

**Cour
Pénale
Internationale**



**International
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Date: **20 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

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

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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Following the Prosecution's submission on 16 June 2008 of the "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"¹ ("Prosecution's Seventh Report"), Germain Katanga's defence filed its "Observations on behalf of Mr. Germain Katanga on the Prosecutor's Disclosure Obligations, together with a related Application for a Stay of Proceedings" ("Katanga's Application")² in which it requests, *inter alia*, a stay of the proceedings in the current case. During the hearing held on 19 June 2008, the Single Judge invited the Prosecution to respond to such an application by 20 June 2008. Shortly prior to the hearing Mathieu NGUDJOLO's defence team filed its "Observations de la Défense de Monsieur Ngudjolo relatives au respect par le Procureur de ses obligations conformément à l'Article 67(2) du Statut et à la Règle 77 du Règlement de Procédure et de Preuve pour l'audience de confirmation des charges" which also contained, *inter alia*, a request for a stay of the proceedings.³ The Prosecution respectfully submits its observations in response to the stay of proceedings application made by both defence teams.

The Defence's motion based on the Lubanga Decision is premature

1. The Defence has submitted a request to stay the proceedings based on the recent decision in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.⁴ However, the Prosecution is seeking leave to appeal this decision. Since the decision is, until decided by the Appeals Chamber, of uncertain status, it would be improper to rely on its permanence for the purposes of the instant motion by the defence.

¹ ICC-01/04-01/07-596.

² ICC-01/04-01/07-611.

³ See ICC-01/04-01/07-609, paras. 26-29.

⁴ ICC-01/04-01/06-1401.

2. In addition, the instant motion concerns a pre-trial confirmation of charges, while the Lubanga decision concerns the status of a case which is at a significantly more advanced stage. A confirmation hearing is limited in scope and purpose. The confirmation process merely seeks to establish whether “there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”.⁵
3. In the confirmation stage the issue being addressed by the Court is only one of the sufficiency of evidence and not the guilt or innocence of the accused. In this context the only question addressed by the Court concerns the evidence before it and not the impact such evidence may have on the future determination of guilt or innocence of the accused. Therefore, the threshold for considering the evidence at a confirmation hearing is less than that which may be imposed by a trial chamber.

The Prosecution’s approach to Article 54(3)(e) is consistent with the Statute

4. In contrast to the Defence motions,⁶ and as previously submitted by the Prosecution, the Prosecution submits that it has used correctly Article 54 (3) (e) and has requested and received information subject to confidentiality under Article 54(3)(e) solely for the purpose of generating new evidence.
5. At the time of deciding to investigate the conflict in Ituri, the Prosecution needed information on the nature of the conflict, the groups involved and their respective leadership, and evaluate the security situation. The quantity of material collected was a function of the geographical scope of the situation referred,⁷ the vast numbers of crimes and perpetrators, the time period over which crimes were committed and the existence of multiple militias who continuously merge and divide. The information obtained allowed the

⁵ Article 61(7) of the Statute.

⁶ See ICC-01/04-01/07-611, para. 15(c); ICC-01/04-01/07-609, para. 30.

⁷ This includes the entire Democratic Republic of the Congo (DRC).

Prosecution to focus its investigation on an objective basis, in full compliance with its obligations to establish the truth pursuant to Article 54(1).

6. The Prosecution notes that the operation of Article 54(3)(e) does not limit the nature of the material to which it applies, but rather the purposes for which that material may be used.⁸ In this regard, there are no separate categories of material which exist independently of the Statute – incriminatory or exculpatory evidence on the one hand; and lead or springboard materials on the other – only one of which may be legitimately gathered under Article 54(3)(e). The material remains the same, and the restrictions imposed under Article 54(3)(e) only affect the use to which the Prosecution may put it. The Statute, and Rule 82 in particular, explicitly contemplates that material which the Prosecution initially collects for limited purposes under Article 54(3)(e) may subsequently be used as evidence, with the consent of the provider.⁹ The possibility that some of the information received under article 54(3)(e) has evidentiary value as well as lead value, and could potentially be introduced as evidence subject to the consent of the information provider, does not demonstrate any error or impropriety. Rather, this is consistent with, and foreseen in, the system established by the Statute and the Rules which acknowledge that the material obtained cannot be characterised until it is examined. In this regard, the Prosecution also notes the important difference between the incriminatory or exculpatory value of the material received under Article 54(3)(e). In accordance with its duties to investigate incriminating and exonerating circumstances equally, and to disclose information to the Defence, the Prosecution has the discretion to decide whether or not to rely on the incriminatory evidence, and whether or not to

⁸ The Prosecution submits that this is inherent in the language of Article 54(3)(e) (“solely for the purpose of [...]”); and made even more clear, by analogy, in the language and structure of Article 93(8)(b) (“The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.”).

⁹ Article 54(3)(e) only imposes the restriction on the use of the material “unless the provider of the information consents”. See also, in particular, Rule 82 and Article 93(8)(c). The Prosecution submits that a request for the lifting of the restrictions will generally be necessary, for instance, where the material constitutes particularly important evidence, or is evidence of a material fact for which the Prosecution has been unable to secure alternative evidence.

request the lifting of confidentiality to the information provider. But it has a duty to do so for exonerating elements.

7. Other than exceptionally provided for in the MONUC Memorandum of Understanding, the Prosecution seeks to obtain material under Article 54(3)(e) on a case by case basis.¹⁰ The Prosecution agrees to obtain material under Article 54(3)(e) only after the Prosecution has made an initial request for the material, and the provider responded that it was only willing to provide the material on the conditions of confidentiality and the understanding that it be used for lead purposes.¹¹ This is consistent with the Statute; and as Article 93(8)(b) further confirms, it is the provider who determines when such protection is “necessary”.¹²
8. Furthermore, concerning material obtained from the UN, the Prosecution informs the Single Judge:
 - (1) that discussions with the United Nations over the lifting of confidentiality restrictions under Article 54(3)(e) are continuing and
 - (2) that, in the case where no consent to the lifting of restrictions can be given, a verbal agreement has been reached with the UN for all UN documents that they will, if deemed necessary by the Chambers, agree to the Judges viewing the material under appropriate conditions of confidentiality, in particular to assess the adequacies of summaries through viewing the underlying material.¹³

¹⁰ The MONUC Memorandum of Understanding between the United Nations and the International Criminal Court formalised the prior practice of the UN to subject the ad hoc case by case requests of the Office for assistance from MONUC to the conditions and requirements contained in Article 18(3) of the Relationship Agreement. The Prosecution submits that the specific context of this information provider and the challenges it continues to face – namely the largest peace-keeping mission of the UN deployed in a region where armed conflict continues and involves some actors under investigation by the Office – are exceptional.

¹¹ In limited instances, due to the sensitivity of the information and after initial consultations with the provider, the Prosecution has identified the option of providing the information under Article 54(3)(e) within the request.

¹² While 93(8)(b) formally applies only to States, the Prosecution submits that this is further indicative of the manner in which Article 54(3)(e) as a whole is intended to operate. Commentators to the Statute have also confirmed that the imposition of the conditions is the prerogative of the provider, which “may require that these documents be kept strictly confidential and not be used as evidence in court or disclosed in any other manner.” – Prost and Schlunck, “Article 93” in Triffterer (ed) (1999), p. 1115 (emphasis added).

¹³ The UN answer is to be formalised today.

9. The Prosecution disputes the contention of the Defence that the Prosecution's use of agreements under Article 54(3)(e) has been improper. It is also incorrect to present this as a question of the Prosecution "choosing" not to disclose the relevant materials:¹⁴ the Prosecution is complying with its obligations under the Statute, and in the cases of documents stemming from the UN under the terms of an agreement concluded between the Secretary-General of the United Nations and the President of the Court, on behalf of the Court as a whole, and endorsed by the Assembly of States Parties.¹⁵
10. The Prosecution notes that both Defences' motions rest entirely on the recent decision of the Trial Chamber in the case of *The Prosecutor v Thomas Lubanga Dyilo*;¹⁶ and asks the Single Judge to apply similar findings and logic from that trial to the confirmation hearing in this case. Regardless of the differences between the cases, and between the confirmation hearing and trial, the Prosecution informs the Single Judge that it will be seeking leave to appeal the decision of Trial Chamber I, including all of the material elements relied upon in the Defences' applications. The Prosecution disputes the characterisation of its conduct in that decision, and the conclusions drawn by the Trial Chamber; and submits that the Single Judge should not apply them in this case.

The Prosecution's alternatives to full disclosure sufficiently ensure the fairness of the confirmation hearing

¹⁴ ICC-01/04-01/07-611, paras. 13 and 15(b) and (c) ; ICC-01/04-01/07-609, para. 30.

¹⁵ In this regard, given that the Relationship Agreement was approved by the Assembly of States Parties, pursuant to the *Vienna Convention on the Law of Treaties* it should be used to guide the interpretation of the relevant provisions of the Statute (VCLT, Art 31(3)(b)). In addition, pursuant to Articles 2 and 21(1)(b) of the Statute, the Relationship Agreement itself becomes an independent source of law, binding on the Prosecution and the Court, unless otherwise determined otherwise by a Chamber of this Court. As such, the inability of the Prosecution to provide the judges for their viewing materials it had obtained from the United Nations pursuant to article 18(3) of the Relationship Agreement was not attributable to the manner in which the Prosecution had entered into its agreements (contrast ICC-01/04-01/06-1401, para 70). Furthermore, even if the Prosecution had accepted only a very small number of documents in the most exceptional circumstances (as the Trial Chamber appears to accept as permissible: see ICC-01/04-01/06-1401, para. 76), under the terms of the Relationship Agreement this would not change the fact that the Prosecution remains prohibited from making them available to the Trial Chamber, without the consent of the provider, not by its choice but by a binding agreement entered into on behalf of the entire Court by the Presidency and endorsed by the States Parties.

¹⁶ ICC-01/04-01/07-609, paras. 8, 11, 20, 21 and 27; ICC-01/04-01/07-611, paras. 2, 5, 6-16, 18 and 19,.

11. The Prosecution is prepared to provide information analogous to that, which is subject to confidentiality restrictions pursuant to Article 54(3)(e). Such analogous information will eliminate any significant prejudicial effect to the accused resulting from withholding confidential material at the confirmation hearing.
12. Especially in the context of material that cannot be disclosed because its use is restricted under Article 54(3)(e), the Prosecution disputes the contentions that the disclosure of other evidence of a substantially similar nature cannot suffice. The language of Article 54(3)(e), and the purpose of gathering “lead material”, is that it authorizes the use of the material to generate new evidence. This includes obtaining and disclosing alternative evidence for the same facts or issues. Insistence on the disclosure of the original material which was provided under Article 54(3)(e), despite the Prosecution’s active disclosure of other evidence which provides materially similar exculpatory facts in most instances, is inconsistent with the underlying rationale of Article 54(3)(e).
13. Furthermore, the Prosecutor can remedy any inadequacy in the information provided to the accused by stipulating to facts on contentious issues. The sufficiency of such evidence will be considered at the confirmation stage, while the weight of such evidence will be considered at the trial stage. In this manner, both mandates, to establish the truth and ensure a fair trial for the accused, are satisfied.

A stay of proceedings is excessive

14. The Prosecution submits that a stay of the proceedings is, by definition, extraordinary and must always be a measure of last resort¹⁷ and particularly so

¹⁷ For example, the ICTY Appeals Chamber found that only in “exceptional circumstances” where a fair trial is not possible, and “after exhausting all the other measures”, is a motion seeking the stay of proceedings appropriate - see *Prosecutor v Tadic*, IT-94-1-A, Judgement, 15 July 1999, para. 55. See also *Prosecutor v Lubanga*, ICC-01/04-01/06-772 OA4, 14 December 2006, para. 31, stating that “[t]he power to stay proceedings should be sparingly exercised”; and *Prosecutor v Zigiranyirazo*, ICTR-2001-73-PT, Decision on the Defence Motion for Continuance of Trial, 30 April 2005, para. 7, stating that “[t]he remedy of a continuance is not the

at the confirmation stage of the proceedings. Staying proceedings is appropriate only where other remedies have been exhausted, or simply not available. At the preliminary stage of the confirmation hearing, where reasonable and alternatives exist to resolve the issue at hand a stay of proceedings is inappropriate and unwarranted.

15. The Prosecution is fulfilling its duties: it is requesting the consent of the providers to lift confidentiality restrictions, proposing summaries and offering to concede facts. In this light, the Prosecution disputes that, such that the entire judicial process has been ruptured to an extent “to an extent making it impossible to piece together the constituent elements of a fair trial”¹⁸.
16. The Prosecution recalls that in imposing a stay in the case of *The Prosecutor v Thomas Lubanga Dyilo*, Trial Chamber I recognised that a stay has profound adverse implications for “the international community, the peoples of the Democratic Republic of the Congo, the victims and the accused himself.”¹⁹ The Prosecution submits that such a drastic remedy as a stay of the proceedings with such serious effects on the interested parties, is not required.
17. Consistent with this perspective is the fact that the present case is at a very early stage of the proceedings, unlike the *Lubanga* case which was scheduled for trial next week. This allows the parties and the Pre-Trial Chamber in the current proceedings, much more time to consider alternatives and resolve the issue at hand.
18. When the immediacy of the damage of a stay is weighed against the potential for prejudice to the accused, the Prosecution submits that the least obtrusive alternative be used; particularly since the option of imposing a stay remains equally viable at later stages of the proceedings.

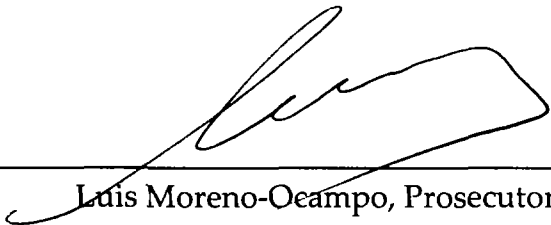
only remedy for a violation of the Prosecution’s disclosure obligations”. See further, Don Mathias, “The Duty to Prevent an Abuse of Process by Staying Criminal Proceedings” (www.geocities.com/venezioiphile/OrchSA.pdf)

¹⁸ ICC-01/04-01/06-772, para. 39.

¹⁹ ICC-01/04-01/06-1401, para. 95.

Submission

19. The Prosecution requests that the Single Judge deny the Defences' applications for a stay of proceedings.



Luis Moreno-Ocampo, Prosecutor

Dated this 20th day of June 2008

At The Hague, The Netherlands