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**International
Criminal
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Date: 5 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

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

Source: Office of the Prosecutor

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

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A. Background

1. In a Decision (the "Decision") notified on 2 June 2008, the Single Judge of Pre-Trial Chamber I provided the Prosecution and the Legal Representatives of the Victims a/0327/07, a/0329/07, a/0300/07 and a/0333/07 until 5 June 2008 to provide 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".¹
2. In the Decision, the Single Judge cites the reports filed by the Prosecution in the case regarding the status of disclosure and lifting requests for material covered by confidentiality agreements under Article 54(3)(e). The Single Judge states that "for the first time" in the seventh report, the Prosecution indicates that for a number of documents for which the providers have rejected requests for consent, the information contained in those documents is analogous to that of already disclosed material.²
3. The Prosecution, in parallel to its requests to information providers for the lifting of confidentiality restrictions under Article 54(3)(e), has indeed been exploring other avenues. It has reviewed the documents subject to "pending lifting requests" for analogous disclosed information.
4. The Prosecution further submits that some of the totals mentioned by the Single Judge in paragraphs 14, 16 and 18 of the Decision, calculated from the numbers provided by the Prosecution in its 14 November 2007 First Report,³ 9

¹ ICC-01/04-01/07-543, pp. 14-15.

² ICC-01/04-01/07-543, para. 22.

³ ICC-01/04-01/07-77.

April 2008 Fourth Report,⁴ and 23 May 2008 Seventh Report,⁵ are different from the numbers actually submitted by the Prosecution.

5. With respect to paragraph 14 of the Decision, the Prosecution submits that the numbers provided in its First,⁶ Fourth,⁷ and Seventh Report⁸ each time referred to the total number of documents of potentially exculpatory nature for which the confidentiality restrictions have been lifted, and not to the number of new documents lifted since the previous report. Therefore, the numbers mentioned in the reports should not be added up. To date, the total number of documents containing potentially exculpatory information for which the confidentiality restrictions have been lifted is eight.

6. As to date, the Prosecution has identified 136 documents containing potentially exculpatory elements that were obtained by the Prosecution under the condition of Article 54(3)(e) of the Statute. Out of these 136 documents, the confidentiality restrictions of eight documents have been lifted and the lifting was rejected for 28 documents.⁹ The number of pending requests therefore amounts to 100 documents to date. The Prosecution has received no answer concerning the other documents from the providers.

7. As submitted by the Prosecution at the Status Conference of 3 June 2008, the Prosecution's original identification of 1632 documents collected *in the situation* was done on the basis of *relevance*, not of "disclosability" under Article 67(2) or Rule 77. This wide criterion of relevance was subsequently narrowed and resulted in a much smaller number of documents that were

⁴ ICC-01/04-01/07-381.

⁵ ICC-01/04-01/07-502.

⁶ ICC-01/04-01/07-77 of 14 November 2007.

⁷ ICC-01/04-01/07-381 of 9 April 2008.

⁸ ICC-01/04-01/07-502 of 23 May 2008.

⁹ As stated by the Prosecution in its 23 May 2008 Seventh Report, upon a closer analysis, the Prosecution concluded that the information contained in seven of these documents has no exculpatory value, ICC-01/04-01/07-502, para. 3.

actually disclosable. The Prosecution continues to refine these criteria, and as a result, it can be expected that the number of documents containing information that is to be disclosed under Article 67(2) or Rule 77 will decrease further.¹⁰

B. Observations of the Prosecution

8. It is the Prosecution's submission that given the specific scope and purpose of the confirmation hearing, there will be no prejudice caused to the defence as a result of the disclosure of material analogous to that which cannot be disclosed due to Article 54(3)(e) restrictions.

9. This Chamber, in the case of *Thomas Lubanga Dyilo*, has confirmed that the Prosecution will have discharged its disclosure obligations, if prior to the confirmation hearing, it has disclosed the "bulk of potentially exculpatory evidence or evidence which could be material to the preparation of the defence."^{11,12} The Prosecution submits that full and complete disclosure prior to the confirmation hearing is not required by the Statute, the Rules or the current jurisprudence of this Chamber. Neither Article 67(2) nor Rule 77 stipulate that disclosure or inspection of material must be completed by any deadline, or before any hearing or trial. Disclosure under Article 67(2) must be provided "as soon as practicable" and no timeline is delineated for inspection under Rule 77 of objects that are "material to the preparation of the defence".¹³

¹⁰ The Prosecution recalls that its next status report on documents subject to Article 54(3)(e) restrictions is to be filed on 9 June 2008.

¹¹ "Decision on the Confirmation of Charges", ICC-01/04-01/06-803-tEN, para. 154.

¹² It is notable too that the pre-trial confirmation disclosure provided to the defence in the *Lubanga* case was found to be sufficient by this Chamber, which, as characterized by the Single Judge in the Decision, has the same Article 54(3)(e) disclosure "problems" as the instant case. ICC-01/04-01/07-543, para. 11.

¹³ Conversely, Rule 77 does apply a presumed deadline for items "intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial"[emphasis added].

10. This standard of disclosure established by the Pre-Trial Chamber is based on the specific scope and purpose of the confirmation hearing.^{14,15} The Single Judge, in the instant case, recently reiterated the scope and purpose of the confirmation hearing,¹⁶ holding that it is:

...one stage of the criminal procedure before the Court which aims at ensuring no case goes to trial unless there is sufficient evidence to establish substantial grounds to believe that the person committed the crime with which he or she has been charged.

The confirmation hearing has limited scope and **by no means can it be seen as an end in itself**, but it must be seen as a means to distinguish those cases that should do to trial from those that should not go to trial.

Furthermore, there must be consistency between the proceedings leading to the confirmation hearing, the hearing itself and, in the eventuality of the confirmation of charges, the proceedings held before the Trial Chamber. Hence, the procedural activities carried out for the purpose of the confirmation hearing must also aim at facilitating the preparation for trial in the event that the charges are confirmed.[emphasis added]¹⁷

11. Consequently, the Defence will not be prejudiced if the disclosure provided by the Prosecution, including the analogous information disclosed, is sufficient to permit the defence to participate in the legal and evidentiary debate at issue, namely whether the Prosecution's core evidence meets the threshold established by Article 61(7), and assists in the defence preparation for trial, in the event of committal.

12. It is submitted that the principle of analogous information disclosure for the purposes of a confirmation hearing and the provision of summaries, are

¹⁴ "Decision on the Confirmation of Charges", ICC-01/04-01/06-803-tEN, para. 37.

¹⁵ This dicta from the Pre-Trial Chamber confirmed the statements of the Single Judge in the Lubanga case where she held "[T]he Pre-Trial Chamber is not a finder of truth in relation to the guilt or innocence of the person against whom a warrant of arrest or a summons to appear has been issued...In the opinion of the single judge, it is not the role of the Pre-Trial Chamber to find the truth concerning the guilt or innocence of Thomas Lubanga Dyilo, but to determine whether sufficient evidence exists to establish substantial grounds to believe that he is criminally liable for the crimes alleged by the Prosecution. The single judge considers that it would be contrary to the role of the Pre-Trial Chamber to file in the record of the case and present at the confirmation hearing potentially exculpatory and other materials disclosed by the Prosecution before the hearing, if neither party intends to rely on those materials at that hearing". "Decision on the Final System of Disclosure and the Establishment of a Timetable", ICC-01/04-01/06-102-Anx1, paras. 55-56.

¹⁶ "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) and Rule 77 of the Rules", ICC-01/04-01/07-428, paras. 71,78, 79,82, 105, 137.

¹⁷ ICC-01/04-01/07-428, paras. 5-7.

options that protect the rights of the Defence. In the “Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules”¹⁸, the Single Judge *inter alia* permits the Prosecution to disclose Article 67(2) and Rule 77 summaries of potentially exculpatory witness statements *inter partes* and without prior judicial authorization – a form of analogous evidence – for the purpose of the confirmation hearing. Furthermore, any defence prejudice occasioned by the lack of judicial oversight of the process can be addressed by the appropriate Trial Chamber in the event of a confirmation of charges.

13. Finally, on the issue of actual prejudice that may be experienced by the defence, the Prosecution wishes to stress that in discharging its obligations under Article 67(2) and Rule 77, it had to hypothesise on possible defence lines to the case. The criteria created by the Prosecution for review of material for possible disclosure have been provided to the defence, most recently in the form of the filing as ordered by the Single Judge,¹⁹ and, in addition, the Prosecution invited the defence teams to assist in modifying or refining these criteria. Neither defence teams elected to do so. While there is no obligation on the defence to assist the Prosecution in this regard, it is submitted that the defence’s decision not to do so is an important factor that must be considered in any analysis of potential prejudice flowing from analogous information disclosure. This point was explicitly endorsed by the Trial Chamber in the *Lubanga* case and it is submitted is appropriate to apply at the pre-confirmation hearing stage as well:

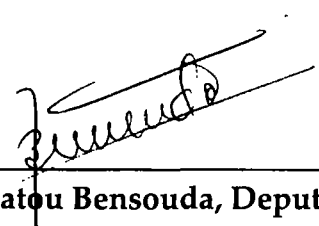
[Presiding Judge Fulford] The Defence declined an invitation from the Chamber to set out the defences the accused is likely to rely on, together with the anticipated issues in the case. At this stage his stance is that he relies on the right to silence, which is his undoubted entitlement. However, unreasonable decisions by the Defence to make late disclosure may have an effect on determinations by the Chamber as to what constitutes a fair trial.
[...]

¹⁸ ICC-ICC-01/04-01/07-428.

¹⁹ ICC-01/04-01/07-458.

Accordingly, if the Defence identifies lines of defence or issues at a significantly and unnecessarily advanced stage this may have consequences for decisions that relate to disclosure to the accused.²⁰

14. In conclusion, it is submitted that the provision to the defence of material and information analogous to information contained in other documents which cannot be disclosed prior to the confirmation hearing due either to a refusal of a lifting request or as a result of a lifting request that is still pending, is an adequate mechanism to protect the defence's future fair trial rights at the confirmation hearing stage. This analogous information permits the defence to identify and advocate positions relating to potential areas of defence at the confirmation hearing and to take preparatory steps for a possible future trial. In the instant case, the Prosecution has disclosed 306 pieces of Article 67(2) and Rule 77 material to the defence in advance of the hearing. Additionally, out of the 243 pieces of incriminatory material disclosed to the defence, at a minimum, 51 of them also contain information potentially of an exonerating nature. It is submitted that in these circumstances, no prejudice flows to the defence from the mechanism proposed by the Prosecution.



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

Dated this 5th day of June 2008

At The Hague, The Netherlands

²⁰ ICC-01/04-01/06-T-71-ENG ET, p. 9, lines 4-21.