; and
- (iii) has been unable to obtain a response in relation to more than 160 documents.

19. The Single Judge considers that these numbers by themselves illustrate the gravity of the situation in the present case. In the view of the Single Judge, although the Prosecution's delays in sending requests for consent to the providers may have contributed to this situation,³⁵ this is certainly not the sole explanation.

20. The Single Judge also notes that article 54(3)(e) of the Statute and rule 82 of the Rules provide for a clear remedy in cases where article 54(3)(e) documents are of an

³⁵ A number of requests were only sent to the providers after the Single Judge ordered the Prosecution at the status conference held on 22 April 2008 to send requests for the providers' consent in relation to all article 54 (3)(a) documents already identified as being potentially exculpatory or otherwise material for the Defence (ICC-01/04-01/07-T-26-ENG-ET 22-04-2008, p. 30, lines 13-25).

incriminatory nature and the Prosecution intends to rely on them either at the confirmation hearing or at trial: absent the consent of the provider, the Prosecution is prevented from relying on them.

21. However, the problem arises in cases of absence of the provider's consent in relation to article 54(3)(e) documents which are of an exculpatory nature or otherwise material for the Defence and must be disclosed to the Defence pursuant to article 67(2) of the Statute and rule 77 of the Rules.

22. In this regard, the Single Judge observes that the Prosecution, in its Seventh Prosecution Report, indicates for the first time that in relation to a number of those documents for which providers have recently rejected requests for consent (33 out of 51), the information contained in such documents is "analogous to that of already disclosed material".³⁶ Moreover, in relation to seven additional documents, the Prosecution states that "upon closer analysis", the information contained in such documents "has no exculpatory value".³⁷

23. The Single Judge observes that the Prosecution has not provided any explanation for why the disclosure of analogous information in other materials already disclosed to the Defence would adequately compensate for the prejudice that may be caused to the Defence by the non-disclosure to the Defence of documents which have been identified as falling under article 67 (2) of the Statute or rule 77 of the Rules.

24. In this regard, the Single Judge finds that the procedural mechanism proposed by the Prosecution, for those cases where the consent of the providers cannot be secured prior to the confirmation hearing, somewhat minimises any prejudice that might be caused to the Defence at this stage of the proceedings.

25. However, before deciding on whether this procedural mechanism will be sufficient to safeguard the Defence's right to a fair trial at this stage, the Single Judge

³⁶ ICC-01/04-01/07-502, paras. 3 to 5.

³⁷ ICC-01/04-01/07-502, para. 3.

would like to hear from the Prosecution, the Defence for Germain Katanga, the Defence for Mathieu Ngudjolo Chui and the Legal Representatives of Victims a/0327, a/0329, a/0330/07, a/0331/07 and a/0333/07 on the matter.

26. Moreover, the Single Judge notes that the Prosecution has not offered any explanation for why the procedural mechanism proposed by the Prosecution has not been followed in relation to the 160 documents for which requests for consent are currently pending, despite the fact that the confirmation hearing is due to start in about three weeks.

27. In this regard, the Single Judge is of the view that, for the purpose of the confirmation hearing, documents for which requests for consent are pending are to be treated in the same manner as documents for which requests for consent have been rejected. As a result, the analysis of whether the Prosecution has complied with its obligation to disclose to the Defence, prior to the start of the confirmation hearing, the bulk of those materials identified as potentially exculpatory or otherwise material for the Defence's preparation for the confirmation hearing must be conducted on this premise.³⁸

28. The Single Judge also emphasises that certain procedural mechanisms that might be available at the confirmation hearing may not necessarily be subsequently available at trial.³⁹ As a result, the Single Judge is of the view that, given the difficulties of securing the providers' consent within a reasonable period of time observed by the Single Judge, the Prosecution willingly assumes a considerable risk if it continues gathering in an extensive manner materials pursuant to article 54(3)(e) of the Statute, rather than doing so only in exceptional or limited circumstances.

³⁸ ICC-01/04-01/06-102, p. 5, p. 15, para. 5, p. 53, para. 119, p. 55, paras. 124, 125, and 127, p. 56, paras. 128 and 129

³⁹ In this regard, the Single Judge is aware of the different views on the matter expressed on the one hand by the Majority of Trial Chamber I in the case of the *Prosecutor v. Thomas Lubanga Dyilo* and on the other hand by Judge Rene Blattmann in Dissenting opinion (ICC-01/04-01/06-1311-Anx2 and ICC-01/04-01/06-1311-Anx3, see also ICC-01/04-01/06-1084, paras. 39-46, and ICC-01/04-01/06-1235, para. 34)

29. In this regard, the Single Judge considers that the avoidance of such risk should be a core factor in any Prosecution decision whether to accept materials pursuant to article 54(3)(e) of the Statute.

30. The Single Judge also emphasises that those organisations that condition their cooperation with the Prosecution on a blank application of article 54(3)(e) of the Statute may also be contributing to creating the above-mentioned risk, as it is likely that many of the documents they provide to the Prosecution under such condition will contain materials which are potentially exculpatory or otherwise material for the Defence.

31. Finally, the Single Judge reminds the Prosecution that in order to avoid the present situation in future cases, it must:

- (i) as soon as a suspect voluntarily appears before the Court or is surrendered to the Court, identify those article 54(3)(e) documents which are potentially exculpatory or otherwise material to the Defence; and
- (ii) expedite the Prosecution's internal procedures in order to request the provider's consent as quickly as possible.

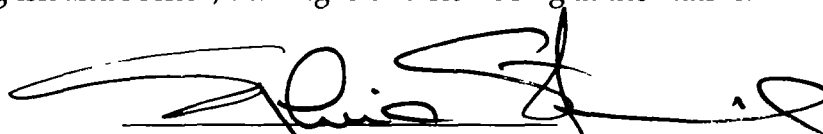
FOR THESE REASONS

DECIDE to give to the Prosecution and to the Legal Representatives of Victims a/0327, a/0329, a/0330/07, a/0331/07 and a/0333/07 until Thursday 5 June 2008 at 16h00 to file their observations on whether, in the absence of the providers' consent under article 54(3)(e) of the Statute, the provision to the Defence of analogous information in materials not subject to the Prosecution's confidentiality obligations

adequately safeguards the Defence's right to a fair trial for the purpose of the confirmation hearing;

DECIDE to give to the Defence for Germain Katanga and for Mathieu Ngudjolo Chui until Monday 9 June 2008 at 16h00 to address the above-mentioned question, and to respond to the observations of the Prosecution and the Legal Representatives of Victims a/0327, a/0329, a/0330/07, a/0331/07 and a/0333/07.

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



Judge Sylvia Steiner
Single Judge

Dated this Monday 2 June 2008

At The Hague, The Netherlands