

**Cour
Pénale
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**International
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Date: 16 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 Seventh Report on the Status of the Procedures Initiated Pursuant to 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

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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During the 10 June 2008 hearing (“Hearing”), the Single Judge decided that for the purpose of the confirmation hearing the “Prosecution shall file [...] its final Report on the disclosure of 67(2) and Rule 77 materials in which it will particularly address the status of those documents covered by Article 54(3)(e) of the Statute and the number of documents for which requests have been rejected or are pending and for which analogous information has been disclosed to the Defence [...]”.¹ In compliance with this order the Prosecution respectfully submits the present report.

Background

1. In answer to the concerns expressed by the Single Judge in her Decision of 2 June 2008 regarding the collection of 54(3)(e) material,² the Prosecution respectfully submits that it has requested and received information subject to confidentiality restrictions for the purpose of generating new evidence.³ At the time of deciding to investigate the specific conflict in Ituri, the OTP needed information on the nature of the conflict and in order to assist the Office in identifying the different groups involved and their respective leadership, and evaluate the security situation on the ground. The amount of documents collected is related to the geographical scope of the situation referred, the entire DRC, the vast numbers of crimes and perpetrators and the existence of multiple militias who continuously merge and divide. The lead information collected allowed the OTP to focus its

¹ ICC-01/04-01/07-T-35-ENG ET, p. 11, lines 14-20.

² ICC-01/04-01/07-543, paras. 9 and 10.

³ In its “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, ICC-01/04-01/06-1401, at para. 72, Trial Chamber I quoted the Prosecution on the question of the collection of 54(3)(e) material for lead purposes. The Prosecution would like to respectfully recall that during the hearing of 2 May, the Prosecution had specifically clarified and stated that: “And my last remark in this context and then I’m going to stop, and solely for the purpose to avoid any misunderstanding and for the record, whenever the Office of the Prosecutor enters into 54(3)(e) agreements, the aim obviously of such agreements is to obtain only lead information”, see ICC-01/04-01/06-T-86-ENG ET, p. 35, lines 13-17 (emphasis added).

investigation on an objective basis in full compliance with its obligations pursuant to Article 54(1).

2. Best practices have been put in place after the initial phase of the DRC investigation to reduce the number of lead documents collected subject to Article 54(3)(e) restrictions. The Article 54(3)(e) materials identified as containing potentially exoneration ("PEXO") information or material to the preparation of the Defence in the case of *The Prosecutor vs. Katanga and Ngudjolo*, were almost entirely collected during the Prosecution's early stage of its investigation of the situation. The number of documents collected pursuant to Article 54(3)(e) as part of the investigation phase focusing on the current case is minimal.

Total number of disclosed material to the Defence that is not subject to Article 54(3)(e) restrictions

3. In the present case, the Prosecution has disclosed 323 pieces of Article 67(2) and Rule 77 material to the defence in advance of the confirmation hearing. Additionally, out of the 274 pieces of incriminatory material disclosed to the defence, at a minimum, 56 also contain information potentially of an exonerating nature. These documents have all been disclosed to the Defence pursuant to the calendar established by the Single Judge.⁴

Documents identified as PEXO as reported on 23 May 2008 - Summary

4. The Prosecution has reviewed all the documents in its possession collected pursuant to Article 54(3)(e) and that are relevant to this case.⁵ 137 documents were identified as containing potentially exculpatory elements pursuant to Article

⁴ ICC-01/04-01/07-459.

⁵ The Prosecutor has requested a new general search of material to ensure that no document has been overseen; the inquiry is being completed. Any relevant information will be provided to the Chamber.

67(2).⁶ Requests for the lifting of confidentiality restrictions were sent to all providers. On the basis of that number, the situation can be summarized as follows:

- Restrictions were lifted for 8 documents which were promptly disclosed to both Defence teams;⁷
- Analogous information was disclosed for 53 documents, for which restrictions have not been lifted;
- Underlined facts can be conceded for 65 documents.

Number of rejected identified PEXO documents

5. To date, lifting has been rejected for 28 of these documents by their providers and analogous information has been previously disclosed to both Defence teams for 16 of them. For the remaining 12 documents, the information contained therein cannot be matched at this stage.

Number of identified PEXO documents pending responses from providers

6. The Prosecution is awaiting a response from the providers for 101 of the 137 documents identified as PEXO. Analogous information has been previously disclosed to both Defence teams for 37 of them. For the remaining 64, the information contained therein cannot be matched with disclosed analogous information at this stage.

Review of Article 54(3)(e) PEXO documents and admission of facts.

7. The Prosecution found that 65 documents referred to events which occurred after September 2003, and the information was not linked in any material way to the

⁶ However, upon further analysis and as detailed below, the Prosecution considers that 65 of these documents should no longer be considered in that category. Nonetheless, the Prosecution is prepared to concede as admitted facts the information contained therein.

⁷ The Prosecution disclosed five as incriminatory material, two pursuant to Rule 77 and one as potentially exonerating material.

Bogoro attack. The information contained in these documents can be the subject of admission of facts by the Prosecution. The Prosecution regrets that, due to a miscommunication, its previous report suggested that a redefinition of PEXO criteria had led to the withdrawing of those 65 documents from the list of 137 documents with PEXO material. It is not the case.

8. Notwithstanding these admissions, the Prosecution maintains its requests to the providers to lift the confidentiality conditions of Article 54(3)(e).

Report on requests related to documents identified as being material to the preparation of the Defence pursuant to Rule 77

Identified Rule 77 documents - Summary

9. To date, 118 documents have been identified as Rule 77 documents and have been collected pursuant to Article 54(3)(e). Lifting of confidentiality restrictions have been requested from all providers.

Number of lifted identified Rule 77 documents

10. To date, the providers have lifted confidentiality restrictions for 16 documents which have been disclosed to both Defence teams.

Number of rejected identified Rule 77 documents

11. To date, lifting has been rejected for 24 of the 118 documents by their providers. Analogous information has been previously disclosed to both Defence teams for

20 of these documents. For the remaining 4, the information contained therein cannot be matched at this stage.⁸

Number of identified Rule 77 documents pending responses from providers

12. The Prosecution is awaiting a response from the providers for 78 of the 118 documents. To date, out of these 78 documents, 69 documents with analogous information have been previously disclosed to both Defence teams. For the remaining 9, the information contained therein cannot be matched at this stage.

13. In conclusion, there are 102 documents identified as Rule 77 and for which lifting has either been refused or for which responses are still pending. The Prosecution has previously disclosed analogous information for 89 of them. For the remaining 13, the Prosecution is still looking for analogous information.

Disclosure of evidence at this stage of the Proceedings - the Confirmation Hearing

14. This Pre-Trial Chamber previously indicated 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."⁹ The Prosecution acknowledges that the disclosure of evidence pursuant to Article 67(2) and/or Rule 77 is an ongoing obligation in order to ensure the fairness of the proceedings against the suspects and submits that it has disclosed, for the purpose of the Confirmation Hearing, the bulk of the exculpatory evidence or evidence which could be material to the preparation of the defence.

⁸ In its last report, the Prosecution indicated that analogous information had been previously disclosed for all of these documents, but upon further review this was a mistake.

⁹ ICC-01/04-01/06-803-tEN, para. 154.

15. Furthermore, the Appeals Chamber confirmed that “it may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial”,¹⁰ and that this may include withholding potentially exculpatory material at this stage.¹¹

16. The Single Judge also, has previously stressed, concerning the scope of the confirmation hearing, that the evidentiary basis of the Confirmation Hearing should be limited to analysing the “core” witnesses and evidence supporting the charges against the suspect.^{12 13}

17. Thus, while the Defence may present evidence, the main focus of the confirmation hearing is the Prosecution’s evidence, and whether the “core” of this evidence is sufficient “to establish substantial grounds to believe that the person committed each of the crimes charged”. Furthermore as the Appeals Chamber has stated,

¹⁰ *Prosecutor v. Germain Katanga*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements””, ICC-01/04-01/07-475 OA, 13 May 2008, para. 68.

¹¹ “While exculpatory material must be disclosed pursuant to article 67(2) of the Statute, the Appeals Chamber does not accept that applications to withhold potentially exculpatory material at the stage of the proceedings prior to the hearing to confirm the charges cannot, in principle, be made ...” - *Prosecutor v. Germain Katanga*, “Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements””, ICC-01/04-01/07-476 OA2, 13 May 2008, para. 57. These findings were made in the context of decisions on redactions in order to protect ongoing investigations or to protect the safety of persons who may be at risk as a result of the activities of the Court, pursuant to Rules 81(2) and 81(4). However they do establish that the withholding of information which would otherwise require disclosure or inspection under Article 67(2) or Rule 77 does not necessarily render a confirmation hearing unfair. The Prosecution submits that this could include withholding particular items which had been collected under Article 54(3)(e). Indeed, the Appeals Chamber has noted in the very same decision that “the Prosecutor may agree not to disclosure material obtained under article 54(3)(e) of the Statute for the purpose of generating new evidence unless the provider of the information consents” (ICC-01/04-01/07-476 OA2, 13 May 2008, para. 56).

¹² The Single Judge declared that a confirmation hearing “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”, see ICC-01/04-01/07-428 –Corr 25 April 2008, para. 5.

¹³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “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”, ICC-01/04-01/07-428, 18 April 2008, para. 79; see also paras. 78, 82; and *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Decision on admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12”, ICC-01/04-01/07-412, 18 April 2008. See also *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81””, ICC-01/04-01/06-774 OA6, 14 December 2006, para. 47. The Appeals Chamber decided that “the threshold for the confirmation of the charges is lower than for a conviction, [therefore] the Prosecutor may be able to convince the Pre-Trial Chamber that the threshold for the confirmation of the charges has been reached even if the reliability of the witnesses and other evidence was not fully tested”.

any ruling on the modalities and extent of disclosure of evidence pursuant to Article 67(2) and/or Rule 77, and their impact on the fairness of the proceedings, must necessarily give due consideration to the relevance of the stage of the proceedings.¹⁴

18. The Prosecution is, nonetheless, striving to disclose the remainder of the potentially exculpatory or Rule 77 documents subject to Article 54(3)(e) restrictions, as soon as practicable.

Alternatives to the current inability to disclose Article 54(3)(e) material for which lifting of confidentiality has not been secured.

19. As in its prior filing on this issue, the Prosecution submits 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.¹⁵

20. In fact, while no decision has been taken on this issue, the Single Judge has already indicated that the “procedural mechanism” of disclosing analogous information “somewhat minimises any prejudice that might be caused to the Defence at this stage of the proceedings”.¹⁶

21. As detailed above, for a significant number of documents identified as containing PEXO or Rule 77 material which are subject to Article 54(3)(e) restrictions, analogous information has already been disclosed.

¹⁴ *Prosecutor v. Germain Katanga*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements””, ICC-01/04-01/07-475 OA, 13 May 2008, paras. 68, 72(b).

¹⁵ See ICC-01/04-01/07-555.

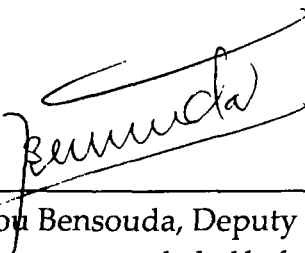
¹⁶ ICC-01/04-01/07-543, para. 24.

UN documents

22. The OTP is actively striving to obtain lifting of confidentiality restrictions applied to documents provided by the UN, in a way that will respect both the requirements of Article 54(3)(e) and the rights of the suspects.

Documents from other information providers

23. Some information providers who provided the OTP with Article 54(3)(e) material and who rejected lifting of confidentiality restrictions, have nonetheless consented to have copies of their material, submitted to the Pre-Trial Chamber as long as their name, the names of their staff or contacts remain redacted. The Prosecution can submit these redacted documents to the Single Judge, on an *ex parte* basis, for her review.



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

Dated this 16th day of June 2008

At The Hague, The Netherlands