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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

**Observations on behalf of Mr Germain Katanga on the Prosecutor's Disclosure
Obligations, together with a related Application for a Stay of Proceedings**

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. The Single Judge ordered, at the hearing of 10th June 2008, 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 [...]”.¹ The Defence was given the opportunity to offer its final views on the issue of disclosure before the 19th of June.² The Defence hereby offers its views and related applications.
2. The Defence has examined the Prosecutor’s seventh report of 16 June 2008³ as well as the recent decision in the Lubanga case, dealing with identical issues, especially the matter of disclosure of potentially exonerating evidence obtained pursuant to Article 54 (3) (e) of the Statute.⁴
3. The Defence concentrates below on the relationship between the Prosecutor’s disclosure obligations pursuant to Article 67 (2) and the possibility for the Prosecutor to obtain information under a confidentiality privilege, pursuant to Article 54 (3) (e). The Defence does not at this stage offer observations on the Prosecutor’s duties under Rule 77, but reserves the right to do so in the future.

Background – non-available PEXO material

4. On the basis of the final Office of the Prosecutor’s (“OTP”) report the Defence concludes that 137 PEXO-documents fall within the ambit of Article 54 (3) (e) of the Statute. In respect of 8 documents the confidentiality restrictions were lifted; lifting was rejected for 28 documents and a decision is pending for the remaining 101 documents. As a result, with the confirmation hearing due next week, the Defence has not been provided with 129 PEXO documents.
5. For reasons already explained in its previous observations the Defence does not accept the provision of analogous information, neither for the purpose of the confirmation hearing (“CH”) nor for trial, as satisfying the Prosecutor’s disclosure obligations and,

¹ ICC-01/04-01/07-T-35-ENG ET WT 10-06-2008 1-33 NB PT, page 11.

² ICC-01/04-01/07-T-35-ENG ET WT 10-06-2008 1-33 NB PT, page 12.

³ ICC-01/04-01/07-596.

⁴ ICC-01/04-01/06-1401.

as important, enabling the Defence to adequately prepare for confirmation.⁵ Furthermore, the Trial Chamber in *Lubanga* has been very clear on the matter: the accused is entitled to all exculpatory evidence, irrespective of whether the content of PEXO-material is similar to documents already disclosed to the Defence.⁶

6. The non-availability of 129 PEXO-documents in the Katanga case concerns an enormous quantity of documents, outreaching even the 95 non-available PEXO-documents in the Lubanga case⁷. Bearing in mind that the scope of the proposed charges in the Katanga case are more focused in time it is fair to say that the present situation is at least as serious, if not even more so.
7. The Defence submit that it is reasonable and compelling to assume that the Prosecutor has adopted the identical approach to receiving confidential information in both the Lubanga case and the present case. The Single Judge in the present case has also drawn clear parallels between the practice in Lubanga and this case.⁸ It is fair to say that information has been obtained under Article 54 (3), on the basis of special agreements to that end concluded with, among other actors, the United Nations. The Defence is therefore confident that the conclusions drawn in the Lubanga case are directly relevant to and applicable to our situation.
8. In this light, we request the Pre-Trial Chamber to make the following determination, similar to that made in the Lubanga case:
 - a. the prosecution has given Article 54 (3) (e) a broad and incorrect interpretation: it has utilized the provision routinely, in inappropriate circumstances, instead of resorting to it exceptionally, when particular, restrictive circumstances apply.⁹
 - b. The prosecution's approach constitutes a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances.¹⁰

⁵ See ICC-01/04-01/07-564, para. 11.

⁶ ICC-01/04-01/06-1401, p. 27.

⁷ Id., para. 63

⁸ See quotation of Judge Steiner's Decision in id., para. 75

⁹ Id., para. 72

¹⁰ Id., para. 73

Impact on fairness of the trial and the interests of justice – application for a stay of proceedings

9. The Pre-Trial Chamber, as with the Trial Chamber, must ensure the fairness of the trial and take all necessary measures in that respect. It is submitted here that for reasons set out in the *Lubanga* decision, the trial of Mr. Katanga has been or certainly will be tainted to the degree that it cannot continue. Therefore, as with the *Lubanga* case, the Defence requests the Pre-Trial Chamber to stay proceedings and to convene a hearing discussing the next appropriate steps to be taken, including the release of the suspect. We now submit our reasons.

10. The Defence does not believe it is necessary to repeat the reasoning in the *Lubanga* decision. Needless to say we fully adhere to the gist of it. What is at the very heart of the decision, in our submission, is that this Court cannot permit itself to conduct trials and pronounce convictions in the knowledge that there is potentially exonerating evidence still ‘out there’, in the exclusive hands of the party seeking the conviction. The *Lubanga* Trial Chamber was, we submit, plainly right in dismissing the option to start a trial on that basis. It did so from a perspective of fairness, but we submit that it is not only fairness. It is also the interests of justice which are at stake, in the sense that the international community expects this Court to base its judgements on all available and relevant evidence in its possession. The Trial Chamber was therefore right in not engaging in a trial in circumstances that can only result in a prejudicial and unauthoritative outcome.

11. The question arises as to how this Decision affects the current case. Clearly, the essential difference between the *Lubanga* situation and the present case is that we are in the confirmation phase while the *Lubanga* trial was about to enter the trial phase. In this light, it is legitimate to raise the question whether our application for a stay of proceedings is premature. Leaving aside for the moment the prejudice it gives rise to in the context of the confirmation hearing, and that is a matter we will explore below, it is our submission that the Prosecutor has already indicated an obdurate and irreversible approach to the matter. There is only one prosecutor at this court. Through his conduct in the *Lubanga* case the prosecutor has indicated the path ahead. It is fully reflected in the conduct he has taken in the present case. This court can, as it were, see what the future holds in this respect, certainly to the extent that it can make reasonable

judgements now as to the future fairness of the trial and process. It is therefore submitted that prejudice has been occasioned, will subsist throughout the pre-trial phase and can by no credible means be repaired. It amounts to a continuing abuse of process. Under these circumstances the continuation of a process that cannot be fair and credible serves no useful purpose, is a waste of judicial resources and highly prejudicial to an individual in detention. In this respect, we note that the Pre-Trial Chamber carries the responsibility to minimize an individual's detention as much as possible, taking fully into account the presumption of innocence and the exceptional nature of detention on remand.

12. The Defence is convinced that the problems addressed in *Lubanga* are structural and fully applicable to our situation. In order to save time and resources, and to minimize harm to an individual in detention, it would be wrong, in our submission, to continue without at least a real and credible prospect that all PEXO-evidence will be disclosed to the Defence well in advance of trial. Such a prospect, in light of the current situation in the Lubanga case, requires an undertaking by the Prosecutor that he will fully comply with any disclosure order, even if this compliance would imply a breach of obligations towards organizations, individuals or entities which have provided information under a condition of confidentiality.

13. The *Lubanga* Trial Chamber spoke on the issue, we submit, in clear and appropriate terms when it stated;

‘The choices for the prosecution are clear and stark. Either it must disclose all the potentially exculpatory material in its possession (in accordance with the Statute) to the accused or it will choose not to do so because of the improper agreements it has reached with information providers. If it follows the latter course, the consequences of that decision are analysed in detail hereafter.¹¹

This choice has until now been made by the Prosecutor in favour of respecting confidentiality and thus prioritizing these obligations over his obligations under the Statute, to the degree that even Court orders regarding disclosure have been knowingly and willingly ignored.¹² In light of this position that appears inflexible given the

¹¹ Id., para. 75.

¹² See id, para. 44:

Lubanga experience, the interests of justice dictate not to unduly postpone a decision as to the progress of the present case as well.

14. The final report by the Prosecutor, which had the full benefit of the *Lubanga* decision, does not offer any basis for a real and credible prospect that all PEXO material will be disclosed well in advance of trial. On the contrary, for example, 28 requests for lifting confidentiality have been rejected; we do not learn how the Prosecutor intends to address this, except for the contention that ‘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 Prosecutor can submit these redacted documents to the Single Judge, on an ex parte basis, for her review’.¹³ With respect, this can of course never suffice:

- a. The OTP mentions ‘some’ information providers; this leads us to conclude that the majority, or at least substantive part, of the 28 rejections do not consent to this possibility;
- b. submission of redacted documents to the Pre-Trial Chamber without the Defence having access to them remains in violation of Article 67 (2)
- c. the Defence objects to an ex parte procedure on this matter; in relation to potentially exonerating evidence the right to an adversarial hearing must be maintained.

15. In relation to UN documents, it is submitted that ‘[t]he 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’.¹⁴ This language warrants the following observations:

- a. The language used, ‘actively striving’, is not very informative as to what is exactly being done and is unlikely to produce fully effective results; at least we know from the

‘In order to address the matter fully, on 3 April 2008 the Chamber ordered the prosecution to provide it with the undisclosed exculpatory material. The prosecution indicated it was unable to comply with this order, citing the provisions of the agreements under which the material had been obtained.

Thereon, the Chamber directed the prosecution to furnish it with descriptions of the undisclosed potentially exculpatory material, together with explanations as to why each document was not in the prosecution's view exculpatory; however, the prosecution indicated that it was also unable to comply with this order of the Chamber.’

¹³ ICC-01/04-01/07-596, para. 23.

¹⁴ Id., para. 22.

Lubanga case that within a very reasonable period of time the Prosecutor has failed in obtaining lifting of confidentiality restrictions applied to the bulk of documents; we also note that the *Katanga* case has been actively before this court for almost a year which calls into question how ‘active’ the striving has been and in any event it is reasonable to assume that the same actors are involved as in the *Lubanga* case;

- b. The qualification ‘in a way that will respect both the requirements of Article 54 (3) (e) and the rights of the suspects’ is indicative of two things. First, it may indicate a continued reluctance to appreciate, in our submission, the dynamics between Article 67 (2) and a misused Article 54 (3) (e), where simply that ‘stark’ choice must be made. Secondly, the language used offers no basis for the slightest possibility that the OTP is prepared to forego its confidentiality obligations. It is wholly reasonable to conclude that the OTP is not prepared to let the duty under Article 67 (2) prevail over any confidentiality obligation.
- c. The Defence notes that it is not Article 54 (3) (e) that imposes any requirements on the Prosecutor. It is the inappropriate use of Article 54 (3) (e), by routine acceptance of information on a confidential basis without taking into account disclosure duties, that may have now imposed on the OTP a number of requirements. But is inappropriate to refer to this as requirements imposed by Article 54 (3) (e).

16. The Defence acknowledges that the possibility is not fully excluded that, prior to trial, the Prosecutor will obtain the consent of all 129 originators to lift confidentiality. But this is, in light of the seriousness of the problems being faced, now only a distant and theoretical possibility. The appropriate standard to apply, in light of the rights of the detained suspect and the interests of justice, is that of real and credible prospect of full disclosure. The following factors render this prospect unattainable:

- the history of events in the *Lubanga* case and the experiences in that case that a significant part of the originators do simply not consent to lifting confidentiality
- the fact that until now only 8 originators have consented to lifting
- the fact that 28 have rejected lifting and that the Prosecutor has not offered any information as to how to secure lifting in the future
- the fact that the OTP is unprepared to breach its confidentiality obligations, even when faced with Court orders to that end

17. All 129 PEXO-documents must be disclosed; the Defence does not accept the possibility of disclosing ‘the bulk’ of the 129 documents. Even a single piece of

undisclosed evidence can cast a shadow over the entire trial, as it just may be the most vital and credible piece exonerating the accused of all guilt. Practice clearly demonstrates that it is often just one piece of undisclosed material that has led to harsh injustice in many cases. Clearly, the word of the OTP that this is not the case, cannot suffice.

18. The Defence again refers to the ‘stark choice’ put to the Prosecutor in the *Lubanga* case, according to which the OTP must disclose *all* PEXO-material *in its possession* (our emphasis).¹⁵

19. On the basis of the above, the inevitable and reasonable conclusion is, in our submission, that the OTP can not offer the Defence and this Chamber a real and credible prospect that all 129 PEXO-material will be disclosed prior to trial. This brings in the relevance of the *Lubanga* case, already at this stage, in the interests of fairness, efficiency and justice. It is inconsistent with the right to a fair trial, the right to liberty and the presumption of innocence to proceed with a case in the clear knowledge that the OTP has violated its disclosure obligations without a real and credible prospect of reparation. We therefore respectfully request the Pre-Trial Chamber to stay proceedings and to convene a hearing discussing further steps to be taken.

Impact on the confirmation hearing

20. Alternatively, and in no way reducing the foregoing argument, should the Chamber reject the application under paragraph 19, the Defence wishes to offer the following views regarding the confirmation hearing.

21. For reasons set out in our previous observations, we submit that Article 67 (2) applies fully at the confirmation hearing and that the provision of analogous information does not satisfy the disclosure obligations.¹⁶

22. This Defence indicates that it does not share the standard that appears to be applied to assess whether or not the OTP has met its disclosure obligations in the context of the

¹⁵ ICC-01/04-01/06-1401, para. 75.

¹⁶ See ICC-01/04-01/07-564.

confirmation hearing. This standard seems to be that the OTP has discharged its disclosure obligations for the purposes of the CH when it has disclosed the ‘bulk of potentially exculpatory evidence or evidence which could be material to the preparation of the defence’.¹⁷

23. The Defence objects to such a general standard in relation to the CH, because there is no legal basis for it. The only restrictive element in the fully and unconditional disclosure duty in Article 67 (2) of the Statute are the words ‘as soon as practicable’. These words cannot be applied on a general basis, but require, we submit, a case by case assessment, including an answer to the question whether the Prosecutor has demonstrated sufficient due diligence in realizing disclosure. As a violation of Article 54 (3) (e) lies at the basis of current problems, no due diligence can be established. As a result, the disclosure duty, even at the CH stage, has been violated.

24. However, if the ‘bulk-standard’ is applied we submit it can not be met, for the following reasons:

- a. the standard applies in our view to all PEXO-evidence. More concretely, one can only assess whether the standard has been met if there is an adequate overview of all evidence in the possession of the Prosecutor. When beforehand Article 54 (3) (e) information is excluded there can be no objective assessment whether the standard has been met. We therefore submit that in addition to the ‘bulk-standard’ at the CH the Defence must have reasonable access to material obtained under Article 54 (3) (e).
- b. In its report of 16 June 2008 the Prosecution submits that it has disclosed the bulk of PEXO material. It did not offer any substantive arguments for this position. The Defence submits that in light of the scope and content of the proposed charges it is wholly misleading for the Prosecutor to say that it has disclosed the bulk of this material when 23 PEXO-documents have been disclosed and 129 PEXO-documents remain undisclosed to Judges or Defence. This represents a clear failure in its duty to disclose.

¹⁷ ICC-01/04-01/06-803-tEN, para. 154.

25. The direct consequence of the above is that, in addition to the violation of Article 54 (3) (e), the Prosecutor has violated the obligations pursuant to Article 67 (2). The Defence requests the PTC to confirm that the OTP has committed this violation. The PTC is respectfully requested to adopt appropriate remedies to address the prejudice occasioned and to sanction the violating party, with a view to future deterrence, to ensure due respect for the rights of the suspect and to preserve the integrity of the proceedings. The Defence requests the Chamber to convene a hearing to discuss the adoption of appropriate remedies, and reserves the right to offer detailed submissions, including analysis of relevant case law, in due course.

26. In respect to the confirmation hearing the Defence have referred to it in our previous observations,¹⁸ but refine these observations and add the following:

- a. The disclosure duty for the purpose of the CH should, we submit, be construed in the light of Article 61 (6) (a) and (b). The fundamental matter therefore is whether these rights of the Defence can be respected when 129 PEXO-documents are unavailable. The Defence submits that this is not possible. The Defence are not in a position to object to charges or challenge evidence submitted by the Prosecutor when it is deprived of 129 relevant PEXO-documents. There is under the current circumstances no proper exercise of the rights set out in Article 61 (6) (a) and (b); as a result, continuing the CH is prejudicial to the Defence.
- b. The decisions the PTC can take on the basis of the CH are exhaustively set out in Article 61 (7) (a), (b) and (c). The Defence submits that the PTC cannot confirm charges, as there cannot be an adequate and fair picture of the case, let alone sufficient evidence, when 129 PEXO-documents are unavailable. The Defence at this stage submits that it is no longer a viable option to request the Prosecutor to make a selection of the 129 PEXO-material in relation to specific charges. This will not solve the problem even for the purpose of the CH. The Defence and the Judges are denied an opportunity to form an opinion about the nature of the material and to verify, in some way, whether the selection of the material has been adequately performed. Furthermore, it is possible that a considerable amount of the 129 PEXO-documents concern contextual

¹⁸ ICC-01/04-01/07-564.

elements, like the existence of an armed conflict, which concern significant portions of, if not all, of the charges. Therefore, we submit that with 129 PEXO-documents not available to the Pre-Trial Chamber it is unable to make a valid and informed decision concerning the sufficiency of evidence for any of the charges.

- c. The Defence objects to an adjournment, as provided for in Article 61 (6) (c). Article 61 (1) obliges the Court to hold the CH ‘within a reasonable time’; the hearing has been postponed twice for Mr. Katanga, who has been detained at the seat of the ICC since 18 October 2007. Any further delay, fully attributable to unlawful conduct by the OTP, is prejudicial and in violation of the Statute.
- d. The Defence submits that a decision under Article 61 (7) (b) is inevitable. This may not be the intended use of this provision, but when large quantities of PEXO-evidence are unlawfully withheld from both Defence and the Court, it must be determined that there exists insufficient evidence for the proposed charges. The provision, interpreting its ordinary meaning in light of its object and purposes permits such a finding. In our submission, it is the inevitable result of the conduct of the OTP in this case, should the Court not choose to follow our primary request, namely ordering a stay of proceedings.

Conclusion

27. The Defence requests the Pre-Trial Chamber:

- a. to determine that the prosecution has given Article 54 (3) (e) a broad and incorrect interpretation and that the prosecution’s approach in respect of Article 54 (3) (e) constitutes a wholesale and serious abuse, and a violation of an important provision intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances.
- b. to stay proceedings in the case of the Prosecutor v. Germain Katanga and to convene a hearing discussing further steps to be taken

failing the request sub b,

- c. to determine that the prosecution has violated for the purpose of the CH its disclosure obligations pursuant Article 67 (2) and to convene a hearing to discuss the adoption of appropriate remedies.

Respectfully submitted,



David HOOPER

Dated this 19 June 2008

At The Hague/Amsterdam, The Netherlands