



Original: **English**

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

Date: **9 June 2008**

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

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

Public Document

**Germain Katanga's Defence'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: Defence for Mr Germain Katanga

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

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[1 name per team maximum]

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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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REGISTRY

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
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Other

Background

1. In her Decision of 2 June 2008, the Single Judge offered the Defence of Germain Katanga (“the Defence”) the opportunity to file observations on the issue ‘whether in the absence of the provider’s 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. The Defence of Germain Katanga has had the benefit in formulating its observations from the Prosecution’s observations² and the observations from the representatives of victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07,³ both filed on 5 June 2008.
3. The Defence respectfully submits its observations in this Document. The Defence of Germain Katanga has difficulty with the provision of analogous information, because this would not satisfy the Prosecution’s obligations under Article 67 (2) of the Statute, and –as a result- is inconsistent with the Defence’s right to a fair trial.

Preliminary observations concerning the manner in which the Prosecution has discharged its disclosure obligations

4. The Defence fully joins in and supports the concern expressed by the Single Judge in her Decision of 2 June, which it interprets and summarises as follows:
 - a. The Prosecutor has made extensive use of Article 54 (3) (e), and not only in exceptional circumstances, for the collection of evidence;⁴
 - b. The problems posed by ‘Article 54 (3) (e)’-information have been significantly aggravated by the fact that the Prosecution has, in many instances, failed to secure permission of the providers pursuant to Rule 82 (1);⁵
 - c. The lack in progress in this area in this case is significant and remarkable;⁶
 - d. The applicable law does not provide for adequate mechanisms in relation to potentially exonerating material provided under Article 54 (3) (e);⁷

¹ ICC-01/04-01/07-543, pp. 14-15.

² ICC-01/04-01/07-555

³ ICC-01/04-01/07-552

⁴ ICC-01/04-01/07-543, paras. 9 – 11.

⁵ Id., para. 12.

⁶ Id., paras. 14 – 18.

⁷ Id., paras. 20-21

- e. In relation to potentially exonerating material that has not been disclosed to the Defence the Prosecution has recently assessed that this material is analogous to already provided material, without providing any explanation as to how this assessment was made;⁸
5. The Defence notes that the procedural mechanism proposed by the Prosecution, namely to verify whether Article 54 (3) (e)-material is analogous to material already disclosed to the defence, meets with some initial approval by the Single Judge:

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.⁹

6. However, the Single Judge has also in the view of the Defence made it clear that the current situation harbours risks and is undesirable, for reasons set out in paragraphs 25 – 31 of her Decision of 2 June 2008. While the Single Judge has identified the concerns and offered well-meant advice in respect of future Prosecutorial conduct in these matters, the key question is of course whether the current state of affairs is acceptable in light of the rights of the Defence and the interests of justice.
7. The Defence is far from reassured by the Prosecution's observations of 5 June 2008.¹⁰ On the contrary, these particularly observations: (a) emphasise the perception of the Prosecution's lack of due diligence in obtaining permission to disclose Article 54 (3) (e); (b) reveal the absence of adequate methodology in assessing the potentially exonerating nature of material; (c) and refer to the lack of input from the Defence as an excuse to the Prosecution's failure to adequately perform autonomous and unconditional obligations laid upon it.
 - a. In its observations of 5 June 2008, the Prosecution has not offered any explanation as to why the lifting of confidentiality has taken so much time and why it has apparently not been obtained more vigorously. The Defence would be particularly interested in receiving an account as to the instances in which the Prosecution has received the information on the basis of a legally relevant and

⁸ Id., paras 22-23.

⁹ Id., para. 24.

¹⁰ ICC-01/04-01/07-555.

applicable ground on the part of the originator, such as set out, for example, in Articles 72 and 73 of the Statute and Rule 73 (4). If, on the other hand, the information has been received under Article 54 (3) (e) without any valid legal ground on the part of the originator, the Prosecution can, and indeed should, insist on the lifting of confidentiality, if necessary via the available mechanisms under Part 9 of the Statute. The Defence submits that the construction of Article 54(3)(e) should not be used with a view to obtain the information easily, while the originator would be under a direct duty to provide the information or can be compelled to do so by means of (State) cooperation on the basis of Part 9 of the Statute.

- b. The Defence is puzzled as to the methodology used by the Prosecution in determining the status of information in its possession, in terms of the language in Article 67 (2) of the Statute; a consistent method is hard to detect. The Prosecution's submission that it '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'¹¹ does not reassure the Defence as it remains unclear what is meant by 'refine' and why should this result in a decrease in disclosure of material. Refining criteria, in the sense of adequate anticipation on defence possibilities, could also very well result in an increase of potentially exonerating material, covered by Article 67 (2). Needless to say that the Defence is concerned that under the pressure of the upcoming confirmation hearing and in light of the disconcerting number of 'Article 54 (3) (e)'-material, the Prosecution is 'refining criteria' to the degree that potentially exonerating material is unduly overlooked.
- c. The Defence objects to the following submissions by the Prosecution:

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, 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.¹²

¹¹ ICC-01/04-01/07-555, para. 7.

¹² ICC-01/04-01/07-555, para. 13

First, the Defence objects to this in principle. The Prosecution has an objective and autonomous obligation to look for incriminating and exculpatory evidence alike, as provided for in Article 54 (1) (a). This shift from the paradigm of adversarial proceedings requires full adjustment to a role where the Prosecution should have at its disposal methodology in identifying exculpatory information. At no times can it be an excuse that the Prosecution had no ‘defence lines’ at its disposal; if this were the case, this would imply that in the purely investigative stage –where no Defence is available- there would be insufficient eye for exonerating evidence.

Second, one may expect the Prosecution to be able to anticipate at every stage of the proceedings on Defence lines, on the basis of the information in its possession and in light of the charges the Prosecution intends to submit. A guiding principle in any legal matter before the ICC is that in case of doubt the issue is decided in favour of the Defence, which in this case must result in disclosure.

Third, the Prosecution confuses two issues in respect of the issue of prejudice. On the one hand, there is the matter of identifying potentially exonerating information in respect of which the Prosecution submits that Defence input is necessary. However, the position of the Defence should play no role in relation to information that has been identified by the Prosecution as potentially exonerating; regarding that particular information, the position of the Defence has no relevance for the matter of prejudice, because the information has been identified by the Prosecution directly as potentially exonerating. It is submitted that even if identifying certain ‘Defence lines’ would assist the Prosecution, it still befalls to the Prosecution to disclose information that is not related to these ‘Defence lines’, but that the Prosecution itself regards as potentially exonerating. This lies at the basis of proceedings of a more inquisitorial nature with an autonomously objective position of the Prosecution. Therefore, the position of the Defence cannot amount to a valid factor in assessing the prejudice flowing from analogous information disclosure, information the Prosecutor has labeled as potentially exonerating.

Fourth, the Defence submits that the Prosecution has misinterpreted the relevance of the Decision in Lubanga for the matter before the Single Judge. The Decision quoted in the Prosecution’s observations¹³ deal with the situation of ‘unreasonable late disclosure’ by the Defence. It is hardly appropriate for a party, which is itself struggling with adequate disclosure, to refer to this particular language.

¹³ ICC-01/04-01/07-555, para. 13

Prejudice and right to a fair trial

8. The Defence submits that 'the provision to the Defence of analogous information in materials not subject to the Prosecution's confidentiality obligations' does not adequately safeguard the Defence's right to a fair trial for the purpose of the confirmation hearing.
9. The Defence observes the following should be the guiding principles in relation to the confirmation hearing:
 - a. The right to a fair trial applies fully to the confirmation hearing. An individual is entitled to his fair trial rights from the moment there is a criminal charge against him. What matters is not the official notification, but any official act on the basis of which there is a reasonable expectation of prosecution. In this case this was the arrest of Mr. Katanga for the purpose of ICC-proceedings.
 - b. The individual rights as set out in the Statute apply fully at every stage of the proceedings, unless the applicable law has clearly set out another arrangement, provided that such arrangement is consistent with internationally protected human rights.
10. The Defence thus submits that Article 67 (2) is fully applicable at this stage. Article 67 (2) does not distinguish between the confirmation and the trial stage, nor can any reduced applicability follow from an interpretation of that provision in accordance with its ordinary meaning, in light of its object and purpose (Article 31 of the Vienna Convention on the Law of Treaties (VCLT)). Furthermore, bearing in mind the importance for the defendant of the confirmation hearing, Article 67 (2) serves a vital purpose in that context as well as in the trial phase. The interpretation of Article 67 (2) as prescribed by Article 31 of the VCLT in the submission of the Defence should produce the following results:
 - a. The duty to disclose potentially exonerating evidence is full and unconditional. As a result, all potentially exonerating evidence, including confidential evidence, in the possession of the Prosecution must be disclosed to the Defence. In case of a conflict with a confidentiality agreement, it is submitted that the obligation under

Article 67 (2) must prevail, on account of it being a fundamental right, within the ambit of the mechanism of Article 21 (3) of the Statute.¹⁴

- b. The effective disclosure must take place as soon as practicable. The Defence notes that in this respect no special provision is made for the confirmation hearing; but the Defence submits that, in order for disclosure to be meaningful for the confirmation hearing, it must take place well in advance of the confirmation hearing. It is noted that if the drafters intended to restrict the scope of application of Article 67 (2), they would have specifically made this clear, as they did, for example, in Article 67 (1) (d) ('subject to article 63, paragraph 2').
 - c. Although the reference to 'as soon as practicable' might imply certain delay, the duty is incumbent upon the Prosecution to minimize that delay. In other words, both the obligation of effective disclosure and the obligation of timing (as soon as practicable) must be assessed in light of the Prosecution's conduct. The Defence is not persuaded, on the basis of the content of the Single Judge's Decision of 2 June 2008, whether the Prosecution has showed due diligence in effectuating disclosure as soon as practicable. It is the Defence view that much more and sooner could and should have been done to obtain permission from the originators to disclose the information. The Defence also submits that where no permission was obtained, the information must nevertheless be provided to the Defence, for reasons given above (in particular, sub a). The Defence thus requests the Single Judge to rule on this matter as provided for in Article 67 (2) and with a view to provide the Defence with an effective remedy occasioned by the violation of Rule 67 (2). Furthermore, the Defence requests the Single Judge to order the Prosecutor to disclose to the Defence potentially exonerating information covered by Article 54 (3) (e), where the originator has refused to lift the confidentiality obligation.
11. It is a fallacy to believe that only the content of the evidence is relevant for the determination of charges and for an adequate picture of the case. Just as relevant is the origin of the evidence and the degree to which it finds corroboration in other sources. In other words, it is highly prejudicial to the Defence –and also misinforms the Judges- when the Defence is informed that potentially exonerating evidence A exists coming from source X, but that it is withheld that the Prosecution is also in possession of A coming from sources Y and Z, and who knows what more. Especially in light of the number of remaining Article 54 (3) (e)-sources, the approach of 'analogous

¹⁴ This finds support in the literature; see William A Schabas, 'Article 67', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers'Notes, Article by Article* (Baden-Baden, Nomos 1999), p. 867.

information', in addition of it being inconsistent with the terms of Article 67 (2), cannot satisfy the defendant's right to a fair trial. The Defence is basically prevented to meaningfully exercise its right under Article 61 (6) (a) to object to the charges. Although at this stage the Defence has elected not to challenge the charges for the purpose of the confirmation hearing, this is a decision made on the basis of the evidence disclosed to it until now. Withholding large quantities of potentially exonerating evidence from the Defence has the inevitable result that no well-informed decision can be made on the question whether or not to object to the charges.

12. The Defence underlines that withholding a large amount of potentially exonerating information is not only prejudicial to it, but also does not enable the Judges to form an adequate opinion about the evidentiary basis for the charges. In fact, with a proper overview of all disclosed evidence, the Defence can make an informed decision about objecting to the charges or not. If the Defence would decide to object to the charges, it could use evidence now still in the exclusive possession of the Prosecutor and bring it in this way to the attention of the Court. The Defence fails to see how, with large quantities of potentially exonerating evidence withheld from the Defence, and thus from the Court, the confirmation can have a proper evidentiary basis.
13. Due to the fact that the Prosecution has poorly handled the situation and has not fully grasped the dynamics between Article 54 (3) (e) and Article 67 (2), the Defence sees the following options:
 - a. The Pre-Trial Chamber orders the Prosecutor to disclose to the Defence all exonerating evidence pursuant to Article 67 (2), irrespective of the fact whether the Prosecution has succeeded in obtaining lifting of confidentiality or not. In this light, it is important to take as a starting point that potentially exonerating evidence must be disclosed in any way and therefore as soon as practicable, bearing in mind the fundamental and prevailing nature of Article 67 (2). To the degree that this would bring the Prosecution in difficulty with the originator of the information, this is the responsibility for the Prosecution.
 - b. The Pre-Trial Chamber should determine that the Prosecution has not met its disclosure obligations pursuant to Article 67 (2). Under normal circumstances this might be repaired or trigger specific remedies, but the Court is now called to decide whether there is sufficient evidence to confirm the charges. It can only do so when there is an adequate picture, judicial oversight, of the case. With significant quantity of potentially exonerating evidence out of reach of the Defence in violation of Article 67 (2), confirming charges to which that evidence relates

may be problematic. Thus, the Defence suggests that the Prosecution informs the Defence and the Court in detail in relation to which charges there is potentially exonerating evidence that has not been and will not be disclosed to the Defence, and requests the Pre-Trial Chamber to rule in relation to those charges that the violation of Article 67 (2) makes it impossible for the Defence to object to them, as a result of which the appropriate remedy may be a Decision pursuant to Article 61 (7) (b).

Respectfully submitted,



David Hooper

Dated this 9 June 2008

At

London/Amsterdam