

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 23 June 2008

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR**

v. Germain Katanga and Mathieu Ngudjolo Chui

PUBLIC

**Decision concerning the Prosecution's Further Information in relation to Article
67(2) of the Statute and Rule 77 of the Rules**

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mr Éric MacDonald, Senior Trial Lawyer

Counsel for the Defence for Germain

Katanga
Mr David Hooper
Ms Caroline Buisman
Mr Göran Sluiter

Counsel for the Defence for Mathieu

Ngudjolo Chui
Mr Jean-Pierre Kilenda Kakengi
Ms Maryse Alié

Legal Representatives of the Victims

Ms Carine Bapita Buyagandu
Mr Joseph Keta
Mr J.L. Gilissen
Mr Hervé Diakiese
Mr Jean-Chrisostome Mulamba
Nsokoloni

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims
States Representatives**

**The Office of Public Counsel for the
Defence
Amicus Curiae**

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

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

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” (“2 June 2008 Decision”),¹ issued by the Single Judge on 2 June 2008;

NOTING the “Prosecution’s Observations concerning Article 54 (3) (e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence’s Preparation for the Confirmation Hearing”² (“the 5 June 2008 Prosecution’s Observations”), filed by the Prosecution on 5 June 2008;

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”³ (“the 9 June 2008 Prosecution’s Report”), filed by the Prosecution on 9 June 2008;

NOTING the “Prosecution’s Seventh Report on the Status of the Procedures Initiated Pursuant to Articles 54(3)(e), 73 and 93 in Relation to Those Items Identified as of a Potentially Exculpatory Nature under Article 67(2) of the Statute or as Material to the Defence under Rule 77 of the Rules”⁴ (“the 16 June 2008 Prosecution’s Report”), filed by the Prosecution on 16 June 2008;

NOTING the “Decision on Article 54 (3) (e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation

¹ ICC-01/04-01/07-543.

² ICC-01/04-01/07-555.

³ ICC-01/04-01/07-571.

⁴ ICC-01/04-01/07-596.

Hearing”⁵ (“the Decision on Article 54(3)(e) Documents”), issued by the Single Judge on 20 June 2008,

NOTING the “Information regarding the Discovery and Examination of Additional Material in the Possession of the Prosecutor”⁶ (“the Prosecution’s Information”) filed by the Prosecution as urgent on 20 June 2008;

NOTING the notification email sent by the Court Management Section (“the CMS”) and by which the CMS informed the participants that it received the Prosecution’s Information at 17h43 on Friday 20 June 2008 and that, although it bears the mark “urgent”, due to a technical problem, it was registered and notified on 23 June 2008 instead of 20 June 2008;

NOTING rule 77 of the Rules of Procedure and Evidence (“the Rules”);

CONSIDERING that on 20 June 2008, the Single Judge decided, in the Decision on Article 54(3)(e) Documents, to reject *in limine* the alternative measures to actual disclosure put forward by the Prosecution in its 16 June 2008 Prosecution Report, since they were proposed the very same day of the expiration of the deadline for effective disclosure of article 67(2) and rule 77 materials for the purposes of the confirmation hearing, due to start on 27 June 2008;⁷

CONSIDERING that in the same decision, the Single Judge further decided that, on the basis of the information provided for by the Prosecution in its 16 June 2008 Prosecution Report:

⁵ ICC-01/04-01/07-621.

⁶ ICC-01/04-01/07-622-Conf

⁷ ICC-01/04-01/07-621, p. 52.

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.⁸

CONSIDERING that on Friday 20 June 2008, the Prosecution filed as “urgent” the Prosecution’s Information;⁹

CONSIDERING that, despite the fact that the Prosecution’s Information was marked as “urgent”, the CMS did not notify the Prosecution’s Information to the Chamber, the Defences or the Legal Representatives of non-anonymous Victims until Monday 23 June 2008;

CONSIDERING therefore that the Single Judge only had access to the information contained in the Prosecution’s Information on the morning of Monday 23 June 2008;

CONSIDERING that according to the e-mail sent by the CMS with the notification of the Prosecution’s Information, the delay in the notification was “due to a technical problem”; and that, the Single Judge considers it necessary for the Registrar to file a report further explaining the reason for the delay in the notification of the Prosecution’s Information in light of the fact that the Decision on Article 54(3)(e) Documents, also marked as urgent, was notified by the CMS on Friday 20 June 2003 at 22h00, that is to say a few hours after the CMS received the Prosecution’s Information;

CONSIDERING that at paragraphs 1 to 3 of the Prosecution’s Information, the Prosecution informs the Single Judge as well as the two Defences as follows:

⁸ ICC-01/04-01/07-621, p. 52.

⁹ ICC-01/04-01/07-622-Conf, p.3.

In the "Prosecution's Seventh Report on the Status of the Procedures Initiated Pursuant to Articles 54(3)(e), 73 and 93 in Relation to Those Items Identified as of a Potentially Exculpatory Nature under Article 67(2) of the Statute or as Material to the Defence under Rule 77 of the Rules", the Prosecution notified the Pre-Trial Chamber and the Defence that "The Prosecutor has requested a new general search of material to ensure that no document has been overseen; the inquiry is being completed. Any relevant information will be provided to the Chamber." The Prosecution advises the Pre-Trial Chamber and the Defence that on 4 June 2008, a member of the OTP, while conducting a search for material relating to W-12, located several unregistered CD-ROMs and items relating to the DRC situation, mostly generated by the UN. A binder with unregistered hard-copy items and an item that appeared to be a map drawn by a witness was also discovered.

The OTP conducted an inventory and assessment of this material and determined that these items were obtained in the course of the investigation into the situation.

In total, 1172 items were registered for the purpose of review. The Prosecution has reviewed all of these items in order to determine whether they contained information that is subject to disclosure under Article 67(2) or should be provided for inspection by the Defence pursuant to Rule 77 ("Materials for disclosure or inspection").

CONSIDERING further that at paragraphs 4 to 7 of the Prosecution's Information, the Prosecution states:

Of these items, 19 have been identified as items that should be provided for inspection by the Defence pursuant to Rule 77. No items have been identified as subject to disclosure under Article 67(2).

Of the 19 Rule 77 items, 9 have no restrictions and can be disclosed forthwith.

Of the 19 Rule 77 items, 7 were provided by the UN and are subject to Article 54(3)(e) restrictions. The Prosecution is now determining whether analogous information to that which is contained in any of these Article 54(3)(e) items has already been or can be disclosed to the Defence in another form. However, the Prosecution is requesting, in parallel, the urgent lifting of the confidentiality restrictions to the UN. Finally, the agreement by the UN referred to in "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"" should apply to those documents.

Furthermore, of the 19 Rule 77 items, 3 were provided by other information providers under the condition that necessary measures will be taken to ensure the confidentiality of the information and the protection of any person at risk. The underlying material can be provided to the Judges confidentially and ex parte if the Chamber so requests. The Prosecution would propose to provide redacted versions or summaries of the items to the Defence if the Judges so agree.

CONSIDERING that, according to the Prosecution, the above-mentioned items were found two days after the issuance of the 2 June 2008 Decision; and that no

reference to such items was made in the 5 June 2008 Prosecution's Observations, the 9 June 2008 Prosecution's Report, and the 16 June 2008 Prosecution's Report;

CONSIDERING that from 4 June 2008 to 16 June 2008 the Prosecution had sufficient time to (i) identify those article 67(2) and rule 77 materials contained in the items referred to in the Prosecution's Information; and (ii) disclose them to the Defence within the 16 June 2008 deadline for effective disclosure of article 67(2) and rule 77 materials for the purpose of the confirmation hearing in the present case;

CONSIDERING therefore that the Prosecution must make those 9 rule 77 items immediately available to both Defences; and that both Defences shall be entitled to make use of such documents for the purpose of the confirmation hearing if they so wish; and that therefore the Defences shall have until Thursday 26 June 2008 at 12h00 to file an Additional List of Evidence, in which they can include:

- (i) any of these 9 items; and
- (ii) any other item of evidence on which they decide to rely at the confirmation hearing in light of the content of the 9 items disclosed pursuant to the present decision.

CONSIDERING that for the same reasons given in the Decision on Article 54 (3)(e) Documents in relation to the two alternative measures to actual disclosure proposed by the Prosecution in its 16 June 2008 Prosecution Report, the alternative measures to actual disclosure provided for in the Prosecution's Information must be rejected *in limine* for the purpose of the confirmation hearing that is due to start on 27 June 2008;

CONSIDERING that the Prosecution filed as “confidential” the Prosecution’s Information; and that the Single Judge does not see any reason why the Prosecution’s Information cannot be reclassified as a public document;

FOR THESE REASONS

ORDER the Registry to file a report explaining the reasons for the delay in the notification of the Prosecution’s Information by Monday 30 June 2008 at 16h00.

DECIDE that the Prosecution’s Information shall be reclassified as a public document.

ORDER the Prosecution to immediately make available to the Defences for Germain Katanga and Mathieu Ngudjolo Chui those 9 items referred to in the Prosecution’s Information which have been identified as rule 77 materials and which are not subject to any confidentiality restrictions;

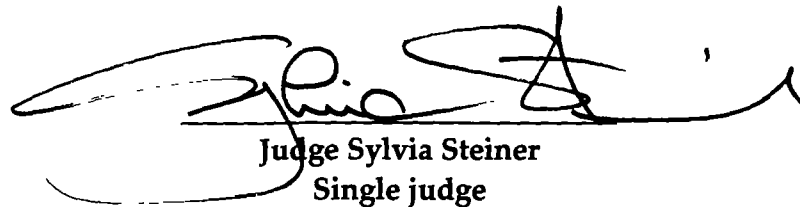
DECIDE that the Defences for Germain Katanga and Mathieu Ngudjolo Chui shall have until Thursday 26 June 2008 at 12h00 to file an Additional List of Evidence in which they can include:

- (i) any of the 9 items made available to them pursuant to the present decision; and
- (ii) any other item of evidence on which they decide to rely at the confirmation hearing in light of the content of the 9 items disclosed to them pursuant to the present decision.

GIVE the Defences for Germain Katanga and Mathieu Ngudjolo Chui, as well as to the Legal Representatives of anonymous and non-anonymous victims to make observations on the Prosecution's Information by Tuesday 24 June 2008 at 16h00.

ORDER the Prosecution to immediately bring to the attention of the Single Judge any additional article 67(2) and/or rule 77 issues that the Single Judge has not yet been informed of in relation to the confirmation hearing in the present case.

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



Judge Sylvia Steiner
Single judge

Dated this Monday 23 June 2008

At The Hague, The Netherlands