

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-01/07
Date: 5 **November** 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

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

Public

***Defence Response to Prosecution's Application Concerning Disclosure by the
Defence Pursuant to Rules 78 and 79(4) (ICC-01/04-01/07-1529) of 13 October 2009***

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
Mr Andreas O'Shea

Counsel for the Defence for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims

Ms Carine Bapita Buyangandu
Mr Joseph Keta
Mr Jean-Louis Gilissen
Mr Hervé Diakiese
Mr Jean Chrysostome Mulamba
Nsokoloni
Mr Fidel Nsita Luvengika
Mr Vincent Lurquin
Ms Flora Mbuyu Anjelani
Mr Richard Kazadi Kabimba
Mr Magah Pirard
Mr Dieudonné Kaluba Didwa
Mr: Lievin Ngondji Ongombe
Unrepresented Victims

Legal Representatives of Applicants

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

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

A. Introduction

1. In its application of the 13th October 2009¹ (“Prosecution Application”), the Prosecutor requested an order that the Defence of Germain Katanga (“Defence”):

- (a) Provide disclosure, in electronic form, of material in possession or control of the Defence, pursuant to Rule 78, three weeks before the commencement of the trial;
- (b) Provide disclosure of a document setting out in general terms the defences the accused intend to rely on and any substantive factual or legal issues that they intend to raise, three weeks before the commencement of the trial; and
- (c) Provide disclosure of all the evidence the Defence intends to rely on for trial, including information regarding the identification of witnesses, their statements, or summaries thereof before the commencement of the Defence case.

2. The Defence opposes the Prosecution Application on the basis that these requests are premature, impractical, inconsistent with the rights of the defence and finally, ill-founded in the Statute and the Rules. The Application is premature in the sense that it has not been demonstrated that the Defence is in fact in violation of any of its obligations under the Rules, such that an order for compliance is required. It is further premature given the state of the proceedings. The documents necessary for providing proper notice to the Defence of the Prosecution case are still in a state of refinement: the Defence is still being served with proposed Prosecution evidence, which has not yet been presented, such that it can be said that the Defence has a case to meet. It is impractical because it attempts to impose obligations on the Defence that would require a further adjournment of the proceedings in order to be able to comply with it. Finally, it is ill-founded because is it not properly premised on legal duties enshrined in the Statute or in the Rules.

B. The application is premature

¹ ICC-01/04-01/07-1529, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecutor’s Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4), 13 October 2009.

3. The pre-trial proceedings in this case have been characterised by a plethora of pleadings and consequent orders from the Trial Chamber which, while placing heavy time constraints on the parties and the judges, have admittedly been necessary for the fair and expeditious conduct of the pre-trial proceedings. The present application seeks an order from the Trial Chamber that is not only unnecessary at this early stage in the proceedings, but entails inviting yet another wave of pleadings and pre-trial tasks that are neither proper nor justified on the eve of the trial.

(1) No demonstration of non-compliance

4. The obligation stated in rule 78 for the Defence to allow inspection is express and clear. It is not necessary for the Trial Chamber to re-state and enforce the obligation under the rule unless the Prosecutor can establish that the Defence is in violation of the rule. In the absence of reasonable grounds to believe the contrary, it must be assumed that a party is aware of his obligations under the rules and willing to comply with them. The Prosecution has made no attempt to demonstrate either to the Defence or to the Chamber that the Defence is in fact in violation of the said rule. Further, it is submitted that the parties should not make sweeping requests for the compliance with rules.

5. The Prosecution suggests that it has no obligation to request disclosure for it to be made. This is a theoretical and unhelpful position to take. Whatever the position as to whether the obligation is initiated by a request, it surely must be reasonable to expect the Prosecution to approach the Defence before assuming non-compliance with a rule and seeking orders from the Trial Chamber. The Prosecution requested the defence for documents within its custody and the Defence affirmed that it had none at the time of the request. The Prosecution has not demonstrated that it has taken any steps to address non-compliance directly with the Defence. In such circumstances, it is difficult to see how it can be demonstrated that there has been any non-compliance justifying intervention by the Chamber.

(2) Not necessary or fruitful to order Defence disclosure at this stage of the proceedings

6. The matters raised by the Prosecution are largely dependent upon the Defence knowing what case it has to meet. The Prosecution summary of the charges was not served at the time of

its Application, and has only just been served on counsel for the accused on the 28th October 2009.² This document is still potentially subject to further observations by the participants,³ due to be filed on the 5th November 2009. The table of incriminating evidence is still not in its final form such that it can be constructively analysed. At the status conference of the 2nd and 3rd of November 2009, the Prosecution requested supplementary time to finalise this document until the 16th November 2009, and it will therefore not be disclosed in its final version until only five working days before the start of the trial.

7. Even the range of witnesses for trial has only just been determined with two recent decisions on the addition of witnesses 219 and 317.⁴ The Defence is seeking to appeal one of these decisions⁵ and has not had sufficient time to investigate them or properly to assess how they fall into the case matrix. Moreover, at the status conference of 2nd and 3rd November, the Chamber put questions to the Prosecution with respect to the duplication of topics to be addressed by witnesses and the order of witnesses. The Prosecution conceded some of the issues raised by the Chamber and agreed to review its witness order. Consequently, the Defence is not yet in possession of a definitive witness order and it is not clear on which topics each witness will testify, or whether there will be a continuing intention to call the witnesses currently on the said order. The case to be met is still in a stage of formulation.

8. It is therefore unreasonable for the Prosecution to expect not only that the Defence has a formulated defence case, but that it has decided on the witnesses and documents that it intends to use for trial, in circumstances where the Defence is still unsure of the exact parameters of the

² Pursuant to ICTY Rule 65ter(F), the defence is to file a pre-trial brief only “after the submission by the Prosecutor of the items mentioned in paragraph (E)”. The latter reads in relevant part as follows: “Once any existing preliminary motions filed within the time-limit provided by Rule 72 are disposed of, the pre-trial Judge shall order the Prosecutor ... no less than six weeks before the Pre-Trial Conference required by Rule 73bis, to file the following: (i) the final version of the Prosecutor’s pre-trial brief...; (ii) the list of witnesses the Prosecutor intends to call ...”. According to ICTY Rule 72, preliminary motions are those in relevant part that (ii) allege defects in the form of the indictment. At the ICTY, the defence pre-trial brief is intended primarily to be a response to that of the prosecution. *Prosecutor v. Brđanin and Talić*, Decision on Prosecution Response to “Defendant Brđanin’s Pre-Trial Brief”, Case No. IT-99-36-PT, 14 January 2002, para. 4.

³ ICC-01/04-01/07-T-74-CONF-ENG ET, 2 November 2009, pp 25-26.

⁴ ICC-01/04-01/07-1553, *Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence*, 23 October 2009; ICC-01/04-01/07-1590, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecution’s Application to Add P-317 to the Prosecution Witness List (ICC-01/04-01/07-1537), 3 November 2009.

⁵ ICC-01/04-01/07-1586, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Defence Application for Leave to Appeal *Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence*, 2 November 2009.

case it is expected to meet.⁶ It follows that any order of disclosure on the Defence at this stage of the proceedings is likely to be a fruitless exercise because it has not been demonstrated how the Defence would be in a meaningful position to respond. Furthermore, an order for disclosure is unnecessary at this stage of the proceedings because the Prosecution does not need details of the defence in order to organise the presentation of its own evidence prior to the commencement of the trial. The Prosecutor must be deemed to know his case and the burden rests upon him to prove it. How he will do this does not alter according to the defendant's position. He cannot expect to shape and mould the case around the defendant's response, but must formulate and present the allegations as he asserts the evidence, as presented to him through his investigations, demonstrates. The accused may have nothing to answer. He may choose not to answer. He may decide not to advance a positive case. This remains his prerogative until he is confronted with the Prosecution evidence.

9. The Prosecution cannot reasonably expect that the Defence strategy in meeting his case has already been defined to the extent that decisions have been made about the evidence, if any, to be used by the Defence. The Defence has no control over the presentation of evidence at this stage (i.e. the Prosecution is leading the evidence). The Defence may reserve its position on how to meet the Prosecution evidence until it has been presented. Until this time, it cannot be clear what evidence will ultimately be presented and whether it will stand up to scrutiny such that it is necessary to advance a positive case or any specific evidence.

10. As examined in further detail below, defence disclosure obligations, if any, are limited substantively and temporally. Ultimately, while the Prosecution has a duty to prove its case, Mr. Katanga has no duty or obligation to prove a defence⁷; nor need he afford the Prosecution any assistance in making out its case.⁸

⁶ See ICC-01/04-01/06-1235, *Prosecutor v. Lubanga Dyilo*, Decision on Disclosure by the Defence, 20 March 2008, para. 34 ("There is often likely to be a link between the disclosure obligations to be imposed on the defence, on the one hand, and the proximity of the start date of the trial and the extent to which the prosecution has fulfilled its own disclosure obligations").

⁷ See *Prosecutor v. Halilović*, Case No. IT-01-48-T, Decision on Motion for Prosecution Access to Defence Documents Used in Cross-Examination of Prosecution Witnesses, 9 May 2005, para. 9 ("[P]ursuant to Article 21(3) [of the ICTY Statute], according to which the accused shall be presumed innocent until proven guilty, the burden of proof lies with the [p]rosecution, which must establish beyond reasonable doubt the guilt of the accused. While the [p]rosecution has a duty to prove its case, the accused has not to prove his defence. Until the end of the [p]rosecution case, therefore, the [p]rosecution needs to establish its case independently, without requiring the [d]efence to reveal anything", save with regard to Rules 65ter(F)(i) (the defence of alibi or any other special defence as required by Rule 67((A)(i)), and to Rule 65ter(G)).

⁸ See *Prosecutor v. Tadić*, Case No. IT-94-1, Separate Opinion of Judge Stephen on Prosecution Motion for Production of Defence Witness Statements, 27 November 1996 ("The accused need not afford the [p]rosecution

C. Consistency with the rights of the accused

11. An accused cannot have a defence imposed upon him. Whether to present a defence at all is within the discretion of and the right of the accused. Moreover, the accused cannot be deprived of his right to defend himself by virtue of not complying with a time limit imposed on the formulation of that defence before the closure of the Prosecution case. Attempts to constrain Mr. Katanga's freedom to formulate his defence in response to the Prosecution evidence within a time frame that enables him to understand, know, analyse and effectively meet the Prosecution evidence as it actually emerges during the trial necessarily infringes upon his right to a fair trial⁹, including his right to remain silent. Limited obligations are placed on the defence to give notice of alibi or other specific grounds for excluding responsibility in terms of article 31(1) of the Statute. These obligations have been imposed in order to allow the Prosecution to investigate and address such possibilities through its witnesses. However, this is a matter that arguably, from the point of view of the time of determination by the accused and his counsel, does not depend on how the Prosecution evidence emerges, but on the nature of the charge.

12. This right to silence has been described by the Appeals Chamber in *Lubanga* as "inalienable"¹⁰ and by the Trial Chamber in the same case as an "undoubted entitlement"¹¹, "fundamental", and "inviolable". It was also determined by the latter as not to be undermined by any obligations imposed on the defence, or indeed in any other way. So essential is this right, that the Chamber "has a critical duty" to uphold it and other protections afforded to the defence, as so enshrined in the Statute.¹² In essence, the Chamber at all times "has an

any assistance in making out the [p]rosecution case; he may, if so advised, simply remain mute and require the [p]rosecution to prove its case").

⁹ Cf. Prosecution Application, para. 13 ("It seems clear that under the Rome Statute framework it is envisaged that an accused's right to a fair trial is not necessarily compromised by the imposition on him or her of an obligation to reveal in advance and in appropriate circumstances, details of the defences...").

¹⁰ ICC-01/04-01/06-1433, *Prosecutor v. Lubanga Dyilo*, Judgment on Appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, Partly Dissenting Opinion of Judge Georgios M. Pikis, 11 July 2008, para. 14.

¹¹ ICC-01/04-01/06-T-71-ENG ET WT, *Prosecutor v. Lubanga Dyilo*, Oral Decision of Trial Chamber I of 18 January 2008, 18 January 2008, p. 9, lines 6-7.

¹² Article 67(1) affords the accused a fair hearing, conducted impartially, and the minimum guarantees enumerated therein, in full equality. For the purposes of trial, he is presumed innocent until proven guilty (article 66(1)); the defence bears no burden of proof, which instead rests with the Prosecution (article 66(2)); the accused does not bear the reverse burden of proof or an onus of rebuttal (article 67(1)(i)); and he may not be compelled to testify or to confess guilt, but is entitled to remain silent, without entailing any impact on the court's determination of his guilt or innocence (article 67(1)(g)). See ICC-01/04-01/06-1235, *Prosecutor v. Lubanga Dyilo*, Decision on Disclosure by the Defence, 20 March 2008, para 27. See also ICC-01/04-01/06-1433, *Prosecutor v. Lubanga Dyilo*, Judgment on the Appeal of Mr. Lubanga Dyilo against the Oral Decision of

absolute duty to ensure that any discretionary order it makes regarding defence disclosure does not derogate from the accused's right to a fair and impartial hearing in which his rights are fully safeguarded".¹³

13. Indeed, as noted by Judge Pikis, the right to silence, guaranteed by article 67(1)(g), is in no way qualified in the Statute, except with regard to the specific defences prescribed in rule 79(1). However, the Trial Chamber in *Lubanga*, by its very invitation to the defence to disclose its lines of defence, (an invitation which has to date not been responded to) suggests that this right is not absolute, but is instead qualified: failure by the defence to disclose its line(s) of defence may entail consequences on behalf of the accused, particularly if such disclosure is made at a belated stage. By this decision of the Trial Chamber, "the exercise of the right to silence can draw adverse consequences, of which the accused is warned", according to Judge Pikis, effectively compromising "in a direct way" the right of the accused to remain silent.¹⁴

Trial Chamber I of 18 January 2008, Partly Dissenting Opinion of Judge Georgios M. Pikis, 11 July 2008, para. 14 ("The right to silence is interwoven with the presumption of innocence of the accused. The accused is presumed innocent. He does not have to prove his innocence. What he must do in order to free himself from the accusation is cast doubt on its validity; it is his right to be acquitted unless the accusations against him are proven beyond reasonable doubt"); Salvatore Zappalà, "The Rights of the Accused", in Antonio Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), Vol. II, p. 1343 ("Other rules inspired by the presumption of innocence are those on the right to remain silent").

¹³ ICC-01/04-01/06-1235, *Prosecutor v. Lubanga Dyilo*, Decision on Disclosure by the Defence, 20 March 2008, para 33. See also ICC-01/04-01/06-1313, *Prosecutor v. Lubanga Dyilo*, Decision on the Defence Request to Leave to Appeal the "Decision on Disclosure by the Defence", Dissenting Opinion of Judge Blattmann, 8 May 2008, para. 37 ("...[That] the fundamental rights of the defence ... must be maintained in their complete form [is] of critical importance to the Court").

¹⁴ ICC-01/04-01/06-1433, *Prosecutor v. Lubanga Dyilo*, Judgment on the Appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, Partly Dissenting Opinion of Judge Georgios M. Pikis, 11 July 2008, paras 11-14 ("The undoubted right of the accused to silence, without such silence drawing adverse inferences, proclaimed in the decision of the Trial Chamber, is qualified by the passage quoted hereafter: 'However, unreasonable decisions by the Defence to make late disclosure may have an effect on determination by the Chamber as to what constitutes a fair trial'. This passage signifies a decision that the accused, be it at some stage of the proceedings, is under a duty to disclose his lines of defence. And if he fails to do so, there may be consequences ...: 'For instance, given the need to protect witnesses and others who have provided information to the Court, if the Bench ... is put in a position at a late stage of the proceedings, without any proper justification, of being asked to order the disclosure of exculpatory witnesses when at the point in time it is impossible to secure their necessary protection, the possibility exists that the Court will conclude that the continued trial is fair notwithstanding the failure to reveal their identities to the accused'. In the following passage, the Chamber identified, in a definitive way, the consequences that may befall the accused if disclosure of the lines of defence is made at a belated stage: 'Accordingly, if the [d]efence identifies lines of defence or issues at a significantly and unnecessarily advanced stage this may have consequences for decisions that relate to disclosure of the accused'. ... This passage is expressive of the decision of the Chamber that failure on the part of the accused to make timely disclosure of the lines of defence may have repercussions on the conduct of his case and may deprive him of the right to have disclosure of what the Prosecution is duty-bound to disclose").

14. Contrary too, to the finding by the Majority of the Trial Chamber, its order is very much relevant to the accused's right to silence.¹⁵ It opined that the ambit of its order is "limited to disclosure of information only if the accused decides to advance a positive case (thereby waiving his right to silence)".¹⁶ The Defence submits, as held by Judge Blattmann in his Dissenting Opinion, that this argument is flawed:

I do not agree that the accused waives his right to silence if choosing to advance a defence. Rather, an accused person's right to silence is fundamental and it cannot be considered that an accused person has only two options; either to sit in silence throughout the entirety of the proceedings without advancing any sort of defence, or to waive their right to silence. This would be extremely disadvantageous to an accused person and could hardly be considered a fundamental protection of an accused person. Therefore, I am not in agreement with the Majority that if an accused person should choose to defend him or herself, they have no right to silence throughout the proceedings.¹⁷

15. Whilst the Trial Chamber may, pursuant to rule 84 (Disclosure and Additional Evidence for Trial), and to article 64(3)(c) (Functions and Powers of the Trial Chamber), make any necessary orders for the disclosure of information not previously disclosed, it must do so in accordance *inter alia*, with the general requirements set forth in article 64(1) and (2).¹⁸ In particular, the functions and powers of the Trial Chamber set out in article 64 are to be exercised in accordance both with the Statute and the Rules¹⁹; also, the Trial Chamber must ensure that a trial is fair and that it is conducted "with full respect for the rights of the accused".²⁰ In other words, any order for the disclosure of additional

¹⁵ Cf. ICC-01/04-01/06-1313, *Prosecutor v. Lubanga Dyilo*, Decision on the Defence Request to Leave to Appeal the "Decision on Disclosure by the Defence", 8 May 2008, para. 13. See also ICC-01/04-01/06-1433, *Prosecutor v. Lubanga Dyilo*, Judgment on the Appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, para. 35 ("The Appeals Chamber understands the relevant statements in the Impugned Decision to be limited to the narrow prospective situation *if* the Defence elects to reveal a line of defence or an issue 'at an unnecessarily and unjustifiably late stage in the proceedings'. This limited situation does not directly engage or infringe an accused's right to remain silent – an assessment [that] is supported by the express observation in the Impugned Decision that the accused is undoubtedly entitled to rely on the right to silence") (emphasis in original). See also *Idem*, paras 43-44. However, see ICC-01/04-01/06-1433, *Prosecutor v. Lubanga Dyilo*, Judgment on the Appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, Partly Dissenting Opinion of Judge Georgios M. Pikis, 11 July 2008, paras 11-14.

¹⁶ ICC-01/04-01/06-1313, *Prosecutor v. Lubanga Dyilo*, Decision on the Defence Request to Leave to Appeal the "Decision on Disclosure by the Defence", 8 May 2008, para. 13 (emphasis in original).

¹⁷ ICC-01/04-01/06-1313, *Prosecutor v. Lubanga Dyilo*, Decision on the Defence Request to Leave to Appeal the "Decision on Disclosure by the Defence", Dissenting Opinion of Judge René Blattmann, 8 May 2008, para. 12.

¹⁸ Rule 84 is subject *inter alia*, to article 64, the general exercise of which is governed by the requirements identified in sub-paragraphs (1) and (2) of article 64.

¹⁹ See article 64(1).

²⁰ See article 64(2).

information not previously disclosed is subordinate to the respect in full of the rights of the accused.

16. Furthermore, regulation 54 (Status Conferences before the Trial Chamber) is to be read as with all Regulations, “subject to the Statute and the Rules”.²¹ Indeed, the Court is bound to apply, in the first place, its Statute and its Rules, the application and interpretation of which must be consistent with internationally recognised human rights.²² The issuance of orders pursuant to the said regulation must therefore be in accordance with the respect in full of the rights of the defence. In particular, regulation 54(f)²³ must be subject to the need to ensure a fair and expeditious trial and the rights of the accused. That regulation is to be applied in accordance with the Statute and the Rules, both of which guarantee Mr. Katanga the exercise in full of such rights and guarantees.²⁴ Accordingly, whilst it may be appropriate to request certain details from the Defence prior to its defence case, Regulation 54 should not be read to impose such obligations on the Defence before the Prosecution’s case has even begun. Such an interpretation of Regulation 54, which does not stipulate a date as to when orders under this Regulation are to be made, would be inconsistent with the defendant’s rights and guarantees set out in the Statute and Rules.

17. In essence then – and contrary to the Court’s intrinsic duty to uphold the rights of the accused – forced disclosure by the Defence of its strategy, obligatory in nature or otherwise, particularly if not properly formulated in response to Prosecution evidence, would undermine Mr. Katanga’s right to a fair trial. His rights would then not be exercised in full, as otherwise required by the governing texts. Any limitation by means of requesting or requiring of the Defence that it disclose its defence(s) other than pursuant to rule 79(1) must therefore be rejected.

²¹ Regulation 1(1) (Adoption of these Regulations). *See also* Regulation 54, the preamble of which subjects any order issued pursuant to same, to the Statute and the Rules.

²² *See* article 21 (Applicable Law) (“(1) The Court shall apply: (a) in the first place, this Statute... and its Rules of Procedure and Evidence ... (3) The application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights...”).

²³ According to Regulation 54, “At a status conference, the Trial Chamber may, in accordance with the Statute and the Rules, issue any order in the interests of justice for the purposes of the proceedings on, *inter alia*, the following issues: (f) the production and disclosure of the statements of the witnesses on which the participants propose to rely”.

²⁴ *See* article 64(2) (Functions and Powers of the Trial Chamber) (“The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused...”); article 66(1) (Presumption of Innocence), and article 67 (Rights of the Accused).

D. No foundation in the Statute or Rules to force disclosure of the accused's defence prior to trial

18. The first two prosecution requests seek to force the Defence to break his right to silence and reveal the nature of his defence. The Defence is not under any statutory obligation to provide the Prosecution with any information that could reveal the strategy of its case, save with regard to the existence of an alibi or a ground for excluding criminal responsibility provided for in article 31(1).²⁵ That the defence cannot be forced to otherwise present its strategy is also confirmed by the drafting history of rule 78.²⁶ In *Lubanga*, the Appeals Chamber similarly confirmed that the Trial Chamber in its decision under consideration²⁷ “makes no order requiring that the accused reveal his defence(s)”.²⁸

19. In writing on ICC rule 132²⁹ (Status Conferences), one commentator notes that it does not contain any obligation on the defence to inform the Trial Chamber – or indeed the Prosecution – about its main lines of the defence case.³⁰ For its part, Rule 79(4) (Disclosure by the Defence) governs only the ordering by a Trial Chamber of “any other *evidence*”, which excludes by definition mere information (i.e. the lines of defence). The same is true

²⁵ Pursuant to rule 79(1), the defence is to notify the Prosecution of any special defence listed in same. Failure to provide such notice does not limit the right of the defence to raise these matters and to present evidence thereon (rule 79(3)). The Defence has communicated to the Prosecution that it does not intend at this stage to raise the existence of an alibi, or any ground for excluding criminal responsibility provided for in article 31(1). See ICC-01/04-01/07-T-74-CONF-ENG ET, 2 November, pp 61-62.

²⁶ See Helen Brady, “Disclosure of Evidence”, in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsey, New York: Transnational Publishers Inc., 2001), pp 406, 416 (It was acknowledged during informal consultations in the Preparatory Committee that the accused cannot be forced to present a defence either at the confirmation hearing or at the trial).

²⁷ ICC-01/04-01/06-T-71-ENG ET WT, *Prosecutor v. Lubanga Dyilo*, *Oral Decision of Trial Chamber I of 18 January 2008*, 18 January 2008, p. 9, lines 4-21.

²⁸ ICC-01/04-01/06-1433, *Prosecutor v. Lubanga Dyilo*, Judgment on the Appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, paras 51, 34 (The Appeals Chamber concurred with that Trial Chamber's view that its decision “does not impose disclosure obligations on the [d]efence...”). See also ICC-01/04-01/06-1290, *Prosecutor v. Lubanga Dyilo*, Decision on the Request of Mr. Thomas Lubanga Dyilo for Suspensive Effect of his Appeal Against the Oral Decision of Trial Chamber I of 18 January 2008, 22 April 2008, para. 8 (Confirming that the Trial Chamber decision in question did not oblige the defence to disclose his lines of defence); ICC-01/04-01/06-T-71-ENG ET WT, *Prosecutor v. Lubanga Dyilo*, Oral Decision of Trial Chamber I of 18 January 2008, 18 January 2008, p. 9, lines 4-5 (The Trial Chamber only invited the defence in the said case to disclose his lines of defence).

²⁹ Rule 132 (Status Conferences) reads as follows: “(1) Promptly after it is constituted, the Trial Chamber shall hold a status conference in order to set the date of the trial. The Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may postpone the date of the trial. The Trial Chamber shall notify the trial date to all those participating in the proceedings. The Trial Chamber shall ensure that this date and any postponements are made public. (2) In order to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber may confer with the parties by holding status conferences as necessary”.

³⁰ See Alphons Orié, “Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC”, in Antonio Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), Vol. II, p. 1484.

with regard to article 69(3) (Evidence), pursuant to which the Court has “the authority to request the submission of all *evidence* that it considers necessary for the determination of the truth”.³¹ The Defence notes too, that no document is required at the ICTR in which the defence is obliged to disclose its strategy.³² In short, there is no obligation in the Statute or in the Rules, or indeed in the relevant jurisprudence, for the Defence to disclose its strategy.

20. It is to be noted that the Lubanga Defence team was ordered to produce, three weeks prior to the commencement of trial, a document setting out “in general terms the defences the accused intends to rely on and any substantive factual or legal issues that he intends to raise (and including by way of an alibi or grounds for excluding criminal responsibility under Rule 79 of the Rules)”.³³ However, the circumstances of that case were different from the circumstances in the present case. The order in the Lubanga trial was given many months before the trial was due to commence.³⁴ In the present case, there is insufficient time to produce such a document prior to trial. If the Chamber would even render a decision on the Prosecution’s request prior to trial, leave to appeal may be sought by one of the parties. It is therefore not to be expected that this issue will be resolved prior to the commencement of the trial. In addition, the Defence is currently overloaded with other tasks and cannot be expected to produce such a document within a few days. It will need adequate time to prepare such a document, and even in such circumstances it will fundamentally interfere with the Defence preparation of prosecution witnesses. Given the state of current understanding of the Prosecution case and level of progress of Defence investigations it is, in any event, doubtful how useful or accurate the resulting information will turn out to be.

21. In these circumstances, the Lubanga Trial Chamber’s decision to order the Defence to produce such a document should not be followed. It has in any event not been confirmed by

³¹ Emphasis added.

³² See ICTR Rules 73bis(F) (Pre-Trial Conference) (“At the Pre-Trial Conference, the Trial Chamber or the designated Judge may order the Defence to file a statement of admitted facts and law and a pre-trial brief addressing the factual and legal issues, not later than seven days prior to the date set for trial”).

³³ ICC-01/04-01/06-1235, *Prosecutor v. Lubanga Dyilo*, Decision on Disclosure by the Defence, 20 March 2008, para. 41(b).

³⁴ Already on 13 December 2007 did the Trial Chamber issue an “Order setting out the schedule for submissions and hearing on further subjects which require determination prior to trial,” inviting submissions on, inter alia, the issue of disclosure by the defence as follows (‘ ICC-01/04-01/06-1083, paragraph 1 B). On 7 January, submissions were filed by the Prosecution, Defence and victim participants. On 9 January 2008, these issues were debated orally during a Status Conference (Transcript of hearing on 9 January 2008, ICC-01/04-01/06-T-67-ENG, pages 25-44) and on 20 March 2008, the Chamber rendered its decision issuing the order (see *ibid*). Many tentative dates to start the trial were set, but they were constantly delay as a result of unresolved disclosure issues. Eventually, the trial started in January 2009.

the Appeals Chamber,³⁵ neither has it been executed by the Defence.³⁶ The Lubanga Trial Chamber itself recognized that “[t]here is often likely to be a link between the disclosure obligations to be imposed on the defence, on the one hand, and the proximity of the start date of the trial and the extent to which the prosecution has fulfilled its own disclosure obligations, on the other.”³⁷ Given that the present case is due to start in less than three weeks and given the new witnesses that have been added to the list of the Prosecution witnesses, the Defence submits that, in these circumstances, it would be unfair to request the Defence to produce such a document. This accords with the Lubanga Trial Chamber, holding:³⁸

It is of paramount importance that they are deployed only on the basis of their relevance and applicability to the known facts and issues, against the background of the interests of justice and the circumstances of the case. At all times the Chamber has an absolute duty to ensure that any discretionary order it makes regarding defence disclosure does not derogate from the accused's right to a fair and impartial hearing in which his rights are fully safeguarded.

E. Limited obligation to disclose material in its possession or control

(1) General principles

(2) Prosecution and Defence inspection of material in their respective control differs temporally

22. The Defence is to permit the Prosecution, pursuant to rule 78 (Inspection of Material in Possession or Control of the defence), to inspect tangible objects in its possession or control that it intends to use as evidence at trial. The Defence is under an obligation to disclose such materials *only* if it intends to use them.³⁹ In comparing rules 77 (Inspection of Material in Possession or Control of the Prosecutor) and 78, the range of disclosure with respect to the latter is not as extensive: it does not extend, as does ruled 77, to that which is “material to the preparation” of the Prosecution case.⁴⁰ In other words, there is no comparable duty imposed on the Defence to disclose items that might

³⁵ The Defence sought leave to appeal this decision, which was rejected by majority on 8 May 2008, see ICC-01/04-01/06-1313.

³⁶ See transcripts: ICC-01/04-01/06-T-89-FRA, pages 31-33; see also ICC-01/04-01/06-1366.

³⁷ ICC-01/04-01/06-1235, *Prosecutor v. Lubanga Dyilo*, Decision on Disclosure by the Defence, 20 March 2008, para. 34.

³⁸ *Ibid*, para. 33 [emphasis added].

³⁹ Alphons Orie, “Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC”, in Antonio Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), Vol. II, p. 1483-1484.

⁴⁰ See rules 77 and 78.

assist the Prosecution.⁴¹ Nor is the Defence obliged to disclose incriminating evidence, as this would violate the accused's right against self-incrimination.⁴²

23. The Defence does not object to allow the Prosecution pursuant to rule 78, to inspect material within its control *intended for use at trial*. However, the purpose of rule 78 is not to oblige the Defence to expose to the Prosecution its strategy through having to identify exactly which documents it will use at trial.⁴³ To do so would effectively reveal to the Prosecution its lines of defence, which as submitted above, and in order to secure the respect in full of Mr. Katanga's rights and the fairness of the proceedings, the Defence cannot be obliged to do. Hence the difference temporally between the inspection of materials in the possession of the Defence with that in the possession of the Prosecution. In essence, the Defence must permit the Prosecution to inspect materials pursuant to rule 78 only after the close of the former's case, and prior to the commencement of that of the Defence.

24. As noted above, and as similarly confirmed by the Trial Chamber in *Bagosora*,⁴⁴ reciprocal disclosure relates only to materials that the Defence intends to use at trial, an assessment of which the Defence will not be able to make until the Prosecution has rested its case. Importantly, this principle has been upheld by the ICTR, despite the fact that the construction of the rule there is identical to that at the ICC (i.e. neither ICTR Rule 67(C)⁴⁵ nor ICC rule 78 specifies the time at which disclosure must take place). The difference in time of this disclosure obligation imposed on the defence is also enshrined in the relevant ICTY rule.⁴⁶

⁴¹ William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001), p. 117.

⁴² See article 67(1)(g).

⁴³ See *Prosecutor v. Delalić*, Case No. IT-96-21, Decision on the Motion to Specify the Documents Disclosed by the Prosecutor that Delalić's Defense Intends to Use as Evidence, 8 September 1997, para. 7 (The rationale of ICTY Rule 67(C) is not to oblige the defence to expose to the prosecution exactly which documents that it will use at trial). The said Rule read as follows at the relevant time: "If the defence makes a request pursuant to Sub-rule 66(B) [Disclosure by the Prosecution], the Prosecutor shall be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at trial". Cf. ICC-01/04-01/06, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Various Issues Related to Witnesses' Testimony During Trial, 29 January 2008, para. 34 (In which the Trial Chamber found that "the disclosure of documents to be used in questioning of a witness is governed by rules 77 and 78 of the Rules: the parties are required to provide for inspection, in advance of trial, those documents which they intend to use for this purpose").

⁴⁴ *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Decision on Prosecutor's Request for an Order Allowing the Inspection of Defence Materials and a Time-Limit for Compliance Pursuant to Rules 66(B), 67(C) and 73, 2 March 2004, para. 8.

⁴⁵ Pursuant to ICTR Rule 67(C), "If the Defence makes a request pursuant to Rule 66 (B) [Disclosure of Exculpatory and Other Relevant Material], the Prosecutor shall in turn be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the Defence and which it intends to use as evidence at the trial".

⁴⁶ Rule 67 (Additional Disclosure) (Pursuant to which the defence is to permit the prosecutor, at a time not prior to a ruling under 98bis [i.e. not prior to the judgment of acquittal, which necessarily implies after the close of the

Not only then, should disclosure by the Defence be of a substantively restricted nature, but it must also be limited in time to after the close of the Prosecution case in chief.

25. The Defence notes further in this regard and as submitted above, that rule 78 refers to real evidence, and not to proofs of testimonial evidence that is expected to be given by a witness. That is to say, the Prosecution is not entitled pursuant to rule 78, to inspect Defence witness statements.⁴⁷ Nor is the possible desire by the Prosecution to use Defence witness statements or interview notes to assess the credibility of its own witnesses, an interest that triggers any Defence obligation under rule 78.⁴⁸ The Defence therefore agrees with Judge Blattmann⁴⁹ that any expansive reading of regulation 52(2) of the Regulations of the Registry to impose on the Defence disclosure pursuant to rule 78⁵⁰ is flawed.

F. No obligation to disclose the evidence on which the Defence intends to rely at trial

26. The Prosecution's third request entails in part securing an order obliging disclosure of all the evidence upon which the Defence intends to rely at trial prior to the Defence case.

27. Article 69(3) enables the Trial Chamber to "request the submission of all evidence that it considers necessary for the determination of the truth". Similarly, the Trial Chamber has the

prosecution case], but not less than one week before the start of the defence case: "(i) ... to inspect and copy any books, documents, photographs, and tangible objects in the defence's custody or control, which are intended for use by the [d]efence as evidence at trial...").

⁴⁷ See *Prosecutor v. Tadić*, Case No. IT-94-I-A, Judgment, Separate Opinion of Judge Shahabuddeen, 15 July 2007, paras 45, 47-48 ("It may seem odd and unbalanced that the defence has a unilateral right to receive copies of prosecution witness statements under Rule 66(A)(ii). But that, I think, is the transmuted equivalent of the right of an accused person, under many legal systems, to be apprised beforehand, in one way or another, of the evidence for the prosecution. Also, it has to be remembered that, altogether apart from the question whether he is guilty or not guilty, a man has a right not to be charged without just cause. Fairness requires this kind of unilateralism. A man who has been indicted, with the prospect of loss of liberty, has a right to know what is the evidence on the basis of which he is being put through the judicial process. The prosecution does not stand on that ground and has no similar basis for demanding access to the evidence of the defence. In my opinion, the reciprocity provisions of Rule 67(C), read with Rule 66(B), do not enable the prosecution to have access to defence witness statements. More importantly, it appears to me that, *a contrario*, those provisions imply that the prosecution stands excluded from such access: materials to which the prosecution may have access, and then only on a reciprocal basis, are specified, and they do not include witness statements").

⁴⁸ See *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on Prosecution Cross-Motion for Enforcement of Reciprocal Disclosure, 21 September 2007, para. 9.

⁴⁹ ICC-01/04-01/06-1313, *Prosecutor v. Lubanga Dyilo*, Decision on the Defence Request to Leave to Appeal the "Decision on Disclosure by the Defence", Dissenting Opinion of Judge Blattmann, 8 May 2008, para. 29 (In which Judge Blattmann notes, "[w]hile regulation 52(2) [of the Regulations of the Registry] states that, 'participants shall provide to the court officer, in electronic version whenever possible, the evidence they intend to use at the hearing at least three full working days before the scheduled hearing', the Trial Chamber ordered full disclosure to the parties, participants and the Trial Chamber").

⁵⁰ See ICC-01/04-01/06-1313, *Prosecutor v. Lubanga Dyilo*, Decision on the Defence Request to Leave to Appeal the "Decision on Disclosure by the Defence", 8 May 2008, paras 27-31.

authority pursuant to rule 79(4), to order the disclosure of evidence other than that of an alibi or any special defence on which the accused intends to rely. This provision merely indicates that the express obligations with respect to alibi and other defences excluding responsibility, do not prevent the Trial Chamber from making decisions in respect of disclosure of other evidence. These functions and powers of the Trial Chamber are not unlimited, however, for it must exercise those functions and powers in accordance with the Statute and the Rules⁵¹; and “ensure that a trial is fair and expeditious and is conducted with full respect of the rights of the accused”.⁵²

28. Apart from the premature nature of this application, arising out of the fact that Prosecution disclosure is not even complete and the prosecution case is yet to start, the Defence, unlike the prosecution, is not presenting allegations, but defending against them. Its situation is therefore quite different from that of the Prosecution. In order to preserve the fairness of the trial of an accused, the Defence, unlike the Prosecution, cannot be limited in time as to the introduction of evidence as long as the defence case has not been closed, although adverse inferences may be drawn. In light of this, the exact scope of the Defence obligation to produce some advance notice of the evidence they will rely on during the defence case will have to be determined at a later stage after the close of the Prosecution’s case.

G. The Defence is not obliged to disclose its witness statements

29. The general obligation to disclose prior statements of (prospective) witnesses does not apply to the Defence at the ICC.⁵³ For example, there is no corresponding disclosure obligation on the defence with respect to its witness statements as there is on the Prosecution.⁵⁴ In

⁵¹ See article 64(1).

⁵² Article 64(2) (Functions and Powers of the Trial Chamber); also see para. 15 above for similar arguments.

⁵³ Alphons Orie, “Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC”, in Antonio Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), Vol. II, p. 1484.

⁵⁴ See rule 76(1) (“The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence”); rule 76(2) (“The Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses”); rule 76(3) (“The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks”).

Lubanga, the defence was ordered to provide after the completion of the Prosecution case, only the name, address, and date of birth of any witness and not their statements *per se*.⁵⁵

30. Similarly, the Appeals Chamber in *Tadić* opined that “[t]here is no blanket right for the [p]rosecution to see the witness statement of a [d]efence witness”. Instead, it has the power only to apply for such disclosure, only after the witness has testified. However, the Chamber retains the discretion to grant this kind of disclosure based on the particular circumstances in the case at hand. Moreover, its power to so order relates to an evidentiary question (in terms of the Chamber ascertaining the credibility of the witness in question). As such, disclosure thereof, if the Trial Chamber considers it right in the circumstances to so order, is to the Trial Chamber and not to the prosecution.⁵⁶ As noted by ICTY Judge Shahabuddeen,

It is difficult to see how a defence witness statement is to be used by the prosecution otherwise than as a fishing expedition if it were the law that the prosecution has an automatic right to disclose on completion of the examination-in-chief of each defence witness. At the point of disclosure, the prosecution will have no basis for suspecting that there is any variance between oral testimony and written statement; it will be only “fishing” for a variance.⁵⁷

Strictly speaking then, the principle of equality of arms is not relevant to this particular issue.⁵⁸

31. Whilst disclosure of defence witness statement would be only after the close of the prosecution case, even then, the following would still apply, with the consequence that a Trial Chamber may still exclude it: the need to ensure a fair and expeditious trial, the rights of the accused, the probative value of the statement in question, and whether the said value is substantially outweighed by the need to ensure a fair trial.⁵⁹

⁵⁵ See ICC-01/04-01/06-1235, *Prosecutor v. Lubanga Dyilo*, Decision on Disclosure by the Defence, 20 March 2008, para 41(d).

⁵⁶ See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 2007, para. 322. See also *Prosecutor v. Dokmanović*, Case No. IT-95-13a-PT, Order, 28 November 1997 (in which disclosure of defence witness statements from witnesses it intended to call for trial were disclosed prior to the commencement of the trial, and in which such disclosure was made to the Trial Chamber only, pursuant to the consent of the defence, with the following proviso: the Chamber did not regard them as having been admitted as evidence, but “only assist our comprehension and management of the trial”).

⁵⁷ *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, Separate Opinion of Judge Shahabuddeen, 15 July 2007, para. 52.

⁵⁸ *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 2007, paras 319, 320. Cf. Prosecution Application, para. 10 (“[The disclosure of prior Defence witness statements or a summary thereof] would enable the parties to identify the issues to be tried and would therefore ensure a fair and expeditious trial through the equality of arms...”).

⁵⁹ *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 2007, paras 321, 322, 324.

32. The Defence submits that regulation 54(f)⁶⁰ of the Court must be subject to these considerations: the said regulation is to be applied in accordance with the Statute and the Rules, both of which guarantee Mr. Katanga the exercise in full of such rights and guarantees.⁶¹ Also, any discretionary power exercised by the Chamber under regulation 54(f) should be for evidentiary purposes only, as was the case of the very limited practice at the ICTY. On balance, however, and absent any explicit provision either in the Statute or in the Rules and for the reasons set forth above, the Defence cannot be obliged to disclose to the parties or indeed to the Chamber, its (prospective) witness statements.

33. Furthermore, the disclosure at the ICTY of defence witness materials was codified in ICTY Rule 65ter(G), pursuant to which the defence is to file after the close of the prosecution's case and before the commencement of the defence case, only a *summary* of the facts on which each witness it intends to call will testify. Whilst ICTY Rule 67(A)(ii) (Additional Disclosure) obliges the defence at a time not prior to a ruling under Rule 98bis (Judgment of Acquittal) and no longer than one week prior to the start of the defence case, to provide the prosecution copies of the statements of its witnesses, the said Rule was adopted as late as 2008. Criticism similar to that of amendments to other ICTY Rules favouring a more relaxed approach to the admission of written testimony can be made, particularly in that such amendments have met with strong judicial criticism concerning the influence of political and budgetary concerns emanating from the completion strategy on the fairness of the judicial process.⁶²

34. Indeed, the Prosecution in the current case has noted that the strategy at the ICTY "is to wind down the Tribunal and their rules are designated with that objective in mind.... [T]hings

⁶⁰ According to Regulation 54, "At a status conference, the Trial Chamber may, in accordance with the Statute and the Rules, issue any order in the interests of justice for the purposes of the proceedings on, *inter alia*, the following issues: (f) the production and disclosure of the statements of the witnesses on which the participants propose to rely".

⁶¹ See article 64(2) (Functions and Powers of the Trial Chamber) ("The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused..."); article 66(1) (Presumption of Innocence); article 67 (Rights of the Accused); article 69(40) (Evidence) ("The Court shall rule on the relevance or admissibility of any evidence taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence").

⁶² See Dissenting Opinion of Judge Hunt, *Prosecutor v. Slobodan Milošević*, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-chief in the form of Written Statements, 21 October 2003, para. 20. See also *Prosecutor v. Tadić*, Case No. IT-94-1, Separate Opinion of Judge Stephen on Prosecution Motion for Production of Defence Witness Statements, 27 November 1996, pp. 3, 7 (The relevant rules did not extend to the disclosure by the defence of its witness statements, but applied instead only to the prosecution. "Our Rules strongly support the existing inviolate nature of witness statements in the possession of defence counsel").

are being dealt with more expeditiously”.⁶³ Any Defence disclosure obligations should thus not exceed providing after the close of the Prosecution’s case and before the commencement of the Defence case, a summary *only* of the facts on which each witness it intends to call will testify, and not all the evidence on which it intends to rely on for trial, as otherwise sought.⁶⁴ The Prosecution should be able to properly prepare for its cross-examination of Defence witnesses based on the summaries provided at the relevant time, if indeed so ordered.⁶⁵

G. Conclusion

35. For the reasons set forth above, the Defence requests the Trial Chamber to reject in its entirety the Prosecution Application.

Respectfully submitted,



David HOOPER

Dated this 5 November 2009

At The Hague

⁶³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-T-74-CONF-ENG ET, lines 7-10, dated 2 November 2009.

⁶⁴ See Prosecution Application, para. 15(iii) (“Pursuant to the reasoning laid out in this submission, the Prosecution seeks Trial Chamber II to order the Defence to: Provide disclosure of all the evidence the Defence intends to rely on for trial, including information regarding the identification of witnesses, their statements, or summaries thereof before the commencement of the Defence’s case”). See also *idem*, para. 9 (“The Prosecution contends that pursuant to rule 79(4) and regulation 54, the Chamber has the discretionary power to order disclosure of all evidence that the accused intends to rely on for trial and which is not covered by the scope of rules 78 and 79(1)”).

⁶⁵ See *Prosecutor v. Dragomir Milosović*, Case No. IT-98-29/1-T, Decision on the Prosecution’s Motion for Defence Compliance with Rule 65ter (G), 26 June 2007 (“Considering that a party should be able to properly prepare for cross-examination based on the other party’s Rule 65ter [Pre-Trial Judge] summaries”).