



Original: English

No.: ICC-01/04-01/07
Date: 19 January 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public Document

Defence Observations on the *Rapport de l'Accusation sur les documents ou renseignements obtenus en vertu d'accords de confidentialité conclus sur la base de l'article 54(3)(e) suite à « l'Ordonnance enjoignant aux participants et au Greffe de déposer des documents complémentaires »*

Source: Defence for Mr Germain Katanga

Document 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 Eric Macdonald, Senior Trial Lawyer

**Counsel for the Defence for Germain
Katanga**

Mr David Hooper
Ms Caroline Buisman

**Counsel for the Defence for Mathieu
Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of Victims

Ms Carine Bapita Buyangandu
Mr Hervé Diakiese
Mr Jean-Christostome Mulamba
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Mr Joseph Keta
Mr J.L. Gilissen

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. The Defence notes and appreciates the progress made in the disclosure of materials qualified by the Prosecution as Article 67(2) and Rule 77 materials elicited under Article 54(3)(e) of the Rome Statute.
2. The Defence accepts the proposition that at present the approach set out by the Appeals Chamber in the Lubanga case¹ be followed for UN documents not yet disclosed to the Defence.
3. In respect of documents from all other sources, the Defence requests that the Prosecution continues to seek permission to disclose such documents. Alternatively, the Defence suggests that, where disclosure is not consented to, the Prosecution, in such exceptional circumstances, should seek to establish an arrangement similar to that presently had with the UN. That is to say, be permitted to disclose the materials in question to the judges who may then, in *ex parte* proceedings, determine whether non-disclosure of such materials leads to unfairness of the proceedings and “whether, and if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of the non-disclosure of the information”.²
4. The Defence does not accept the non-disclosure of materials identified as Article 67(2) or Rule 77 materials under any other conditions. In this regard, the Defence notes that, on 9 January 2009, the Prosecution has disclosed for the first time a Rule 77 document elicited under Article 54(3)(e) in summarised form (document DRC-OTP-0204-0371). The Prosecution made the determination to summarise this document without the authorisation of the Trial Chamber or the consent of the Defence. The Defence objects to such *proprio motu* determinations and submits that only the Trial Chamber should be allowed to make such determination upon review of the document in question. Accordingly, the Defence requests that the full content of this document be disclosed to the Defence as soon as possible. If the provider of the information does not consent to such disclosure, the Defence requests that the Prosecution seeks the provider’s consent to submit the document to the Trial Chamber for *ex parte* review of its content in line with the Lubanga procedure.

¹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1486, *Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”*, 21 October 2008, para. 48.

² *Ibid.*

Respectfully submitted,



David HOOPER

Dated this 19 January 2009

At London