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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**

**Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or
Otherwise Material to the Defence's Preparation for the Confirmation Hearing**

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

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Other

Table of Contents

I. Preliminary Remarks.....	8
I.1 The Different Scope of the Prosecution’s Disclosure Obligations pursuant to Article 67(2) of the Statute and Rule 77 of the Rules at the Confirmation Hearing and Trial Stages.	8
I.2 The Prosecution’s Last Minute Proposal of Alternative Measures in lieu of Actual Disclosure	14
I.3. Issues Relating to the Prosecution’s Determination of Search Criteria.....	17
II. The Current Situation Resulting from the Prosecution’s Investigation Techniques in the Early Stages of the Investigation into the DRC Situation	19
II.1. The Prosecution’s Practice of Extensive Gathering of Documents Pursuant to Article 54(3)(e) and Difficulties Encountered in Obtaining the Consent of the Providers to Lift the Confidentiality Restrictions.....	19
II.2. Confidentiality Agreements Concluded by the Prosecution pursuant to Article 54(3)(e) of the Statute.....	27
III. Alternative Measures in Lieu of Actual Disclosure for the Purposes of the Confirmation Hearing	32
III.1. Transmission to the Chamber of Summaries containing the Information Potentially Exculpatory or Otherwise Material for the Defence Identified in Article 54(3)(e) Documents.....	32
III.2. The Principle of Analogous Information.....	37
IV. Whether the Principle of Analogous Information Should be Applied for the Confirmation Hearing in the Present Case Despite the Likelihood that this Principle Will Not be Applicable at Trial in the event the Charges are Confirmed	40
V. Whether for the Purposes of the Confirmation Hearing in the Present Case the Prosecution has Disclosed to the Defences the Bulk of those Materials Identified as Potentially Exculpatory or Otherwise Material to the Defences’ Preparation for the Confirmation Hearing.....	48

I, Judge Sylvia Steiner, judge at the International Criminal Court (“the Court”);

NOTING the “Prosecution’s Report on the Status of the Procedures Initiated under 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” (“the Prosecution First Report”)¹ filed by the Prosecution on 14 November 2007;

NOTING the “Second Prosecution’s Report on the Status of the Procedures Initiated under 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” (“the Prosecution Second Report”)² filed by the Prosecution on 21 December 2007;

NOTING the “First Prosecution’s Report on the Status of the Procedures Initiated under 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” (“the Prosecution Third Report”)³ filed by the Prosecution on 25 March 2008;

NOTING the “Second Prosecution’s Report on the Status of the Procedures Initiated under 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” (“the Prosecution Fourth Report”)⁴ filed by the Prosecution on 9 April 2008;

NOTING the “Third Prosecution’s Report on the Status of the Procedures Initiated under 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” (“the Prosecution Fifth Report”)⁵ filed by the Prosecution on 24 April 2008;

¹ ICC-01/04-01/07-77

² ICC-01/04-01/07-122

³ ICC-01/04-01/07-338.

⁴ ICC-01/04-01/07-381

⁵ ICC-01/04-01/07-438

NOTING the “Prosecution’s Report regarding Review Criteria and Lifting Procedures for Information under Article 54(3)(e)” (“the Prosecution Explanatory Report”)⁶ filed by the Prosecution on 29 April 2008;

NOTING the “Fourth Prosecution’s Report on the Status of the Procedures Initiated under 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” (“the Prosecution Sixth Report”)⁷ filed by the Prosecution on 9 May 2008;

NOTING the “Prosecution’s Fifth Report on the Status of the Procedures Initiated under 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” (“the Prosecution Seventh Report”)⁸ filed by the Prosecution on 23 May 2008;

NOTING the “Decision Requesting Observations concerning Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence’s Preparation for the Confirmation Hearing”⁹ issued by the Single Judge on 2 June 2008, in which the Single Judge decided to give:

- (i) the Prosecution and the Legal Representatives of Victims a/0327, a/0329, a/0330/07, a/0331/07 and a/0333/07 until Thursday 5 June 2008 at 16h00 to file their 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 purposes of the confirmation hearing;
- (ii) the Defences for Germain Katanga and for Mathieu Ngudjolo Chui until Monday 9 June 2008 at 16h00 to address the above-mentioned question,

⁶ ICC-01/04-01/07-458

⁷ ICC-01/04-01/07-473

⁸ ICC-01-04-01/07-502.

⁹ ICC-01-04-01/07-543

and to respond to the observations of the Prosecution and the Legal Representatives of Victims a/0327, a/0329, a/0330/07, a/0331/07 and a/0333/07;

NOTING the “*Observations sur la ‘Decision Requesting Observations concerning Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence’s Preparation for the Confirmation Hearing’*”¹⁰ (“the Legal Representative’s Observations”) filed by the Legal Representatives of Victims a/0327/07, a/0329/07, a/0330/07, a/0331/07 and a/0333/07 on 5 June 2008;

NOTING the “Prosecution’s Observations Concerning Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing”¹¹ (“the Prosecution’s Observations”) filed by the Prosecution on 5 June 2008;

NOTING the “Germain Katanga’s Defence’s Observations Concerning Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing”¹² (“the Defence for Germain Katanga’s Observations”) filed by the Defence for Germain Katanga on 9 June 2008;

NOTING the “*Observations de la Défense de Monsieur Ngudjolo relatives aux documents tombant sous le champ d’application de l’Article 54(3)(e) identifiés comme potentiellement à décharge ou à toutes autres informations pour la préparation de l’audience de confirmation des charges*”¹³ (“the Defence for Mathieu Ngudjolo Chui’s Observations”) filed by the Defence for Mathieu Ngudjolo Chui on 9 June 2008;

¹⁰ ICC-01-04-01/07-552.

¹¹ ICC-01-04-01/07-555

¹² ICC-01/04-01/07-564

¹³ ICC-01-04-01/07-566.

NOTING the “Prosecution’s sixth report on the Status of the Procedures Initiated under 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”¹⁴ (“the Prosecution Eighth Report”) filed by the Prosecution on 9 June 2008;

NOTING the “Prosecution’s seventh report on the Status of the Procedures Initiated under 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”¹⁵ (“the Prosecution Ninth Report”) filed by the Prosecution on 16 June 2008;

NOTING the “*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*”¹⁶ filed by the Defence for Mathieu Ngudjolo Chui on 19 June 2008 ;

NOTING the “Observations on behalf of Mr Germain Katanga on the Prosecutor’s Disclosure Obligations, together with a related Application for a Stay of Proceedings”¹⁷ filed by the Defence for Germain Katanga on 19 June 2008;

NOTING the oral decision issued by the Single Judge during the hearing held on 19 June 2008, by which the Single Judge gave the Prosecution and the Legal Representatives of the victims until 20 June 2008 at 16h00 to make observations on the request of the Defence for Germain Katanga for a stay of proceedings¹⁸

¹⁴ ICC-01/04-01/07-571

¹⁵ ICC-01/04-01/07-596.

¹⁶ ICC-01/04-01/07-609

¹⁷ ICC-01/04-01/07-611

¹⁸ ICC-01/04-01/07-T-36 ENG ET 19-06-2008, page 5, line 22 to page 6. line 3

NOTING the “*Observations des victimes a/0327/07, a/0329/07 à a/0331/07, a/0010/08, a/0010/08, a/0011/08, a/0012/08, a/0013/08, a/0015/08, a/0016/08, a/0038/08, a/0039/08, a/0043/08, a/0044/08, a/0046/08, a/0049/08, a/0051/08, a/0055/08, a/0057/08, a/0060/08, a/0061/08, a/0066/08, a/0067/08, a/0070/08, a/0071/08, a/0073/08, a/0076/08, a/0078/08, a/0080/08, a/0083/08, a/0085/08, a/0088/08, a/0090/08, a/0092/08, a/00100/08, a/00101/08, a/00103/08 et a/00104/08 sur les observations de la défense des Germain Katanga et Mathieu Ngudjolo relative à la suspension de la procédure de l’audience de confirmation des charges*”¹⁹ filed by the Legal Representatives of the above victims on 20 June 2008;

NOTING the “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’”²⁰ filed by the Prosecution on 20 June 2008;

NOTING articles 54(3)(e) and 67(2) of the *Rome Statute* (“the Statute”) and rules 77 and 82 of the *Rules of Procedure and Evidence* (“the Rules”);

I. Preliminary Remarks

I.1 The Different Scope of the Prosecution’s Disclosure Obligations pursuant to Article 67(2) of the Statute and Rule 77 of the Rules at the Confirmation Hearing and Trial Stages.

1. According to article 67(2) of the Statute, the Prosecution has the duty to disclose, for the purposes of the trial pursuant to article 67(2) of the Statute, all materials within the Prosecution’s possession or control that the Prosecution believes: (i) show or tend to show the innocence of the accused; (ii) mitigate the guilt of the accused; and (iii) may affect the credibility of the Prosecution’s evidence. Furthermore, according to rule 77 of the Rules, the Prosecution has the duty to permit the Defence to inspect any books, documents, photographs and other

¹⁹ ICC-01/04-01/07-618

²⁰ ICC-01/04-01/07-619 and Annex

tangible objects in the possession or control of the Prosecution, which are material to the Defence's preparation for the trial²¹ or were obtained from or belonged to the person.

2. When the Prosecution has any doubt as to whether or not certain materials fall within any of these categories, it may, pursuant to rule 83 of the Rules, "request as soon as practicable a hearing on an *ex parte* basis before the Chamber dealing with the matter" for the purposes of obtaining a ruling on whether the relevant materials fall under any of the above-mentioned categories, and must therefore be disclosed to the Defence. The *rationale* behind the *ex parte* nature of rule 83 hearings is that the subject matter of such hearings is to determine whether the Defence should have access to some specific materials. The presence of the Defence at this type of hearing would, in principle, defeat its very purpose because: (i) the Prosecution would be prevented from going into the details of the relevant materials, which have not yet been disclosed to the Defence; and (ii) the Defence would not be in a position to make meaningful submissions as it does not have access to such materials. Therefore, the argument of the Defence for Germain Katanga on the need for the Defence to be present for this type of hearing is rejected.²²

3. The Prosecution's duty to disclose article 67(2) and rule 77 materials for the purposes of trial is inextricably tied with the Defence's right to receive such materials, and is a core component of the accused's right to a fair trial. In its 13 June 2008 Decision, the Trial Chamber in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ("the *Lubanga Case*") explained this principle as follows:

The Chamber has unhesitatingly concluded that the right to a fair trial - which is without doubt a fundamental right - includes an entitlement to disclosure of exculpatory material. This is established not only by the provisions of Article 67(2) of the Statute, but also by a review of the relevant international jurisprudence, and particularly that of the European Court of Human Rights and the ICTY. In *Krstic* the Appeals Chamber of that latter court stated:

²¹ Rule 77 of the Rules also refers expressly to the preparation of the confirmation hearing

²² ICC-01/04-01/07-116, p. 5.

The disclosure of exculpatory material is fundamental to the fairness of proceedings before the Tribunal and considerations of fairness are the overriding factor in any determination of whether the governing Rule has been breached.²³

In *Oric* the Trial Chamber of the ICTY observed:

The jurisprudence of the Tribunal is clear that, in pursuit of justice, the disclosure of Rule 68 [exculpatory] Material to the Defence is of paramount importance to ensure the fairness of proceedings before this Tribunal.²⁴

In *Jespersen v. Belgium*, the European Commission of Human Rights held that the principle of equality of arms imposes on prosecuting and investigating authorities an obligation to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating himself or in obtaining a reduction in sentence. This principle covers a wide variety of evidential possibilities, and it includes evidence which may undermine the credibility of a prosecution witness.²⁵

4. Restrictions to this principle for the purposes of trial, including those derived from the Prosecution's confidentiality obligations under article 54(3)(e) of the Statute, are allowed only in very exceptional circumstances and upon the adoption of the necessary procedural safeguards. This was recently articulated by the 13 June 2008 Trial Chamber Decision in the *Lubanga* Case as follows:

Critically, although international human rights jurisprudence and that of the ad hoc tribunals indicate that "only such measures restricting the rights of the accused, which are strictly necessary, ought to be adopted", these cannot extend to denying him or her a fair trial. For instance, the ICTY in *Talic* emphasised that although it may be "necessary in some cases to withhold certain material from the defence, so as to safeguard an important public interest" nonetheless "the public interest [...] is excluded where its application would deny to the accused the opportunity to establish his or her innocence."²⁶

In *Rowe and Davis v U.K.*, the European Court of Human Rights held that although Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) generally requires the prosecution to disclose to the defence all relevant evidence for or against the accused, considerations of national security or the protection of vulnerable witnesses may, in certain circumstances, justify an exception to this rule. The court decided that any departure from the principles of open adversarial justice must, however, be strictly necessary, and the consequent handicap imposed on the defence must be adequately counterbalanced by procedural safeguards, to protect the rights of the accused.²⁷

In *Rowe and Davis* it was decided that where the prosecution has withheld relevant evidence on public interest immunity grounds, without first submitting the material to the trial judge, the fair-trial requirements of Article 6 were not met. This principle was described by the European Court of Human Rights in *Rowe* as follows:

[T]he prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial.²⁸

²³ ICC-01/04-01/06-1401, para. 77.

²⁴ ICC-01/04-01/06-1401, para. 78.

²⁵ ICC-01/04-01/06-1401, para. 79.

²⁶ ICC-01/04-01/06-1401, para. 80.

²⁷ ICC-01/04-01/06-1401, para. 82.

²⁸ ICC-01/04-01/06-1401, para. 83.

It follows that under international jurisprudence it is clear that it is the judges and not the prosecution who are solely competent to decide upon this issue. As Judge Pettiti (albeit in a dissenting opinion) has noted, in relation to the non-disclosure of exonerating information:

Cases where evidence has been hidden from the trial court have left bitter memories in the history of justice.²⁹

Likewise, in *Jasper v United Kingdom* in finding that there had been no miscarriage of justice by non-disclosure of potentially exculpatory material, the European Court of Human Rights stated:

The fact that the need for disclosure was at all times under assessment by the trial judge provided a further, important, safeguard in that it was his duty to monitor throughout the trial the fairness or otherwise of the evidence being withheld.³⁰

It has been stressed by the Appeals Chamber in relation to other issues, that any factor implicating the rights of the accused must be assessed on a case by case basis. On the non-disclosure of potentially exculpatory information pursuant to Rule 81(2), the Appeals Chamber held "a thorough assessment will need to be made by the Pre-Trial Chamber of the potential relevance of the information to the Defence on a case by case basis. If the information is relevant or potentially exculpatory, the balancing exercise performed by the Pre-Trial Chamber between the interests at stake will require particular care." In the view of the Chamber, each individual document purporting to contain potentially exculpatory material must be individually examined by the Chamber in order to enable it to assess whether the trial will be "conducted with full respect for the rights of the accused" in accordance with Article 64(2) of the Statute.³¹

5. According to the Trial Chamber in the *Lubanga* Case, restrictions on disclosure for the purposes of trial are also acceptable where materials that were initially identified as potentially exculpatory or otherwise material to the preparation of the Defence, may no longer be regarded as such, because of: (i) agreement between the Prosecution and the Defence on those facts affected by the relevant materials;³² or (ii) the Prosecution's withdrawal of those factual allegations and/or charges affected by the relevant materials.³³

6. Moreover, as the Trial Chamber held in its 13 June 2008 Decision, international human rights jurisprudence and that of the *ad hoc* Tribunals have rejected the adoption of certain alternative measures in lieu of actual disclosure of those materials that are potentially exculpatory or otherwise material to the preparation of the Defence. Such alternative measures are unacceptable because they insufficiently safeguard the right of the accused to a fair trial. In particular, they include: (i) the Prosecution's transmission to the Trial Chamber of summaries containing the

²⁹ ICC-01/04-01/06-1401, para. 84

³⁰ ICC-01/04-01/06-1401, para. 85

³¹ ICC-01/04-01/06-1401, para. 89

³² ICC-01/04-01/06-1311-Anx2, para. 90.

³³ ICC-01/04-01/06-1401, para. 6

information identified by the Prosecution as potentially exculpatory or material to the Defence; and (ii) the Prosecution's disclosure of materials containing analogous information to that identified by the Prosecution as potentially exculpatory or material to the Defence. As the Trial Chamber has explained:

Although the prosecution has sought to suggest, in a general sense, that the exculpatory value of the non-disclosed material has been covered in other documents or information that have already been served, the Court has been unable to assess for itself whether this proposition is accurate, and whether, notwithstanding the existence of other disclosed material, fairness dictates that the accused should be provided with part or all of the undisclosed evidence. On this latter issue, the Chamber has grave reservations as to whether serving other, similar evidence can ever provide an adequate substitute for disclosing a particular piece of exculpatory evidence: the right of the accused is to both items. In the Chamber's "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters" of 8 May 2008 the majority observed in the context of the accused's "absolute entitlement" to potentially exculpatory evidence:

The fact that it may be undermined by other evidence, or the witness may also provide incriminating evidence, or there are other sources providing similar evidence are all irrelevant for these purposes. If the real possibility exists that this evidence may contribute to a resolution of material factual issues in the case in favour of the accused, he is to be provided with it [...]³⁴

On a linked issue, the Appeals Chamber of the ICTY has disapproved attempts by the prosecution to avoid disclosure when other, similar evidence has been served. In its judgment on the appeal in the Blaskic case, the Appeal Chamber observed:

[...] the Appeals Chamber reiterates that it cannot endorse the view that the Prosecution is not obliged to disclose material which meets the disclosure requirements provided for in Rule 68 if there exists other information of a generally similar nature.³⁵

In deciding whether non-disclosure is justified, human rights law suggests that it is the evidence and not summaries which should be provided to the court. The European Court of Human Rights held in *V. v Finland* that as the courts (at first instance and on appeal) had been denied access to crucial detailed telephone metering information, they were not therefore in a position to monitor the relevance to the defence of the withheld information.³⁶

7. The Single Judge recalls that it is clear, from the explicit wording of rule 77 of the Rules, as well as from the consistent case law of this Chamber, that article 67(2) of the Statute, and rules 77 and 83 of the Rules are applicable for the purposes of the confirmation hearing.³⁷

8. Nevertheless, this Chamber has held on several occasions that the specific features and limited scope and purpose of the confirmation hearing allow for the

³⁴ ICC-01/04-01/06-1401, para. 60

³⁵ ICC-01/04-01/06-1401, para. 81.

³⁶ ICC-01/04-01/06-1401, para. 86

³⁷ ICC-01-04-01/06-102, p. 5

Prosecution to fulfil its article 67(2) and rule 77 disclosure obligations for the purposes of that hearing by disclosing, sufficiently prior to the start of the hearing, the bulk of the materials identified as potentially exculpatory or otherwise material to the Defence's preparation for the confirmation hearing ("the bulk rule").³⁸

9. In this regard, the Single Judge recalls that on the related topic of redactions, pursuant to rule 81(2) and (4) of the Rules, the Appeals Chamber has held that preventing the Defence from having access to certain information that has been identified as potentially exculpatory in application of these two rules does not necessarily makes the confirmation hearing as whole unfair.³⁹

10. As a result, the Single Judge cannot agree with the submission of the Defence for Germain Katanga that, for the purposes of the confirmation hearing, "all potentially exonerating evidence, including confidential evidence, in the possession of the Prosecution, must be disclosed to the Defence".⁴⁰

11. Moreover, the question arises as to whether - in cases where confidentiality restrictions, particularly those under article 54(3)(e), prevent the Prosecution from disclosing those materials identified as potentially exculpatory or otherwise material to the Defence - the Prosecution may rely for the purposes of the confirmation hearing upon certain alternative measures to actual disclosure that have been considered insufficient for meeting fair trial standards in the context of trial proceedings. This question, particularly in relation to the principle of analogous information, as well as to the transmission of summaries of the relevant materials to the Single Judge, will be addressed below in Section III of the present decision.

12. Finally, the Single Judge observes that the Defence for Germain Katanga 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

³⁸ See *inter alia* ICC-01/04-01/06-102, para 124. See also ICC-01/04-01/06-803, para 154

³⁹ ICC-01/04-01/07-475, paras. 71 to 73, and ICC-01/04-01/07-476, paras 57 and 60 to 65.

⁴⁰ ICC-01/04-01/07-564, para 10(a) See also ICC-01/04-01/07-611, paras 22 and 23.

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').⁴¹

13. The Single Judge fully agrees with the Defence's submission on this point. Indeed, it is for this reason that, at the hearing held on 10 June 2008, Judge Akua Kuenyehia ordered the Prosecution to file its final report on the disclosure of article 67(2) or rule 77 materials by Monday, 16 June 2008. In the view of the Single Judge, as long as the number of article 67(2) or rule 77 materials disclosed on such date (or in the days immediately prior to such date) is not disproportionately high, the Defences for Germain Katanga and for Mathieu Ngudjolo Chui are in a position to make use of those materials at the confirmation hearing by including them in their respective Lists of Additional Evidence, to be filed today at the latest.

I.2 The Prosecution's Last Minute Proposal of Alternative Measures in lieu of Actual Disclosure

14. The Single Judge observes that in the 23 May 2008 Prosecution's Seventh Report, the Prosecution submitted that the alternative measure of providing analogous information should be available at the confirmation hearing stage.⁴² Subsequently, in the 5 June 2008 Prosecution Observations, the Prosecution also submitted that the provision of summaries to the Single Judge, with information identified as potentially exculpatory or otherwise material to the Defence, should also be available at the confirmation hearing stage.⁴³ Finally, in the 16 June 2008 Prosecution Ninth Report, the Prosecution proposed two additional alternative measures for the purposes of the confirmation hearing: (i) the concession of what the Prosecution calls "underlined facts";⁴⁴ and (ii) the submission of documents to the

⁴¹ ICC-01/04-01/07-564, para. 10(b)

⁴² ICC-01/04-01/07-502, paras 3 and 5

⁴³ ICC-01/04-01/07-555, p 7

⁴⁴ ICC-01/04-01/07-596, para 4.

Single Judge with the names of the providers, their staff and their contacts redacted.⁴⁵

15. At the outset, the Single Judge would like to highlight that:

- (i) from November 2007 to the end of May 2008, the Prosecution did not propose any alternative measures to actual disclosure of the relevant materials. The first alternative measure proposed by the Prosecution was the principle of analogous information, and which was made barely a month prior to the start of the confirmation hearing (itself already postponed on two previous occasions);
- (ii) in each of the Prosecution's submissions since its 23 May 2008 Seventh Prosecution's Report, the Prosecution has proposed a different alternative measure to actual disclosure;
- (iii) in its last report, filed on 16 June 2008, which was the last day for the Prosecution's effective disclosure of article 67(2) and rule 77 materials for the purposes of the confirmation hearing, the Prosecution proposed two additional alternative measures to actual disclosure.

16. The Single Judge also notes that this way of proceeding is not limited to the present case, but appears to be taking place across all cases in which suspects have already been surrendered to the Court.⁴⁶

17. With all due respect, the Single Judge considers that this dynamic evinces a demonstrable lack of foresight by the Prosecution in resolving disclosure problems relating to article 54(3)(e) documents identified as containing information potentially exculpatory or otherwise material to the Defence. These problems were generated, to a very important extent, by the Prosecution, and were identified as early as October

⁴⁵ ICC-01/04-01/07-596, para 23

⁴⁶ ICC-01/04-01/06-1041; ICC-01/04-01/06-1319, ICC-01/04-01/06-1259; ICC-01/04-01/06-1235, ICC-01/04-01/06-1210, and ICC-01/04-01/06-1019

2006. Therefore, addressing them at the last minute by proposing one alternative measure after another, as opposed to proposing a coherent and comprehensive approach, and continuing bringing additional alternative measures even after the deadlines for actual disclosure have expired, is not, in the Single Judge's view, up to the standards required by an International Criminal Court.

18. In any event, the Single Judge emphasises that the two above-mentioned additional alternative measures proposed by the Prosecution in the Prosecution's Ninth Report will not be taken into consideration by the Single Judge, as they were proposed at the same time that the 16 June 2008 deadline for effective disclosure of article 67(2) and rule 77 materials for the purposes of the confirmation hearing expired.

19. Furthermore, the application of either of these two additional measures would inevitably further postpone the confirmation hearing.

20. With regards to the proposal that redacted documents be presented to the Single Judge for her analysis of their potentially exculpatory value, the Single Judge stresses that undertaking this measure at the present stage of the proceedings would require the review of dozens of such documents. In light of the fact that the Prosecution had six months to make such a proposal, the Single Judge finds incredulous that the Prosecution now presumes that the Single Judge should conduct such a review in a matter of hours.

21. The second additional alternative measure proposed by the Prosecution is what the Prosecution refers to as a "concession of underlined facts".⁴⁷ Unfortunately, the Prosecution failed to clarify what this measure actually entails. Nonetheless, on 12 June 2008—eight months after the surrender of Germain Katanga to the Court—the Prosecution filed its Amended Charging Document pursuant to rule 121(4) of the Rules, in which it extended the factual basis of the present case. The Single Judge finds it highly disturbing that only four days later, on 16 June 2008, the Prosecution

⁴⁷ ICC-01/04-01/07-596, para 4

now states that it is prepare to “concede underlined facts” contained in around 65 documents.

22. Therefore, the Prosecution’s proposal for two additional alternative measures contained in the Prosecution’s Ninth Report is rejected *in limine*. The other two alternatives measures proposed by the Prosecution in the Prosecution’s Seventh Report will be addressed below in Section III of the present decision.

I.3. Issues Relating to the Prosecution’s Determination of Search Criteria

23. The Single Judge considers that with regards to materials within the possession or control of the Prosecution, article 67(2) of the Statute and rule 77 of the Rules impose upon the Prosecution the obligation to define its search criteria in a manner that will ensure full compliance with its disclosure obligations under those provisions.

24. As a result, the Single Judge fully agrees with the submission of the Defence of Germain Katanga that 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.⁴⁸

25. Furthermore, if the Prosecution has any doubt as to the necessity of applying certain criteria to conduct its article 67(2) and rule 77 searches, the Prosecution may always request, pursuant to rule 83 of the Rules, an *ex parte* hearing with the Chamber for the purpose of obtaining a ruling on such matter.

⁴⁸ ICC-01/04-01/07-564, para. 7(c)

26. The Single Judge, however, agrees with the Prosecution that it needs to redefine the search criteria used in conducting its article 67(2) and rule 77 searches as the proceedings continue.

27. The Single Judge is also aware that the Prosecution's redefinition of its search criteria may result in the increase or decrease of the overall number of materials identified as falling under article 67(2) of the Statute and rule 77 of the Rules. From this perspective, the Single Judge agrees with the submission of the Defence for Germain Katanga that:

[...] the Prosecution's submissions 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' 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).⁴⁹

28. The Single Judge strongly disagrees with the Prosecution's submission that the magnitude of the current problems posed by article 54(3)(e) documents, which have been identified as containing information potentially exculpatory or otherwise material to the Defence, is due to the "broad" search criteria used by the Prosecution in conducting its article 67(2) and rule 77 searches. On the contrary, in the opinion of the Single Judge, the Prosecution's definition and application of such "broad" search criteria is required by article 67(2) of the Statute and rule 77 of the Rules. Indeed, given the broad language of these two provisions, any more restrictive interpretation of the search criteria by the Prosecution is likely to lead to a violation of its disclosure obligations pursuant to such provisions.

29. It is precisely for this reason that, at the Hearing held on 10 June 2008, Judge Akua Kuenyehia, acting as a Single Judge, stated as follows:

The first is that the Single Judge is seriously concerned by the fact that the number of potentially exculpatory documents falling under Rule 67(2) of the Statute and covered by Article 54(3)(e) has decreased dramatically from 137 to 72 after the issuance of her decision of 2nd June 2008.⁵⁰

⁴⁹ ICC-01/04-01/07-564, para 7(b)

⁵⁰ ICC-01/04-01/07-T-35-ENG, 10 June 2008, p 10 lines 17-23

The second—the Single Judge observes that during the previous six months the number of documents identified by the Prosecution as falling under this category has systematically been 140 to 160. Although over time the number came down on about 20 documents, the Single Judge is seriously concerned with the new Prosecution redefinition of the criteria that has brought the number of identified documents suddenly to half of the original.⁵¹

As a result and given the time constraints that we are all facing, the Single Judge will take into consideration the 137 documents identified by the Prosecution in its previous report, that is to say the one filed on the 23rd of May, 2007, in order to determine whether the Prosecution has violated or not its disclosure obligations pursuant to Article 67(2) of the Statute and Rule 77 of the Rules.⁵²

The Single Judge would like to emphasise that any disclosure of materials pursuant to Article 67(2) and Rule 77 of the Rules must be done sufficiently in advance so that the Defence can make use of it, if it so wishes, at the confirmation hearing. Therefore, for the purpose of this confirmation hearing, the Single Judge decides that the Prosecution shall file on Monday, the 16th of June, at 16 hours 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 through other documents. In this regard, the Single Judge emphasises that this report must explicitly refer to the 137 documents identified as potentially exculpatory in the 23rd May 2008 Prosecution report.⁵³

30. The Single Judge notes that in the Prosecution's Ninth Report, filed on 16 June 2008, the Prosecution has: (i) followed the guidance given at the 10 June 2008 Hearing; (ii) addressed the current status of the 137 article 54(3)(e) documents identified as potentially exculpatory under article 67(2) of the Statute; as well as (iii) addressed the current status of the 118 article 54(3)(e) documents identified as material to the Defence pursuant to rule 77 of the Rules.⁵⁴

II. The Current Situation Resulting from the Prosecution's Investigation Techniques in the Early Stages of the Investigation into the DRC Situation

II.1. The Prosecution's Practice of Extensive Gathering of Documents Pursuant to Article 54(3)(e) and Difficulties Encountered in Obtaining the Consent of the Providers to Lift the Confidentiality Restrictions

⁵¹ ICC-01/04-01/07-T-35-ENG, 10 June 2008, p. 10 line 22 and p. 11 line 3.

⁵² ICC-01/04-01/07-T-35-ENG, 10 June 2008, p. 11 lines 4-9.

⁵³ ICC-01/04-01/07-T-35-ENG, 10 June 2008, p. 10 lines 10-23.

⁵⁴ ICC-01/04-01/07-596, paras. 4 and 11.

31. According to article 54(3)(e) of the Statute, the Prosecution may, for the purposes of conducting its investigation according to the principle of objectivity as provided for in article 54(1) of the Statute:

Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents;⁵⁵

32. As the Single Judge highlighted at paragraphs 20 and 21 of the 2 June 2008 Decision:

[...] article 54(3)(e) of the Statute and rule 82 of the Rules provide for a clear remedy in cases where article 54(3)(e) documents are of an incriminatory nature and the Prosecution intends to rely on them either at the confirmation hearing or at trial: absent the consent of the provider, the Prosecution is prevented from relying on them.

However, the problem arises in cases of absence of the provider's consent in relation to article 54(3)(e) documents which are of an exculpatory nature or otherwise material for the Defence and must be disclosed to the Defence pursuant to article 67(2) of the Statute and rule 77 of the Rules.⁵⁶

33. The problem faced by the Prosecution is that, prior to accepting any given document under article 54(3)(e) of the Statute, the Prosecution cannot assess either its incriminating or its potentially exculpatory value. In the view of the Single Judge, it is impossible to determine incriminating and/or potentially exculpatory value without first having an opportunity to read the relevant document and to place it in context with other materials gathered during the investigation. Moreover, the Single Judge considers it likely that the incriminating and/or potentially exculpatory value of documents may not be fully evident upon their initial analysis. Rather, the incriminating and/or potentially exculpatory value of a given document may be better ascertained as the investigation progresses, and additional materials are gathered.

34. As a result, any time the Prosecution assesses a document pursuant to article 54(3)(e) of the Statute, it faces an obvious uncertainty insofar as the document might

⁵⁵ Article 54(3)(e) of the Rome Statute.

⁵⁶ ICC-01/04-01/07-543, paras. 20 and 21

be highly incriminating, and might lead the Prosecution to request the consent of the provider to use it as evidence in Court. Alternatively, the document might turn out to be potentially exculpatory or otherwise material to the Defence, in which case the Prosecution would be obliged to request the consent of the provider to disclose it to the Defence.

35. Moreover, given that it is the provider, and not the Prosecution, who has the last word on whether to consent to lift confidentiality restrictions, the Prosecution faces uncertainty as to whether the provider will give the requested consent whenever it gathers a document pursuant to article 54(3)(e) of the Statute.

36. Under these conditions, the Prosecution, as the organ of the Court primarily entrusted with the investigations of the relevant situations and cases arising out of such situations, has a duty to conduct itself with extreme care in gathering documents pursuant to article 54(3)(e) of the Statute.

37. The Single Judge is aware that the Prosecution's refusal to accept documents under confidentiality restrictions pursuant to article 54(3)(e) of the Statute may cause some delay in accessing the relevant documents,. In certain instances, it may even trigger the unwillingness of some providers to provide the relevant documents to the Prosecution.

38. Nevertheless, this does not exempt the Prosecution from its duty to conduct itself with extreme care in gathering documents pursuant to article 54(3)(e) of the Statute. This is particularly so when considering that there are other alternatives open to the Prosecution, such as, pursuant to Part IX of the Statute, requesting the Pre-Trial Chamber to issue a cooperation request to the provider to provide the relevant documents to the Prosecution. In this regard, the Single Judge highlights that no such request has been filed with this Chamber to date.

39. Even in those cases in which no alternative measures are available to the Prosecution, since the relevant provider does not have an obligation pursuant to the

Statute and the Rules to cooperate with the Court, the Prosecution still has the obligation to be extremely cautious before accepting a document pursuant to article 54(3)(e) of the Statute. Such a document may always, at a later stage, turn out to have important exculpatory value, and if the provider declines to consent to the lifting of the confidentiality obligations, the fairness of the process, as recently stated by the Trial Chamber in its 13 June 2008 Decision, may be questioned. In other words, as the title of article 54 of the Statute expressly states, investigative powers are concomitant with investigative duties and, as the organ primarily in charge of the investigation, the Prosecution is bound to act with due care to ensure that investigative techniques will by no means affect at a later stage the right of accused persons to a fair trial.

40. The Single Judge, at paragraphs 9 to 12 of her 2 June 2008 Decision, found that the Prosecution, far from acting with due care in accepting documents under article 54(3)(e) of the Statute, routinely resorted to a practice of extensively gathering documents pursuant to article 54(3)(e) of the Statute in the following terms:

At the outset, the Single Judge notes the considerable number of documents (1632 according to the last indication given by the Prosecution on 25 April 2008) that the Prosecution has collected pursuant to article 54(3)(e) of the Statute, and that, according to the Prosecution, "were considered to be relevant" for the present case. In the view of the Single Judge, this is particularly notable because the present case is confined to the crimes allegedly committed during one attack against one village on a single day.

The Single Judge finds this considerable number of documents to indicate that the Prosecution is not resorting to article 54(3)(e) of the Statute only in exceptional or limited circumstances, but rather is extensively gathering documents under such provision.

This practice, in the view of the Single Judge, is at the root of the problems that have arisen in the present case, as well as in the case of the Prosecutor v. Thomas Lubanga Dyilo, with regard to the disclosure to the Defence of those materials identified as potentially exculpatory (article 67(2) of the Statute) or otherwise material for the Defence's preparation for the confirmation hearing (rule 77 of the Rules) and that have been collected under the conditions of confidentiality set forth in article 54(3)(e) of the Statute.⁵⁷

41. The Single Judge notes that, in its recent 13 June 2008 Decision, the Trial Chamber in the *Lubanga* Case reached the same conclusion in relation to the routine Prosecution's practice of extensively gathering documents pursuant to article

⁵⁷ ICC-01/04-01/07-543, para 9

54(3)(e) of the Statute, after noting that, at the Status Conference held on 6 May 2008, “the prosecution conceded in open court that agreements reached under Article 54(3)(e) have been used generally to gather information, unconnected with its springboard or lead potential.”⁵⁸

42. Moreover, in her 2 June 2008 Decision, the Single Judge, after finding that “little to no progress” has been made with the providers since December 2007,⁵⁹ concluded that:

[...] the series of reports filed by the Prosecution in the last six and a half months (i.e. from 14 November 2007 to 23 May 2008) show that the problems posed by the practice of extensively gathering materials pursuant to article 54(3)(e) of the Statute are significantly aggravated by the Prosecution's difficulties in securing the consent of the providers.⁶⁰

43. In the view of the Single Judge, the numbers are revealing of the gravity of the situation in all cases where suspects have already been surrendered to the seat of the Court. In the present case, as explained in the Prosecution's Ninth Report, the Prosecution has identified 137 potentially exculpatory documents⁶¹ and 118 additional documents⁶² that are material to the Defence's preparation for the confirmation hearing, which were obtained pursuant to article 54(3)(e) of the Statute. Out of these 255 documents, the Prosecution has only been able to obtain, in the last eight months, the consent of the providers to disclose to the Defence 24 of the said documents.⁶³ For the remaining 231 documents, the providers have refused to give consent in relation to 52 documents,⁶⁴ and requests for consent are pending in relation to 179 documents.

44. In the *Lubanga* Case, the Trial Chamber described, at paragraphs 63 and 64 of the 13 June 2008 Decision, the current situation as follows:

⁵⁸ ICC-01/04-01/06-1401, para. 72

⁵⁹ ICC-01/04-01/07-543, para. 14

⁶⁰ ICC-01/04-01/07-543, para. 12

⁶¹ ICC-01/04-01/07-596, para. 7.

⁶² ICC-01/04-01/07-597, para. 9

⁶³ Consent has been granted for eight potentially exculpatory documents, and twenty-four documents that are material for the Defence's preparation for the confirmation hearing. ICC-01/04-01/07-596, para.11

⁶⁴ Consent has been rejected for twenty-four potentially exculpatory documents, and for twenty-eight documents that are material for the Defence's preparation of the confirmation hearing

In this case over 200 documents, which the prosecution accepts have potential exculpatory effect or which are material to defence preparation, are the subject of agreements of this kind. On 10 June 2008, the Chamber was told that there are "approximately" 95 items of potentially exculpatory material and 112 items which are "material to defence preparation", pursuant to Rule 77, making a total of 207 items of evidence. Of these 207 items, 156 were provided by the UN.

The prosecution is unable to disclose any of these items of evidence to the accused, in full or in a redacted form. Furthermore, save for a limited number of documents (32) that have been supplied to the Chamber by six unidentified information-providers in redacted form, the prosecution (given the terms of the agreements) is unable to show them to the Chamber. This is because the information-providers do not consent to the judges viewing copies of the original materials (in the majority of instances the Chamber cannot be shown the documents at all), notwithstanding an undertaking which has been given by the judges to uphold the confidential status of the documents or information, unless consent is given by the information-providers for their wider distribution.⁶⁵

45. The Single Judge recalls that, at the time of completion of her duties as Single Judge in the *Lubanga* Case on 5 October 2006, the Prosecution had only identified twenty-nine article 54(3)(e) documents as potentially exculpatory or otherwise material to the Defence.⁶⁶ As consent had already been secured in relation to sixteen of such documents,⁶⁷ and hundreds of documents falling under article 67(2) and rule 77 had already been disclosed to the Defence by that time,⁶⁸ Judge Claude Jorda, acting as Single Judge of the Chamber, found that the applicable standard at the confirmation hearing encapsulated in the so-called "bulk rule" had been met.⁶⁹ As a result, the Single Judge is surprised to learn that after the confirmation hearing in the *Lubanga* Case, the number of article 54(3)(e) documents identified as potentially exculpatory or material to the Defence rose, in fact, into the hundreds.

46. In any event, the current situation of all cases before the Court in which suspects have already been surrendered to the Court demonstrates that the Prosecution has wholly disregarded its duty to act with due care in accepting documents pursuant to article 54(3)(e) of the Statute. Instead, the Prosecution has recklessly accepted, as a matter of course, thousands of documents from numerous providers pursuant to the said provision.

⁶⁵ ICC-01/04-01/06-1401, para. 63 and 64

⁶⁶ ICC-01/04-01/06-611, para. 6

⁶⁷ ICC-01/04-01/06-611, para. 11

⁶⁸ ICC-01/04-01/06-T-20-EN [26Sep2006Edited], p. 22 lines 12-17

⁶⁹ ICC-01/04-01/06-T-30-EN, 9 November 2006, p. 146 lines 4-13

47. Regardless of the merits of the remedy provided for in the 13 June 2008 Trial Chamber Decision, the Single Judge notes that the above-mentioned situation has, as of today, led to:

- (i) a stay of the proceedings in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (the first case in which the most serious crimes of international concern have been tried before this International Criminal Court); and
- (ii) a very complex situation in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*,⁷⁰ on the basis of which the Defence for Germain Katanga filed a motion for staying the proceedings.

48. Moreover, unless a solution is found, the same problems faced in these two cases are likely to reappear, at the very least, in all cases arising from the investigation into the DRC situation.

49. After more than a hundred years of struggle, a permanent international criminal court has finally emerged as a unique symbol of the fight against impunity for the most heinous crimes of international concern. It represents the last hope for justice for the millions of children, women and men who have suffered, and are currently suffering, unimaginable atrocities that shock the conscience of humanity. With all due respect for the Prosecution, the Single Judge strongly believes that the International Criminal Court cannot allow such problems to reoccur, and that therefore, the Bureau of the Assembly of States Parties, as well as the Assembly of States Parties, will have to draw their own conclusions.

50. It is for these reasons that the Single Judge, in the 2 June 2008 Decision, has already highlighted that, given the unknown incriminating and/or potentially exculpatory value of any document gathered under article 54(3)(e) of the Statute,

⁷⁰ ICC-01/04-01/07-611, para 27.

and in light of the difficulties that the Prosecution is facing in securing the providers' consent within a reasonable time period, the Prosecution:

- (i) "willingly assumes a considerable risk if it continues gathering in an extensive manner materials pursuant to article 54(3)(e) of the Statute, rather than doing so only in exceptional or limited circumstances;"⁷¹ and
- (ii) "the avoidance of such risk should be a core factor in any Prosecution decision whether to accept materials pursuant to article 54(3)(e) of the Statute."⁷²

51. In this regard, the Single Judge observes that, at the hearing held on 3 June 2008, the Prosecution submitted it had stopped its practice of extensively gathering documents pursuant to article 54(3)(e) of the Statute by October 2006, and since then no document that could be considered relevant for the purposes of the present case has been gathered under such provision.⁷³ Moreover, at paragraphs 1 and 2 of the Prosecution's Ninth Report, the Prosecution states:

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, the Prosecution respectfully submits that it has requested and received information subject to confidentiality restrictions for the purpose of generating new evidence. 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 investigation on an objective basis in full compliance with its obligations pursuant to Article 54 (1).

Best practices have put in place after the initial phase of the DRC investigation to reduce the number of lead documents collected subject 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

⁷¹ ICC-01/04-01/07-543, para. 28.

⁷² ICC-01/04-01/07-543, para. 28.

⁷³ ICC-01/04-01/07-T-31 ENG ET, 3 June 2008, p. 26 lines 5-8

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.⁷⁴

52. Regardless of whether the number of documents collected by the Prosecution under article 54(3)(e) of the Statute after October 2006 is minimal⁷⁵ or even none,⁷⁶ the Single Judge observes that it seems that the Prosecution has attempted to end its reckless practice of extensively gathering documents pursuant to article 54(3)(e) of the Statute, once it learned of the magnitude of the problem already created by such practice.

53. Such development, despite occurring after more than two years into the investigation of the DRC situation, can only be welcomed by the Single Judge. As a result, the Single Judge notes that the problems presented by article 54(3)(e) documents identified as containing information potentially exculpatory or otherwise material for the Defence are currently “confined” to the thousands of documents that were extensively gathered under confidentiality restrictions during the first two years of the investigation into the DRC situation.

II.2. Confidentiality Agreements Concluded by the Prosecution pursuant to Article 54(3)(e) of the Statute.

54. Concerning the confidentiality agreements concluded by the Prosecution with various providers pursuant to article 54(3)(e) of the Statute, the Single Judge would first like to underline that, in the 2 June 2008 Decision, she did not entertain a *stricto sensu* analysis of the legality of the following, with regards to the statutory framework provided for in the Statute and the Rules:

- (i) the Prosecution’s practice of extensively gathering documents pursuant to article 54(3)(e) of the Statute;

⁷⁴ ICC-01/04-01/07-596, para. 1 and 2

⁷⁵ ICC-01/04-01/07-T-31-ENG ET, p. 25 line 25 and p. 26 lines 1-8

⁷⁶ ICC-01/04-01/07-596, para. 2

- (ii) the confidentiality agreements concluded by the Prosecution with the various providers under the general umbrella of article 54(3)(e) of the Statute, including the "Memorandum of Understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo and the International Criminal Court" ("the Memorandum of Understanding").

55. This does not mean, however, that the Single Judge considers that she does not have the competence to do so. On the contrary, in the view of the Single Judge, the competent Chamber, as the organ of the Court which has ultimate responsibility for interpreting and applying the different provisions of the Statute and the Rules, has always the competence to determine whether the Prosecution's practices, as well as agreements concluded by the Prosecution pursuant to article 54 (3) (e) of the Statute, are consistent with the Statute and the Rules.

56. As such, the Single Judge considers that there is a meaningful distinction between a reckless resort to article 54(3)(e), and what the Trial Chamber identified in its 13 June 2008 Decision as persistent and consistent violation of this provision. In this regard, the Single Judge observes that, according to the Trial Chamber, the Prosecution's approach "to use Article 54(3)(e) to obtain a wide range of materials under the cloak of confidentiality, in order to identify from those materials evidence to be used at trial (having obtained the information provider's consent)" was "the exact opposite of the proper use of the provision, which is, exceptionally, to allow the prosecution to receive" information or documents that are not for use at trial, but that are instead solely intended to "lead" to new evidence.⁷⁷ As a result, the Trial Chamber concluded that:

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

⁷⁷ ICC-01/04-01/06-1401, para 73

confidentially, in very restrictive circumstances. The logic of the prosecution's position is that all of the evidence that it obtains from information-providers can be the subject of Article 54(3)(e) agreements.⁷⁸

In light of the prosecution's inappropriate use of these confidentiality agreements, and the resulting inability to effect proper disclosure to the defence, it is manifest that the agreements should not be allowed to operate in a way that subverts the Statute. 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.⁷⁹

57. The Single Judges highlights that the 13 June 2008 Trial Chamber Decision is not yet final, as it is still *sub-judice*. She also observes that such decision does not refer to the fact that the Memorandum of Understanding was signed on 8 November 2005 by the UN Under-Secretary General for Peace Keeping Operations; the Prosecutor of the Court; and Bruno Cathala, the then Registrar of the Court who, as the principal administrative officer of the Court, exercised his functions under the authority of the President of the Court.

58. The Single Judge also notes that, in analysing the Memorandum of Understanding, and in particular its article 10(6),⁸⁰ the Trial Chamber does not seem to specify if such provision was found to be unlawful because: (i) it establishes as a general rule—as opposed to as an exception—the transmission of documents by the United Nations to the Prosecution under confidentiality restrictions pursuant to article 54(3)(e) of the Statute; (ii) it extends the confidentiality restrictions *vis-à-vis* any organ of the Court, including the competent Chamber; or (iii) both types of reasons. Finally, the Single Judge observes that the Trial Chamber, having found the provision to be in plain contradiction to article 54 of the Statute and therefore unlawful, does not seem to specify:

⁷⁸ ICC-01/04-01/06-1401, para. 73

⁷⁹ ICC-01/04-01/06-1401, para. 74

⁸⁰ According to article 10 (6) of the Memorandum of Understanding

Unless otherwise specified in writing by the Under-Secretary-General for Peacekeeping Operations or an Assistant Secretary-General for Peacekeeping Operations, documents held by MONUC that are provided by the United Nations to the Prosecutor shall be understood to be provided in accordance with and subject to the arrangements envisaged in Article 18, paragraph 3, of the Relationship Agreement. The United Nations will affix to all documents so provided a stamp clearly marking them as "Article 54 Confidential — United Nations (MONUC)"

- (i) whether as a result of such finding, article 10(6) of the Memorandum of Understanding is null and void;
- (ii) whether, if such provision, or part thereof, was null and void, all or some of the confidentiality restrictions provided for by article 10(6) of the Memorandum of Understanding have no effect; and
- (iii) whether, if some or part of the said confidentiality restrictions have no effect, the relevant documents could be disclosed to the Defence, or could at least be transmitted to the Trial Chamber for analysis of the impact of non-disclosure on the fairness of the proceedings.⁸¹

59. Under these circumstances, and in light of article 21(2) of the Statute, as well as the different scope, purpose and features that the confirmation hearing and the trial have in the procedure before the Court, the Single Judge considers that the 13 June 2008 Trial Chamber Decision is not *per se* binding upon the Pre-Trial Chamber.

60. In the view of the Single Judge, with regard to article 54(3)(e) documents that are identified as containing information potentially exculpatory or otherwise material to the Defence, the focus, in the proceedings leading to the confirmation hearing, is not on the legality of the agreements concluded by the Prosecution. On the contrary, the focus is on ensuring, sufficiently prior to the commencement of the confirmation hearing, that the Defence has access to the relevant documents so as to be in a position to make use of it at the hearing.

61. The *rationale* is clear: as long as the Prosecution can disclose to the Defence in a timely manner those article 54(3)(e) documents identified as containing information potentially exculpatory or material to the Defence, the Single Judge considers that there can be no issue with the underlying agreement between the Prosecution and a provider that has given timely consent for the disclosure to the Defence of the relevant documents.

⁸¹ The Single Judge also observes that at no point have the United Nations been invited to present their observations on the legality of the Memorandum of Understanding, or part thereof.

62. Moreover, the Single Judge considers that the Prosecution, as the organ of the Court primarily entrusted by the International Community with the investigation of the most serious crimes of international concern, must be presumed not to conduct itself and not to conclude agreements in violation of the Statute and the Rules.

63. Nevertheless, if it becomes clear that the Prosecution cannot comply with its disclosure obligations as a result of the application of one or more confidentiality agreements concluded pursuant to article 54(3)(e) of the Statute with some of its providers, the Chamber, as the ultimate guarantor of the fairness of the proceedings and the rights of the suspects, may engage in a *proprio motu* analysis of the legality of such agreements. If all or part of such agreements are found to be contrary to the statutory framework provided for by the Statute and the Rules, some of their confidentiality clauses may be declared null and void. Therefore nothing may prevent the Prosecution from disclosing the relevant materials to the Defence, or at the very least, to the relevant Chamber for assessment of the impact of non-disclosure on the fairness of the proceedings.

64. The Single Judge highlights that the circumstances in the present case are very different from the circumstances in the *Lubanga* Case when the Trial Chamber issued its 13 June 2008 Decision. Despite the seriousness of the situation in the present case, the Single Judge considers that, in light of the information available to date to the Single Judge (which is that provided by the Prosecution in the Ninth Prosecution Report), there is no need to engage, at this stage, in a legality analysis of the several confidentiality agreements, including the Memorandum of Understanding, concluded by the Prosecution with several providers under article 54(3)(e). Only if, in spite of taking the measures provided for in sections III and IV of the present decision, it becomes clear that the Prosecution cannot meet its article 67(2) and rule 77 disclosure obligations, this Single Judge, or the competent Chamber as the case may be, may decide to undertake such a legality analysis *proprio motu*.

III. Alternative Measures in Lieu of Actual Disclosure for the Purposes of the Confirmation Hearing

III.1. Transmission to the Chamber of Summaries containing the Information Potentially Exculpatory or Otherwise Material for the Defence Identified in Article 54(3)(e) Documents

65. The Single Judge observes that the two measures proposed by the Prosecution, in the 23 May 2008 Prosecution Seventh Report and in the 5 June 2008 Prosecution's Observations—the provision to the Defence of analogous information, and the provision to the Single Judge of summaries containing the information potentially exculpatory or otherwise material to the Defence identified in article 54(3)(e) documents—have been explicitly rejected by the Trial Chamber, as insufficient for discharging the Prosecution's obligations pursuant to article 67(2) and rule 77 for the purposes of trial.

66. Nevertheless, in the view of the Single Judge, this does not necessarily mean that they are insufficient for discharging the Prosecution's disclosure obligations under article 67(2) and rule 77 for the purposes of the confirmation hearing. In this regard, the Single Judge recalls the consistent case law of this Chamber, that has emphasised that the confirmation hearing and the trial are two different stages of the proceedings, and that the following are specific goals and features of the confirmation hearing:

- (i) the confirmation hearing aims to ensure that 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;⁸²

⁸² ICC-01/04-01/07-411-Conf-Exp, para 5

- (ii) the confirmation hearing has a limited scope and cannot be seen as an end in itself;⁸³
- (iii) the debate of the Prosecution's evidence at the confirmation hearing must be limited to analysing the core evidence of the case;⁸⁴
- (iv) the Prosecution shall only comply with its obligations under article 67(2) of the Statute and rule 77 of the Rules if it discloses, prior to the start of the confirmation hearing, the bulk of the materials identified as potentially exculpatory or otherwise material to the Defence's preparation for the confirmation hearing;⁸⁵
- (v) the 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.⁸⁶ As a result, "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, as well as other materials disclosed by the Prosecution before the hearing, if neither party intends to rely on those materials at that hearing;"⁸⁷
- (vi) the confirmation hearing must be held within a reasonable time after the person's surrender or voluntary appearance before the Court;⁸⁸ and
- (vii) there must be consistency between the proceedings leading to the confirmation hearing, the hearing itself, and, in the eventuality of the confirmation of the charges, the proceedings held before the Trial Chamber. Hence, those procedural activities carried out for

⁸³ ICC-01/04-01/07-411-Conf-Exp, para. 6

⁸⁴ ICC-01/04-01/07-411-Conf-Exp, para. 79

⁸⁵ ICC-01/04-01/06-102, para. 124

⁸⁶ ICC-01/04-01/06-102, para. 55

⁸⁷ ICC-01/04-01/07-102, para. 56

⁸⁸ ICC-01/04-01/07-411-Conf-Exp, para. 8.

the purposes of the confirmation hearing must also aim to facilitate the preparation for trial in the event that the charges are confirmed.⁸⁹

67. It is in light of these specific goals and features that the Single Judge must analyse whether the two above-mentioned alternative measures to actual disclosure proposed by the Prosecution are adequate for discharging the Prosecution's obligations pursuant to article 67(2) and rule 77 for the purposes of the confirmation hearing.

68. With regard to furnishing the Chamber with summaries of article 54(3)(e) documents containing the information identified by the Prosecution as potentially exculpatory or otherwise material to the Defence, Judge Akua Kuenyehia, acting as Single Judge, stated at the 10 June 2008 Hearing that such a measure does not discharge the Prosecution's obligation under article 67(2) of the Statute and rule 77 of the Rules, and thus the Prosecution should not pursue such remedy at this stage in relation to article 54(3) documents.⁹⁰ Judge Akua Kuenyehia further noted that the reasons for this decision would be explained in a subsequent decision to be issued in the coming days.⁹¹ The Single Judge hereby provides the said reasons.

69. In this regard, the Single Judge notes that the Trial Chamber, after revising a number of cases brought before the European Court of Human Rights against the United Kingdom (in particular, *Rowe and Davis v U.K.*,⁹² *Edwards v. United Kingdom*,⁹³ and *Jasper v. United Kingdom*⁹⁴), concluded in its 13 June 2008 Decision that:

Accordingly, under international jurisprudence the judges are empowered to determine relevant issues concerning the disclosure of potentially exculpatory materials. Particularly given that with trials before the ICC the judges are also the ultimate fact-finders, they are in a position to know what effect the exculpatory evidence may have on their ultimate decision in the case. It follows that the Chamber rejects the suggestion, advanced by the prosecution, that it is entitled to decide whether or not potentially exculpatory evidence will only impact in principle on the Chamber's decision, rather than having a material impact in fact on the

⁸⁹ ICC-01/04-01/07-411-Conf-Exp, para 7

⁹⁰ ICC-01/04-01/07-T-35 ENG ET, 10 June 2008, p. 12 lines 6-13

⁹¹ ICC-01/04-01/07-T-35 ENG ET, 10 June 2008, p. 12 line 6.

⁹² ECtHR, *Rowe and Davis v United Kingdom*, no 28901/95, Judgment of 16 February 2000

⁹³ ECtHR, *Edwards v United Kingdom*, no 13071/87, Judgment of 16 December 1992

⁹⁴ ECtHR, *Jasper v United Kingdom*, no 27052/95, Judgment of 16 February 2000, paragraph 56

Chamber's determination of the guilt or innocence of the accused. This is not a decision for the prosecution but for the judges: once the prosecution believes that the evidence "shows or tends to show the innocence of the accused" (Article 67(2) of the Statute), it is to be disclosed to the defence, or in case of doubt put before the Court.⁹⁵

70. The Single Judge considers that, regardless of the merits of this conclusion for the purposes of the trial, it is not necessarily applicable at the stage of the confirmation hearing. Indeed, at the confirmation hearing, the Chamber: (i) is not a truth-finder; (ii) has access to a limited selection of the evidence gathered by the Prosecution (i.e., the core evidence); (iii) has no access to any material potentially exculpatory or otherwise material to the Defence, and that is subject to disclosure pursuant to article 67(2) of the Statute and rule 77 of the Rules; and therefore (iv) is not in a position to fully appreciate the potential exculpatory value of documents covered by article 54(3)(e) of the Statute.

71. This conclusion is further supported by the case law of this Chamber in relation to:

- (i) the use, pursuant to article 61(5) of the Statute, of summaries of interview notes, interview transcripts and statements of witnesses for whom anonymity has been granted, as incriminating evidence for the purposes of the confirmation hearing; and
- (ii) the use of summaries of the evidence of potential witnesses on whom the Prosecution does not intend to rely at the confirmation hearing, for the purposes of discharging the Prosecution's disclosure obligations under article 67(2) of the Statute and rule 77 of the Rules.

72. In both scenarios, the Single Judge has repeatedly stated that she does not need to authorise the content of these summaries, and that it is the sole responsibility of the Prosecution to include in them all information that is potentially exculpatory or

⁹⁵ ICC-01/04-01/06-1401, para. 87

otherwise material to the Defence.⁹⁶ Moreover, as the Single Judge has consistently affirmed, this procedure is not without proper safeguards insofar as, in the event the charges are confirmed, the interview notes, interview transcripts and statements for which summaries are currently disclosed, will likely have to be disclosed in a full format after the confirmation hearing and prior to the commencement of the trial.⁹⁷

73. Moreover, the Single Judge notes that according to the 13 June 2008 Trial Chamber Decision, as well as the case law of the European Court of Human Rights, it is the relevant documents themselves, and not their summaries, that must be served upon the competent Chamber for review. As the Trial Chamber has highlighted:

In deciding whether non-disclosure is justified, human rights law suggests that it is the evidence and not summaries which should be provided to the court. The European Court of Human Rights held in *V. v Finland* that as the courts (at first instance and on appeal) had been denied access to crucial detailed telephone metering information, they were not therefore in a position to monitor the relevance to the defence of the withheld information.⁹⁸

74. Therefore, even if the Pre-Trial Chamber were in a position to fully appreciate the exculpatory value of the relevant information, which is not the case, serving the Chamber with summaries, and not the actual article 54(3)(e) documents, would not be sufficient for discharging the Prosecution's article 67(2) and rule 77 disclosure obligations for the purposes of the confirmation hearing.

75. Furthermore, the Single Judge does not see how the Defence's preparations for trial, in the event the charges are confirmed, could be facilitated by the Prosecution serving upon the Chamber alone summaries of the relevant article 54(3)(e) documents, as the Defence would remain without access to the relevant information.

76. For these reasons, furnishing the Chamber with summaries of article 54(3)(e) documents does not discharge the Prosecution's disclosure obligations under article

⁹⁶ ICC-01/04-01/07-362-Conf-Exp, p. 8 and ICC-01/04-01/07-411, para. 90.

⁹⁷ ICC-01/04-01/07-411, para. 107, ICC-01/04-01/07-423-Conf, para. 107, and ICC-01/04-01/07-428, para. 107.

⁹⁸ ICC-01/04-01/06-1401, para. 86. See also, ECtHR, *V. v Finland*, no 40412/98, Judgment of 24 July 2007, para. 78.

67(2) of the Statute and rule 77 of the Rules, and thus the Prosecution should not be pursuing this remedy at this stage of the present case.

III.2. The Principle of Analogous Information

77. In relation to the principle of analogous information, the Single Judge would like to highlight at the outset that she shares the Trial Chamber's view that, according to article 67(2) of the Statute and rule 77 of the Rules, the suspects have the right to the disclosure of those documents covered by article 54(3)(e) of the Statute, as well as any other materials that contain analogous information identified as potentially exculpatory or otherwise material to the Defence's preparation for the confirmation hearing.

78. Nevertheless, the Single Judge considers that the principle of analogous information at the present stage of the proceedings permits the Defence to have a "proper overview" of the information identified as potentially exculpatory or otherwise material to the Defence's preparation for the hearing. Therefore, the Single Judge considers that the principle of analogous information redresses one of the main concerns raised by the Defence for Germain Katanga when submitting the following:

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.⁹⁹

79. In the view of the Single Judge, the principle of analogous information thus enables the Defence, for the purposes of the confirmation hearing, to "make an informed decision about objecting to the charges or not"¹⁰⁰, as well as to rely upon

⁹⁹ ICC-01/04-01/07-564, para 12.

¹⁰⁰ ICC-01/04-01/07-564, para 11

the specific article 67(2) and rule 77 information that is disclosed to the Defence pursuant to this principle.

80. As a result, the Single Judge considers that the principle of analogous information minimises the prejudice that may be caused to the Defence by non-disclosure of article 54(3)(e) documents that are identified as containing information potentially exculpatory or otherwise material to the Defence's preparation of the confirmation hearing.¹⁰¹

81. Nevertheless, the Single Judge also observes that the principle of analogous information would still deprive the Defence from having access to the actual documents covered by article 54(3)(e) of the Statute, and therefore to the sources of the information identified by the Prosecution as potentially exculpatory or otherwise material to the Defence. Therefore, although the principle of analogous information minimises the prejudice caused by non-disclosure, it does not fully eliminate it.

82. However, contrary to the submission of the Defence for Mathieu Ngudjolo Chui,¹⁰² such prejudice¹⁰³ does not, in the view of the Single Judge, prevent the principle of analogous information from being an effective mechanism for discharging the Prosecution's obligations pursuant to article 67(2) and rule 77 at a stage of the proceedings in which the Pre-Trial Chamber is concerned with determining whether there is "sufficient evidence establishing substantial grounds to believe", rather than with the finding of the truth.

83. Indeed, the limited scope and purpose of the confirmation hearing lead the Single Judge to conclude that what is relevant in determining whether the Prosecution has complied with its disclosure obligations at this stage, is that the information identified as potentially exculpatory or otherwise material to the Defence is given to the Defence sufficiently in advance of the confirmation hearing.

¹⁰¹ ICC-01/04-01/07-543, para 24

¹⁰² ICC-01/04-01/07-566, paras. 17-19.

¹⁰³ Both the Trial Chamber in its 13 June 2008 Decision, and the ICTY Appeals Chamber in the *Blaskic* case, found this prejudice to be insurmountable for the purpose of the trial

Such timely disclosure places the Defence in a position to bring such information, if it so wishes, before the Chamber at the confirmation hearing.

84. The Single Judge considers that this conclusion finds further support in the Decision on the Evidentiary Scope of the Confirmation Hearing, which authorised the Prosecution to provide the Defence with:

- (i) summaries of the interview notes, interview transcripts and statements of those potential witnesses of the present case on whom the Prosecution had decided not to rely at the confirmation hearing, and that contained information identified as potentially exculpatory or otherwise material for the Defence;¹⁰⁴ and
- (ii) those documents identified as falling under article 67(2) or rule 77 on which the Prosecution did not intend to rely at the confirmation hearing with the redactions that the Prosecution considered necessary, on the understanding that the Defence will have fifteen days upon receipt of the relevant documents to request the lifting of those redactions.¹⁰⁵

85. Moreover, contrary to submissions of Defence for Mathieu Ngudjolo Chui,¹⁰⁶ the Single Judge also considers that, in the event the charges are confirmed, the Defence's preparation for trial will be facilitated by the receipt—many months prior to the commencement of trial—of documents containing information analogous to that identified in article 54(3)(e) documents as potentially exculpatory or otherwise material to the Defence.

86. For these reasons, the Single Judge considers that the reasons provided for by the Trial Chamber in its 13 June 2008 Decision are not *per se* applicable at the stage of the confirmation hearing. The same holds true for the Judgment of the ICTY Appeals

¹⁰⁴ ICC-01/04-01/07-411-Conf-Exp, para. 140 (i); ICC-01/04-01/07-423-Conf, para. 140 (i), and ICC-01/04-01/07-428, para. 140 (i).

¹⁰⁵ ICC-01/04-01/07-411-Conf-Exp, para. 140 (ii), ICC-01/04-01/07-423-Conf, para. 140 (ii), and ICC-01/04-01/07-428, para. 140 (ii).

¹⁰⁶ ICC-01/04-01/07- 566, paras 17-19

Chamber in the *Blaskic* case, which may not be interpreted as applying to the confirmation hearing stage, insofar as the procedure before the ICTY provides: (i) for no Defence's intervention prior to the confirmation of the indictment,¹⁰⁷ and (ii) for the issuance of a warrant of arrest only upon the confirmation of the indictment by a Pre-Trial Judge.¹⁰⁸

IV. Whether the Principle of Analogous Information Should be Applied for the Confirmation Hearing in the Present Case Despite the Likelihood that this Principle Will Not be Applicable at Trial in the event the Charges are Confirmed

87. In light of the recent 13 June 2008 Trial Chamber Decision barring the application of the principle of analogous information for the *Lubanga* Case,¹⁰⁹ the question arises as to whether it is appropriate to rely on such a principle for the purposes of the confirmation hearing in the present case as the application of such principle might subsequently be unavailable for trial.

88. In their applications for stay of the proceedings in the present case, the Defences for Germain Katanga and Mathieu Ngudjolo Chui emphasize that the question is critical, as:

- (i) the problems posed by the Prosecution's practice of extensively gathering documents pursuant to article 54(3)(e) of the Statute are not confined to the *Lubanga* Case;¹¹⁰
- (ii) the Trial Chamber, in its 13 June 2008 Decision, has ordered the stay of the proceedings in the *Lubanga* Case because, after more than eleven months, the Prosecution has failed to propose a satisfactory manner for discharging, for the purposes of the trial, its article 67(2)

¹⁰⁷ Rule 47 of ICTY Rules of Procedure and Evidence

¹⁰⁸ Rule 47 of ICTY Rules of Procedure and Evidence.

¹⁰⁹ ICC-01/04-01/06-1041, para. 2(d).

¹¹⁰ ICC-01/04-01/07- 611, para. 12

and rule 77 disclosure obligations in relation to article 54(3)(e) documents.¹¹¹

89. In particular, the Defences for Germain Katanga and Mathieu Ngudjolo Chui highlight in their application for the stay of the proceedings¹¹² that the Trial Chamber explained, in its 13 June 2008 Decision, that “in its filing of 9 June 2008, the prosecution went no further than raising the possibility that the Chamber may be provided at some stage in the future with no more than incomplete and insufficient materials”.¹¹³ As a result, both Defences underline that the Trial Chamber found there was “no prospect, on the information before the Chamber, that the present deficiencies will be corrected,”¹¹⁴ and concluded that:

[...] it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process, it is necessary - indeed, inevitable - that the proceedings should be stayed. It would be wholly wrong for a criminal court to begin, or to continue, a trial once it has become clear that the inevitable conclusion in the final judgment will be that the proceedings are vitiated because of unfairness which will not be rectified.¹¹⁵

90. According to the Defences for Germain Katanga¹¹⁶ and Mathieu Ngudjolo Chui¹¹⁷, under present circumstances, the question of whether it is appropriate to rely on the principle of analogous information is particularly relevant in light of the confirmation hearing’s stated goal of facilitating the preparation of the trial in the event that the charges are confirmed.¹¹⁸

¹¹¹ ICC-01/04-01/07-611, paras 9-10 and ICC-01/04-01/07-609, paras 21 and 27

¹¹² ICC-01/04-01/07-611 and ICC-01/04-01/07-609

¹¹³ ICC-01/04-01/06-1401, para. 91

¹¹⁴ ICC-01/04-01/06-1401, para 91

¹¹⁵ ICC-01/04-01/06-1401, para. 91

¹¹⁶ ICC-01/04-01/07-611, para. 5 and ICC-01/04-01/07-564, para. 11

¹¹⁷ ICC-01/04-01/07-566, paras. 10-19 and ICC-01/04-01/07-609, paras. 19-25.

¹¹⁸ The Single Judge stated this principle in its recent decision on the admissibility of evidence of Witness 12 (ICC-01/04-01/07-412, p 6)

CONSIDERING that the Single Judge agrees with the Defence of Germain Katanga that the confirmation hearing must also aim at facilitating the preparation for trial in the event that the charges are confirmed,

CONSIDERING that in principle, the Prosecution should not be allowed to rely at the confirmation hearing on the evidence given by a witness (be it in a written format or through oral testimony), if the Prosecution cannot subsequently rely on the evidence of the said witness for the purpose of the trial:

CONSIDERING however that the competence to decide on the admissibility of the evidence given by a witness at trial lies with the Trial Chamber []

91. At the outset, the Single Judge emphasises that, in answering this question, the Single Judge has neither the intent nor the competence to analyse whether in the *Lubanga* Case:

- (i) all available options were explored by the Prosecution and the Trial Chamber prior to staying the proceedings;
- (ii) the situation amounted to such abuse of process by the Prosecution such that the Court could no longer exercise jurisdiction, because “the trial process [had] been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial.”¹¹⁹

92. The Single Judge finds that the current situation in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* does not justify the adoption of the remedy adopted by the Trial Chamber in the *Lubanga* Case, as long as the Prosecution makes effective use of the principle of analogous information for the purposes of the confirmation hearing.¹²⁰

93. In the view of the Single Judge, as long as the Defence receives—in a timely manner before the confirmation hearing¹²¹—those documents containing information analogous to that identified in article 54(3)(e) documents as potentially exculpatory or material to the Defence - the Defence will be in a position to present such information to the Chamber at the confirmation hearing, and to begin trial preparations in the event the charges are confirmed.

94. The Single Judge also observes that in the *Lubanga* Case, the Trial Chamber’s order to stay the proceedings was issued almost a year after it was seized with the case. Hence, regardless of the merits of the remedy adopted by the Trial Chamber, in the event the charges are confirmed in the present case, there remains considerable

¹¹⁹ ICC-01/04-01/07-1401, paras 90 and 93.

¹²⁰ See Prosecution report of 16 June 2008. The Defences have until 19 June 2008 to respond to the 16 June 2008 Prosecution’s Report.

¹²¹ The final deadline set up by the Single Judge is 16 June 2008 so that the Defence can introduce the relevant documents if it so wishes in the Defence’s Additional List of Evidence due to be filed on 20 June 2008.

time from the current stage of the proceedings to the start of the trial to find a satisfactory solution to the current disclosure problems relating to article 54(3)(e) documents.

95. In this regard, the Single Judge observes that the Prosecution has explained in various status conferences that the United Nations is the provider of most of the documents currently covered by article 54(3)(e), as the United Nations transmitted thousands of documents to the Prosecution pursuant to article 10(6) of the Memorandum of Understanding.

96. The Single Judge notes that, in its article 10, paragraphs (8) to (11), the Memorandum of Understanding establishes a specific procedure for the lifting by the United Nations of any confidentiality restrictions contained in its article 10(6). According to this procedure:

In the event that the Prosecutor subsequently wishes to disclose any such document to another organ of the Court or to a third party, including to a suspect or to an accused, convicted or sentenced person or to his or her legal representative, the Prosecutor shall:

- (a) submit a request in writing to the Under-Secretary-General for Peacekeeping Operations for the consent of the United Nations to such disclosure;
- (b) simultaneously copy any such request to the Legal Counsel of the United Nations;
- (c) in the request, identify the organ, organs, person or persons to whom it is wished to disclose the document concerned and explain why such disclosure is sought;
- (d) attach to the request a copy or copies of the document or documents concerned. Such an attachment may take the form of a diskette, compact disc (CD) or digital video disk (DVD) containing copies of the documents concerned in scanned form.¹²²

97. Upon the receipt of the Prosecution's requests:

It is understood that the United Nations shall be free, in the case of any such request, either to decline it, or to accede to it without conditions, or to accede to it subject to such conditions, limitations, qualifications or exceptions as it might deem appropriate. In particular, the United Nations shall be free to accede to any such request on condition that the document be disclosed in redacted form only and to specify the redactions that shall be made to it for that purpose.¹²³

It is further understood that the consent of the United Nations to the disclosure of a document held by MONUC that has, or is understood to have, been provided by it in accordance with and subject to the arrangements envisaged in Article 18, paragraph 3, of the Relationship Agreement may only be granted in writing, by the Under-Secretary-General for

¹²² Article 10 (8) of the Memorandum of Understanding

¹²³ Article 10 (9) of the Memorandum of Understanding

Peacekeeping Operations or by an Assistant Secretary-General for Peacekeeping Operations.¹²⁴

In the event that the response of the United Nations to a request for its consent to the disclosure of such a document occasions difficulties to the Prosecutor, the Prosecutor and the Under-Secretary-General for Peacekeeping Operations shall, at the Prosecutor's request, consult with a view to finding an appropriate way to resolve the matter in a manner that accommodates the needs, concerns and obligations of the United Nations and of the Prosecutor.¹²⁵

98. The Single Judge also observes that, in the present case, the Prosecution has resorted to such procedure over several months with minimal success. The Prosecution has on numerous occasions informed the Single Judge of meetings in New York between members of the Prosecution and the Legal Advisor of UN Department of Peacekeeping Operations. However, despite these consultations having lasted for months, the Single Judge observes that little to no progress has been made, and that the United Nations has only consented to the disclosure of approximately 20 documents out of 264 relevant documents.

99. The Single Judge is gravely concerned with the severe inefficacy of this procedure to date, particularly as it appears that some of the documents currently covered by article 54 (3)(e) of the Statute are also available in the public domain.¹²⁶

100. The Single Judge does not have detailed information as to the specific reasons for this situation. Nevertheless, the Single Judge considers that between the date of issuance of this decision, and the date of issuance of the decision on whether or not to confirm the charges against the suspects, the Prosecution and the United Nations must make a conscious effort to expeditiously lift the confidentiality restrictions on disclosure by effectively applying the procedure provided for in paragraphs (8) to (11) of article 10 of the Memorandum of Understanding.

101. In this regard, the Single Judge recalls that in the 2 June 2008 Decision, she emphasised that:

¹²⁴ Article 10 (10) of the Memorandum of Understanding.

¹²⁵ Article 10 (11) of the Memorandum of Understanding.

¹²⁶ ICC-01/04-01/07-1402, para. 33

[...] those organisations that condition their cooperation with the Prosecution on a blank application of article 54 (3) (e) of the Statute may also be contributing to creating the above-mentioned risk, as it is likely that many of the documents they provide to the Prosecution under such condition will contain materials which are potentially exculpatory or otherwise material for the Defence.¹²⁷

102. The Single Judge reiterates that the disclosure problems currently faced in the present case are also common to the *Lubanga* Case. Furthermore, those issues relating to documents gathered under confidentiality restrictions are likely to be faced, at a minimum, in all cases arising out of the investigation into the DRC situation. Although they are the result of the Prosecution's reckless under-assessment during the first two years of the DRC investigation of the problems arising from an extensive gathering of documents under article 54(3)(e) of the Statute, such problems, in the view of the Single Judge, can no longer merely be seen as the "Prosecution's problems".

103. On the contrary, the Single Judge strongly believes that they do not only concern the Prosecution, but that they have an institutional dimension as well. Unless a solution is found, the Prosecution may be prevented from discharging its article 67(2) and rule 77 disclosure obligations for the purposes of the trial in all DRC-related cases at a minimum

104. Therefore, if, by the time the Chamber issues its decision on confirming the charges or not, and in the event the charges are confirmed, there continues to be no progress on the application of the above-mentioned procedure to lift confidentiality restrictions, the Chamber, as the ultimate guarantor of the fairness of the proceedings and of rights of Germain Katanga and Mathieu Ngudjolo Chui, is prepared to intervene at the request of the Prosecution, the Defence for Germain Katanga, the Defence for Mathieu Ngudjolo Chui or upon its own initiative.

105. In this scenario, the Single Judge considers that it will be necessary to resort to the general cooperation scheme between the International Criminal Court and the United Nations provided for in the Preamble and articles 2 and 87(6) of the Statute,

¹²⁷ ICC-01-04-01/07-543, para. 30

as well as in the Relationship Agreement between the International Criminal Court and the United Nations” (“the ICC-UN Relationship Agreement”). A cooperation request shall then be transmitted by the Registrar, acting under the authority of the President of the Court, to the UN Secretary General for:

- (i) the lifting of the confidentiality restrictions *vis-à-vis* the Chamber, both Defences and the non-anonymous victims in relation to those documents identified by the Prosecution as containing information potentially exculpatory or otherwise material to the Defence; and, if this is not possible in relation to each and every document;
- (ii) the limitation, to the absolute minimum, of those documents for which consent to disclosure to the Defences is rejected, along with the lifting of confidentiality restrictions *vis-à-vis* the competent Chamber as the ultimate guarantor of the fairness of the proceedings and the rights of the suspects.

106. In this regard, the Single Judge recalls articles 2 and 3 of the ICC-UN Relationship Agreement, which state that the guiding principles of the relationship between the United Nations and the Court are to “respect each other’s status and mandate”, and to “cooperate closely, whenever appropriate, with each other.” Moreover, the Single Judge emphasises that, according to article 3 of the ICC-UN Relationship Agreement, the close cooperation between the United Nations and the Court aims at “facilitating the effective discharge of their respective responsibilities.”

107. Furthermore, the Single Judge is of the view that, irrespective of whether resorting to the issuance of a cooperation request to the United Nations by the competent Chamber is finally necessary, the following additional measures must be immediately taken by the Prosecution in the event the charges are confirmed by the Chamber’s decision on whether or not to confirm the charges:

- (i) bringing to the attention of the competent Chamber any agreement concluded by the Prosecution with a provider other than the United Nations that is likely to cause difficulties in the disclosure to the Defences of those article 54(3)(e) documents identified as potentially exculpatory or otherwise material to the Defence's preparation for trial; and
- (ii) bringing—as soon as they arise—to the attention of the Chamber any specific problems concerning the disclosure to the Defence for purposes of the trial of those article 54(3)(e) documents which have identified as potentially exculpatory or otherwise material to the Defence's preparation for trial.

108. In light of the above-mentioned, it is the view of the Single Judge that, in the event the charges are confirmed, there is still sufficient time in the present case to take certain procedural measures which aim at ensuring that the Prosecution can discharge—well in advance of the commencement of the trial—its article 67(2) and rule 77 disclosure obligations. As a result, the Single Judge considers that there is no reason that prevents the Prosecution's reliance on the principle of analogous information for the purposes of discharging its article 67(2) and rule 77 disclosure obligations *vis-à-vis* the confirmation hearing in the present case.

109. As a consequence, the only question that remains to be answered is whether, on the basis of the information provided by the Prosecution in its Ninth Prosecution's Report, "the bulk rule" has been met for the purposes of the confirmation hearing due to start on 27 June 2008. Only if the answer to this question is in the negative, will the Single Judge entertain the question of whether the adequate remedy is a stay of the proceedings, as requested by the Defences for Germain Katanga and Mathieu Ngudjolo Chui, or a lesser remedy.

V. Whether for the Purposes of the Confirmation Hearing in the Present Case the Prosecution has Disclosed to the Defences the Bulk of those Materials Identified as Potentially Exculpatory or Otherwise Material to the Defences' Preparation for the Confirmation Hearing.

110. The Single Judge observes that, according to the Prosecution's Ninth Report, to date the Prosecution has identified 255 article 54(3)(e) documents that have been identified as containing information potentially exculpatory¹²⁸ or otherwise material to the preparation of the Defences for Germain Katanga and Mathieu Ngugjolo Chui for the confirmation hearing.¹²⁹

111. The Single Judge also notes that, according to the Prosecution's Ninth Report, the Prosecution has only been able to secure, in the last eight months, providers' consent to disclose to the Defence 24 of the said 255 documents.¹³⁰ Of the remaining 231 documents, consent has been rejected by the providers in relation to 52 documents,¹³¹ and requests for consent are pending in relation to 179 documents.

112. In the Prosecution's Ninth Report, the Prosecution also states that it has disclosed to both Defences documents containing analogous information to that identified as potentially exculpatory or otherwise material to the Defence in 142 out of the 231 article 54(3)(e) documents which remain undisclosed.

113. Therefore, as of 16 June 2008, neither of the Defences has been given access to the information identified by the Prosecution as potentially exculpatory or otherwise material to the Defence in approximately 89 documents.

114. In this regard, the Single Judge observes that the Defences for Germain Katanga and Mathieu Ngudjolo Chui give different accounts of the number of undisclosed materials. The Single Judge considers that this may be due to the fact that they both

¹²⁸ ICC-01/04-01/07-596, para. 7.

¹²⁹ ICC-01/04-01/07-597, para. 9.

¹³⁰ Consent has been granted for eight potentially exculpatory documents, and twenty-four documents that are material for the Defence's preparation for the confirmation hearing ICC-01/04-01/07-596, para.11.

¹³¹ Consent has been rejected for twenty-four potentially exculpatory documents, and for twenty-eight documents that are material for the Defence's preparation of the confirmation hearing

reject the application of the principle of analogous information and therefore do not include in their assessments those article 54(3)(e) documents for which analogous information has been disclosed.

115. The Prosecution also submits, in the Prosecution's Ninth Report, that from November 2007 to 16 June 2008, it disclosed, pursuant to article 67 (2) of the Statute and rule 77 of the Rules, to the Defences for Germain Katanga and Mathieu Ngudjolo Chui:

- (i) 325 items on which it does not intend to rely at the confirmation hearing and that it has identified as containing information potentially exculpatory or otherwise material to the Defence;¹³² and
- (ii) 56 pieces of evidence on which it intends to rely at the confirmation hearing, and that it has identified as also containing information potentially exculpatory or otherwise material to the Defence.¹³³

116. Therefore, since November 2007, the Prosecution has disclosed to the Defences for Germain Katanga and Mathieu Ngudjolo Chui around 388 items containing information potentially exculpatory or otherwise material to the Defences for the preparation of the confirmation hearing due to start on 27 June 2008. Moreover, the principle of analogous information - which the Single Judge has determined to be an adequate alternative measure to actual disclosure of article 54(3)(e) documents when requests for consent have been rejected or are still pending – has been used in relation to 142 out of the 231 article 54(3)(e) documents that remain undisclosed.

117. As a result, the Single Judge finds that, in relation to more than 80% of the documents identified to date as containing information potentially exculpatory or otherwise material to the Defence, both Defences have been given access to the actual documents or to documents containing analogous information.

¹³² ICC-01/04-01/07-596. para. 3

¹³³ ICC-01/04-01/07-596 para. 3

118. Under these circumstances, the Prosecution claims that the bulk rule has been met for the purposes of the confirmation hearing in the present case.

119. The Defences for Germain Katanga and Mathieu Ngudjolo Chui, in addition to rejecting such rule, submit that it has not been met, given that 231 documents remain undisclosed.

120. According to the Defences for Germain Katanga and Mathieu Ngudjolo Chui, the situation is particularly grave given the limited temporal and geographical scope of this case, which, as the Single Judge has held on several occasions, is confined to an attack that allegedly took place on one day against a single village. As a result, the Defences submit that they are prevented from having “a proper overview” of those materials identified as potentially exculpatory or otherwise material to the Defence, and that under these circumstances, they cannot make an informed decision whether to object to the charges. Thus, in the final analysis, the Defences submit that the Chamber as well would not be in a position to form an adequate opinion regarding the evidentiary basis for the charges.

121. The Single Judge cannot agree with the Defences for Germain Katanga and Mathieu Ngudjolo Chui. Due to the *inter partes* nature of the disclosure process, she has not had access to the content of most of the materials disclosed to date to the Defences under article 67(2) and rule 77. Nevertheless, she considers that in a case confined to crimes allegedly committed during one attack against a single village on one day, and in which the Prosecution’s core evidence is comprised of 274 pieces of evidence, the almost 400 documents disclosed to the Defences under article 67(2) and rule 77 during the last eight months must have placed both Defences in a position to make an informed decision on:

- (i) whether or not to object to the charges; and
- (ii) selecting the evidence upon which they intend to rely at the confirmation hearing, in light of its limited scope and purpose.

122. In this regard, the Single Judge observes that, at the time of issuance of the present decision: (i) neither of the Defences has filed any List of Evidence or of Additional Evidence; and (ii) both Defences have declared that they do not intend to rely on any item of evidence for the purposes of the confirmation hearing.

123. The Single Judge has already emphasised the gravity of the current situation relating to article 54(3)(e) documents resulting from the Prosecution's reckless investigative techniques during the first two years of the investigation into the DRC. In the view of the Single Judge, the present case is a borderline one because of the important number of undisclosed documents that have already been identified as containing information potentially exculpatory or otherwise material to the Defence, and for which the Prosecution has been unable to rely on the principle of analogous information.

124. Nevertheless, all factors considered - notably the limited geographical and territorial scope of the case; the limitation of the Prosecution's evidence to its core evidence as mandated by the Single Judge; as well as the hundreds of documents containing information potentially exculpatory or otherwise material to the Defence - the Single Judge finds that the Prosecution has satisfied the bulk rule for the purposes of the confirmation hearing scheduled to start on 27 June 2008.

125. Consequently, the Single Judge does not need to address the question of whether the adequate remedy for the Prosecution's violation of such rule is a stay of the proceedings. Hence, the applications of both Defences for an order to stay the proceedings are rejected.

FOR THESE REASONS,

DECIDE to reject *in limine*, for the purposes of the confirmation hearing that is due to start on 27 June 2008, the two additional alternative measures proposed by the Prosecution in its 16 June 2008 Prosecution's Ninth Report.

FIND that the principle of analogous information is, for the purposes of the confirmation hearing, an adequate alternative measure to actual disclosure, pursuant to article 67 (2) or rule 77, of article 54(3)(e) documents when requests for consent have been rejected or are still pending.

FIND that the transmission of summaries of article 54(3)(e) documents does not discharge the article 67(2) and rule 77 Prosecution's disclosure obligations for the purposes of the confirmation hearing.

DECIDE that the Prosecution, for the purposes of the confirmation hearing in the present case, has disclosed the bulk of the materials identified as potentially exculpatory or otherwise material to the Defence, and therefore, has not violated its disclosure obligations under article 67(2) of the Statute or rule 77 of the Rules.

REJECT the applications of the Defences for Germain Katanga and Mathieu Ngudjolo Chui to order a stay of the proceedings in the present case.

ORDER the Prosecution to:

- (i) immediately make its best efforts to increase the efficacy of the procedure provided for in article 10, paragraphs (8) to (11), of the Memorandum of Understanding in order to obtain the United

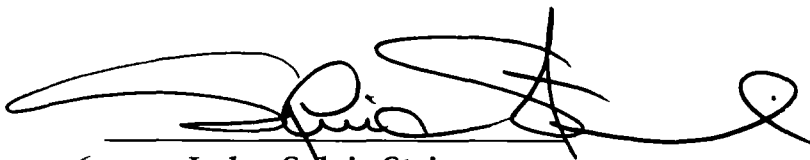
Nations' consent to lifting the confidentiality restrictions on documents containing information potentially exculpatory or otherwise material to the Defences;

- (ii) request again, as soon as practicable, the consent of those providers other than the United Nations that have rejected to consent to the lifting of confidentiality restrictions on documents containing information potentially exculpatory or otherwise material to the Defences;
- (iii) file every three weeks a comprehensive report on the status of the requests for consent to lifting the confidentiality restrictions made to the United Nations, pursuant to the procedure provided for in article 10, paragraphs (8) to (11), as well as to other providers.

ORDER the Registrar, pursuant to the UN-ICC Relationship Agreement, to notify immediately the present decision to the United Nations Secretary General.

ORDER the Registrar to notify immediately the present decision to all members of the Bureau of the Assembly of States Parties.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner
Single Judge

Dated this Friday 20 June 2008

At The Hague, The Netherlands