

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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Date: 14 September 2010

**TRIAL CHAMBER II**

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

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

**IN THE CASE OF  
THE PROSECUTOR *v.* GERMAIN KATANGA *and* MATHIEU NGUDJOLO CHUI**

**Public Document**

**Decision on the "Prosecution's Application Concerning Disclosure by the Defence  
Pursuant to Rules 78 and 79(4) "**

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

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Trial Chamber II ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, having regard to Articles 64 and 67 of the Rome Statute of the International Criminal Court ("Statute"), Rules 78 and 79 of the Rules of Procedure and Evidence ("Rules"), Regulation 54 of the Regulations of the Court and Regulation 52 of the Regulations of the Registry, issues the following decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)" ("Application"), filed on 14 October 2009.<sup>1</sup>

## I. INTRODUCTION

1. On 23 January 2009, the Chamber issued the "Order Fixing the Schedule for Pre-Trial Disclosure of Incriminatory and Exculpatory Evidence and the Date of a Status Conference (rule 132 of the *Rules of Procedure and Evidence*)" ("Order on Prosecution's disclosure").<sup>2</sup>
2. On 31 August 2009, the Chamber set the date for the commencement of the hearings on the merits to 24 November 2009.<sup>3</sup>
3. On 14 October 2009, the Prosecution filed its Application.
4. On 26 October and 5 November 2009, the Defence for Mathieu Ngudjolo ("Ngudjolo Defence") and the Defence for Germain Katanga ("Katanga Defence", collectively "Defence") respectively filed their responses to the Application.<sup>4</sup>

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<sup>1</sup> ICC-01/04-01/07-1529.

<sup>2</sup> ICC-01/04-01/07-846-tENG.

<sup>3</sup> Décision reportant la date d'ouverture des débats au fond (règle 132-1 du Règlement de procédure et de preuve), 31 August 2009, ICC-01/04-01/07-1442.

<sup>4</sup> Defence for Mathieu Ngudjolo, *Réponse de la Défence de Mathieu Ngudjolo à la requête du Procureur numéro ICC-01/04-01/07-1529 du 14 octobre 2009*, 26 October 2009, ICC-01/04/01/07-1560 ("Ngudjolo Defence's Response"); Defence for Germain Katanga, *Defence Response to Prosecution's Application*

5. On 20 November and 1 December 2009, the Presiding Judge issued the “Directions for the conduct of the proceedings and testimony in accordance with rule 140” (“Decision on Rule 140”).<sup>5</sup>
6. The hearings on the merits started on 24 November 2009.

## II. SUBMISSIONS OF THE PARTIES

### A. Prosecution’s Application

7. In the Application, the Prosecution requested the Chamber to order the Defence to:
  1. provide disclosure, in electronic form, or permission for inspection of material in the possession or control of the Defence, pursuant to Rule 78, three weeks before the commencement of the trial;<sup>6</sup>
  2. 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;<sup>7</sup>
  3. 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.<sup>8</sup>

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*Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4) (ICC-01/04-01/07-1529) of 13 October 2009, 5 November 2009, ICC-01/04-01/07-1604 (“Katanga Defence’s Response”).*

<sup>5</sup> ICC-01/04-01/07-1665 ; ICC-01/04-01/07-1665-Corr.

<sup>6</sup> Application, p. 3 and par. 15 (i).

<sup>7</sup> Ibid., p. 3 and par. 15 (ii).

<sup>8</sup> Ibid., p. 3 and par. 15 (iii).

8. The Prosecution submitted that such disclosure is necessary in order to ensure a fair and expeditious trial and in order to assist the Chamber in the determination of the truth.<sup>9</sup>

9. The Prosecution argued that Rules 77 and 78 share a common objective, namely “ensuring an efficient and fair trial through a reciprocal inspection regime”.<sup>10</sup> For this reason, both articles should be interpreted in a uniform manner consistent with this objective.<sup>11</sup>

10. The Prosecution submitted that a number of provisions in the Statute's framework envisage disclosure by the Defence that may go beyond the scope of the defences found in Rule 79(1).<sup>12</sup> One of these provisions, Rule 78, covers material the Defence intends to use as evidence at trial, when questioning not only its own witnesses but also Prosecution witnesses.<sup>13</sup>

11. The Prosecution further claimed that the Defence's obligation to provide access to material under Rule 78 is of a mandatory nature.<sup>14</sup> It also argued that it needs not be formally requested to become operational.<sup>15</sup>

12. The Prosecution also submitted that for efficiency reasons, the “inspection” referred to in Rule 78, should be performed in the same manner as the one that has been determined for the application of Rule 77, namely through electronic disclosure.<sup>16</sup>

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<sup>9</sup> Ibid., p. 3 and par. 14, making reference to Trial Chamber I, Decision on disclosure by the defence, 20 March 2008, ICC-01/04-01/06-1235 and ICC-01/04-01/06-1235-Corr-Anx1 (“Decision on disclosure by the defence, ICC-01/04-01/06-1235-Corr-Anx1”), par. 28.

<sup>10</sup> Ibid., p. 3.

<sup>11</sup> Ibid., p. 3.

<sup>12</sup> Ibid., par. 1, making reference to Decision on disclosure by the defence, ICC-01/04-01/06-1235-Corr-Anx1, par. 30.

<sup>13</sup> Ibid., par. 1-2.

<sup>14</sup> Ibid., par. 3.

<sup>15</sup> Ibid., par. 7-8.

<sup>16</sup> Ibid., par. 4-6.

13. According to the Prosecution, the Chamber has a discretionary power, pursuant to Rule 79(4) of the Rules and Regulation 54 of the Regulations of the Court, to order the disclosure of all the evidence that the accused intends to rely on for trial and which is not covered by the scope of Rules 78 and 79(1). The Prosecution contended that this includes “the defences the accused intends to rely on and any substantive factual or legal issues that he intends to raise, as well as information pertaining to the identification of the Defence witnesses, their statements or a summary thereof”.<sup>17</sup> Such disclosure would ensure “a fair and expeditious trial through the equality of arms and the avoidance of interlocutory delays”.<sup>18</sup>

14. The Prosecution submitted that the principle of a reciprocal obligation to disclose evidence is supported by the jurisprudence of the Court.<sup>19</sup>

### B. Response of Ngudjolo Defence

15. In its response, the Ngudjolo Defence emphasized that the three requests of the Prosecution lack a legal basis.<sup>20</sup>

16. With regard to the Prosecution’s first request, the Ngudjolo Defence stressed the difference between Rules 77 and 78 and stated that the latter only applies to “books, documents, photographs and other tangible objects”, which the Defence will use as evidence at trial. At the time of the Application, the Defence claimed that it was not in possession of any such material which it was sure it would use at trial, and that it intended to continue its investigations, as the Prosecution presents its case. The Ngudjolo Defence stressed that the obligation imposed on the Defence by

<sup>17</sup> Ibid., par. 9 (footnotes omitted). The Prosecution made reference to Decision on disclosure by the defence, ICC-01/04-01/06-1235-Corr-Anx1, and Trial Chamber I, Decision on the defence request for leave to appeal the “Decision on disclosure by the defence”, 8 May 2008, ICC-01/04-01/06-1313.

<sup>18</sup> Ibid., par. 10.

<sup>19</sup> Ibid., par. 11, making reference to Decision on disclosure by the defence, ICC-01/04-01/06-1235-Corr-Anx1, par. 34, 41(b), 41(d) and 41(e). The Prosecution also made reference to Rule 65 *ter* (G) of the Rules of Procedure and Evidence of the ICTY and relevant jurisprudence of the *ad hoc* Tribunals. Ibid., par. 12, fn. 24

<sup>20</sup> Ngudjolo Defence’s Response, par. 5, 32-43.

Rule 78 is limited to the material that the Defence intends to use at trial. Only when a decision on which material to use at trial has been made – a decision that will depend on the Prosecution’s presentation of its evidence – will the Defence be in a position to allow the Prosecution to access such material.<sup>21</sup>

17. The Ngudjolo Defence further stressed that Rule 78 does not impose any deadline on the Defence. The difficulty in imposing an exact deadline lies in the fact that it cannot be determined exactly at what point in time the Defence knows what material it will use at trial.<sup>22</sup> The Defence claims that there is no inconvenience in disclosing to the Prosecution the exculpatory material that it will decide to use at trial, provided that it is not required to do so until such decision is made, and that it will do so in electronic form, as long as it will have the necessary equipment and services.<sup>23</sup>

18. Regarding the Prosecution’s second request, it was submitted that neither Rule 78 nor Rule 79(4) or Regulation 54 of the Regulations of the Court impose an obligation on the part of the Defence to disclose 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 prior to the commencement of the trial. The Ngudjolo Defence claimed that such an obligation would amount to a violation of the rights of the accused.<sup>24</sup>

19. According to the Ngudjolo Defence, it would be impossible to produce such a document so long as the Prosecutor has not presented its case in its entirety and not all documents have been disclosed to the Defence.<sup>25</sup>

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<sup>21</sup> Ibid., par. 7-10, 32-36.

<sup>22</sup> Ibid, par. 11, 34.

<sup>23</sup> Ibid, par. 12-14.

<sup>24</sup> Ibid., par. 38-39, see also par. 15-28.

<sup>25</sup> Ibid., par. 39.

20. Concerning the Prosecution's third request, the Ngudjolo Defence submitted that Rules 78 and 79 as well as Regulation 54 of the Regulations of the Court do not impose any obligation on the Defence to disclose all the material requested by the Prosecution. More specifically, it was submitted that there is no legal basis for the Prosecution's request to disclose witness statements.<sup>26</sup>

### C. Response of Katanga Defence

21. The Katanga Defence opposed the Application on the basis that the Prosecution's requests were "premature, impractical, inconsistent with the rights of the defence and finally, ill-founded in the Statute and the Rules".<sup>27</sup>

22. The Application was considered premature since (i) it has not been demonstrated that the Defence is in violation of any of its obligations under the Rules, such that an order for compliance is required;<sup>28</sup> and (ii) at the time of the filing of the Application the Defence was still being served with proposed Prosecution evidence, which had not yet been presented.<sup>29</sup> In particular, the Defence was not in possession of a definitive order of Prosecution witnesses and it was not clear on which topics each witness was to testify. It was therefore "unreasonable" for the Prosecution to expect, at that stage of the proceedings, a formulated defence case or a decision on witnesses and documents to use at trial when the Defence was still unsure about the parameters of the case it was expected to meet.<sup>30</sup>

23. Furthermore, the Katanga Defence emphasized that the accused has no duty or obligation to prove a defence, nor need he afford the Prosecution any assistance in proving its case.<sup>31</sup>

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<sup>26</sup> Ibid., par. 40-43.

<sup>27</sup> Katanga Defence's Response, par. 2.

<sup>28</sup> Ibid., par. 2- 5.

<sup>29</sup> Ibid., par. 2, 6-10.

<sup>30</sup> Ibid., par. 7-9.

<sup>31</sup> Ibid., par. 10.



24. It further argued that any time limit imposed on the Defence before the closure of the Prosecution case would be contrary to Katanga's right to a fair trial, particularly to his right to silence.<sup>32</sup> It was stressed that attempts to constrain 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 trial"<sup>33</sup>. It was further submitted that whilst it may be appropriate to request certain details from the Defence prior to the opening of its case, Regulation 54 should not be read to impose such obligations on the Defence before the Prosecution's case has even begun. Regulation 54 is to be applied in accordance with the Statute and the Rules.<sup>34</sup>

25. The Defence is under no statutory obligation to provide the Prosecution with any information that could reveal the strategy of its case, except for its obligations under Rule 79 (1) and (2).<sup>35</sup> In this respect, the Katanga Defence submitted that pursuant to Rule 79(4) and Article 69(3), the Chamber can order the disclosure or submission of "evidence", which by definition excludes mere information such as lines of defence.<sup>36</sup> It further noted that even though the defence team in the *Lubanga* case was ordered to produce, three weeks prior to the commencement of the trial, a document setting out "in general terms the defences the accused intends to rely on and any substantive factual and 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)", the circumstances in that case were different from those in the present case. In the *Lubanga* case, such an order was given several months before the trial was due to start. In the present case, it was submitted that the time was insufficient for such a document to be produced prior to start of trial. It

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<sup>32</sup> Ibid., par. 11-17.

<sup>33</sup> Ibid., par. 11.

<sup>34</sup> Ibid., par. 16.

<sup>35</sup> Ibid., par. 18.

<sup>36</sup> Ibid., par. 19.

was also stressed that the decision in the *Lubanga* case to order the Defence to produce such a document has not been confirmed by the Appeals Chamber, nor has it been implemented by the Defence.<sup>37</sup>

26. Furthermore, according to the Katanga Defence the main difference between the disclosure obligations of the Prosecution pursuant to Rule 77 and that of the Defence according Rule 78 is that the scope of disclosure with respect to the latter is not as extensive. It was stressed that the Defence is under no obligation to disclose material which might assist the Prosecution, nor is the Defence obliged to disclose incriminating evidence.<sup>38</sup>

27. It was submitted that the Defence must permit the inspection of material that it intends to use at trial pursuant to Rule 78, only after the close of the Prosecution case and prior to the commencement of the Defence case. Reciprocal disclosure relates only to materials that the Defence intends to use at trial; the Defence will not be able to make an assessment of this until the Prosecution has closed its case.<sup>39</sup>

28. It was further argued that Rule 78 only refers to “real” evidence, not to proofs of testimonial evidence that is expected to be given by a witness, hence does not include the inspection of Defence witness statements by the Prosecution.<sup>40</sup>

29. The Katanga Defence argued that the Chamber’s powers to order disclosure of evidence pursuant to Rule 79(4) must be exercised in accordance with the Statute and the Rules and particularly with respect for the rights of the accused. It submitted that, unlike the Prosecution, the Defence “is not presenting allegations, but

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<sup>37</sup> Ibid., par. 20-21, making reference to Decision on Disclosure by the defence, ICC-01/04-01/06-1235-Corr-Anx1, par. 41(b).

<sup>38</sup> Ibid., par. 22.

<sup>39</sup> Ibid., par. 23-24.

<sup>40</sup> Ibid., par. 25.

defending against them”, and therefore “cannot be limited in time as to the introduction of evidence as long as the defence case has not been closed”.<sup>41</sup>

30. Finally, the Katanga Defence stated that, absent any explicit provision either in the Statute or in the Rules, there is no obligation on the part of the Defence to disclose witness statements to the Prosecution. The Defence referred to the *Lubanga* case, where the Defence was ordered to provide, after the completion of the Prosecution case, only the name, address and date of birth of any witness.<sup>42</sup> It was therefore argued that Defence disclosure obligations should 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 the Defence intends to rely on for trial.<sup>43</sup>

### III. ANALYSIS AND CONCLUSION

#### A. Introductory remarks

31. The disclosure obligations of the Defence are governed mainly by Rules 78 and 79 of the Rules. Regulation 54 of the Regulations of the Court, and Regulation 52 of the Regulations of the Registry are also relevant.<sup>44</sup>

32. The Chamber notes that the Application and the responses of the Defence were filed prior to the commencement of the trial, on 14, 26 October and

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<sup>41</sup> *Ibid.*, par. 28.

<sup>42</sup> *Ibid.*, par. 29, referring to Decision on Disclosure by the defence, ICC-01/04-01/06-1235-Corr-Anx1, par. 41(d).

<sup>43</sup> *Ibid.*, par. 34.

<sup>44</sup> Also, the Chamber notes that pursuant to Rule 80 of the Rules “[t]he defence shall give notice to both the Trial Chamber and the Prosecutor if it intends to raise a ground for excluding criminal responsibility under article 31, paragraph 3. This shall be done sufficiently in advance of the commencement of the trial to enable the Prosecutor to prepare adequately for trial.” The Chamber notes that in the present case neither of the Defence team has notified such an intention. It further notes that this rule concerns the procedures for raising specific defences provided for in Article 31(3) of the Statute and that this provision is not the object of the present Application. This provision has therefore not been addressed any further in the present decision.

5 November 2009, respectively. A few days before the start of the trial, on 20 November 2009, in its Decision on Rule 140,<sup>45</sup> the Chamber gave directions for the conduct of the proceedings which included, among other things, some guidance on disclosure of material by the parties. By this decision, the Chamber imposed limited disclosure obligations upon the Defence within the context of cross-examination, and no disclosure obligations prior to the commencement of the hearings on the merits.

33. In particular, in paragraph 108 of the Decision on Rule 140, the Chamber stated:

108. If a cross-examining party knows in advance that it will make reference to a document that is not already in evidence during cross-examination of a particular witness, it must inform the Chamber and the Court Officer at least three (3) full working days before the scheduled hearing and provide it in electronic form, in accordance with regulation 52(2) of the Regulations of the Registry.

34. On 12 February 2010, the Chamber orally clarified paragraph 108 cited above, stating that information of the documents intended for use in cross-examination, should be made not only to the Chamber and the Court Officer, but also to “the parties and the participants”, within the said time-limit. With that inclusion, the Chamber added, “the adversarial nature of the proceedings and the fairness of the proceedings under Article 64(2) of the Statute will be reinforced”.<sup>46</sup>

35. The present decision, while dealing with the requests set out in the Prosecution’s Application, will further develop the Chamber’s position on the disclosure obligations of the Defence, in particular their scope and timing.

36. The Chamber notes that the Statute’s framework does not provide for a reciprocal disclosure regime. The disclosure obligations of the Prosecution and the

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<sup>45</sup> See *supra*, par. 5.

<sup>46</sup> ICC-01/04-01/07-T-101-CONF-ENG ET 12-02-2010, p. 2-3.

Defence differ significantly, because of the particular roles that these two parties have at trial. While the Prosecution bears the burden of proof and has to investigate both incriminating and exonerating circumstances pursuant to Article 54(1)(a) of the Statute, the role of the Defence is largely reactive to the Prosecution's presentation of evidence. The Statute and the Rules impose on the Prosecution specific obligations of disclosure of incriminating and exculpatory material to the Defence, in time to allow the accused to adequately prepare its defence.<sup>47</sup> Different and more limited disclosure obligations are imposed on the Defence by Rules 78 and 79 of the Rules.

37. As stated by Trial Chamber I in the *Lubanga* case, the "tension between the irreducible elements necessary for a fair trial (which include the right to silence) on the one hand, and the appropriate obligations of disclosure by the defence on the other, is not always easy to resolve".<sup>48</sup> It further held that "[t]he starting-point for consideration of [defence disclosure] is that the fundamental rights of the accused not to incriminate himself or herself and to remain silent must not be undermined by any obligations imposed on the defence, or in any other way."<sup>49</sup> The Chamber has therefore "a critical duty to uphold these protections, which are enshrined in the Statute".<sup>50</sup> However, the Chamber stresses that the Statute's framework contains important provisions which define the obligations that can be imposed on the defence in order to secure a fair and expeditious trial, while ensuring that the rights

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<sup>47</sup> See in particular, Rule 76 setting out the Prosecution's obligation to provide the defence with the names and statements of all witnesses whom the Prosecution intends to call to testify sufficiently in advance to enable the adequate preparation of the defence; Rule 77, providing that the Prosecution has to permit the defence to inspect any books, documents, photographs and other tangible objects in his or her possession or control which are "material to the preparation of the defence" or are intended for use by the Prosecution as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person. Also, Article 67(2) of the Statute sets out the Prosecution's duty to disclose exculpatory evidence to the accused.

<sup>48</sup> Trial Chamber I, Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 19 November 2009, ICC-01/04-01/06-2192-Conf ("Second Decision on disclosure by the defence, ICC-01/04-01/06-2192-Conf"), par. 55.

<sup>49</sup> Decision on disclosure by the defence, ICC-01/04-01/06-1235-Corr-Anx1, par. 27; Second Decision on disclosure by the defence, ICC-01/04-01/06-2192-Conf, par. 55.

<sup>50</sup> Decision on disclosure by the defence, ICC-01/04-01/06-1235-Corr-Anx1, par. 27, referring to Articles 55(1)(a), 61(6), 66(1), 66(2), 67(1)(g) and 67(1)(i). See also, Second Decision on disclosure by the defence, ICC-01/04-01/06-2192-Conf, par. 55.

of the accused are not infringed.<sup>51</sup> The Chamber considers, in particular, that an effective and meaningful application of the principle of *audi alteram partem* requires that the responding party has sufficient time to prepare its response.

38. Pursuant to Rule 79(1) and (2) of the Rules, in fact, the Defence must notify the Prosecution of its intent to raise the existence of an alibi or to raise a ground for excluding criminal responsibility provided for in Article 31(1) of the Statute together with the names of witnesses and any other evidence in support. These must be communicated sufficiently in advance to enable the Prosecution to prepare adequately and to respond.

39. Furthermore, Rule 78 provides that the Defence shall permit the inspection by the Prosecution of any books, documents, photographs and other tangible objects in its possession or control, which are “intended for use [...] as evidence [...] at trial”.

40. In addition, there are other provisions envisaging disclosure that may go beyond the scope of Rules 78 and Rule 79(1), namely Rule 79(4), Regulation 54 of the Regulations of the Court and Regulation 52 of Regulations of the Registry. However, these rules must always be read in light of the statutory rights of the accused; the Chamber has a “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”.<sup>52</sup>

41. The Chamber notes that for the present case involving two accused and a number of victims authorised to participate in the proceedings with the modalities

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<sup>51</sup> Decision on disclosure by the defence, ICC-01/04-01/06-1235-Corr-Anx1, par. 28. See also, Second Decision on disclosure by the defence, ICC-01/04-01/06-2192-Conf, par. 56.

<sup>52</sup> Decision on disclosure by the defence, ICC-01/04-01/06-1235-Corr-Anx1, par. 33; Second Decision on disclosure by the defence, ICC-01/04-01/06-2192-Conf, par. 57.

specified in its decision of 22 January 2010,<sup>53</sup> the disclosure obligations of the Defence shall extend not only to the Prosecution, but also to the co-accused and the Legal Representatives of Victims.

## **B. Scope and timing of disclosure by the Defence**

### 1. Disclosure of documents intended to be used during cross-examination

42. The Chamber considered that challenging the testimony of a Prosecution witness by using documentary evidence triggers an obligation to disclose to the Prosecution such documents sufficiently in advance of the witness's testimony.

43. For this reason, and given the need to ensure procedural fairness and to promote efficiency in the trial, in its Decision on Rule 140 the Chamber ordered, *inter alia* the Defence, to communicate to the parties and the participants, as well as the Chamber and the Court officer, the list of the documents it intends to use for the purposes of its cross-examination of Prosecution witnesses, at least three days in advance of the scheduled hearing.<sup>54</sup> In this respect, the Chamber notes that the documents that the Defence may use during cross-examination are either documents originally disclosed to it by the Prosecution, and therefore already within the possession of the Prosecution, or documents obtained from or belonging to the accused or otherwise gathered by the Defence during its investigations, which are not in the possession of the Prosecution. Only the second category of documents, which are not yet in the E-court system, should be disclosed before using them during cross-examination<sup>55</sup>.

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<sup>53</sup> Decision on the Modalities of Victim Participation at Trial, 22 January 2010, ICC-01/04-01/07-1788-tENG.

<sup>54</sup> Decision on Rule 140, par. 108; ICC-01/04-01/07-T-101-CONF-ENG ET 12-02-2010, p. 2.

<sup>55</sup> With regard to the first category of documents, only a list of documents needs to be provided.

## 2. Disclosure of other material

### (a) Rule 79 (1) and (2)

45. With regard to disclosure pursuant to Rule 79(1)(a) and (b), the Chamber was informed during a status conference held on 2 November 2009, that the two defence teams had indicated to the Prosecution that they did not intend (the Ngudjolo Defence specified, "at that stage") to raise the existence of an alibi or any ground for excluding criminal responsibility of the accused provided for in Article 31(1) of the Statute.<sup>56</sup>

46. The Chamber considers that under Rule 79(1) and (2) the defence teams have the responsibility to notify their intention, if any, to raise a defence to the Prosecution and the Chamber as soon as a determination to rely on such ground has been made. This is without prejudice to Rule 79(3).

### (b) Rule 78

47. Except for the defences referred to in Rule 79(1) (a) and (b), and the material disclosed before its use during cross-examination of Prosecution witnesses, the scope and timing of the disclosure of other material by the Defence are to be determined by the Chamber on the basis of Rule 78 and, where necessary, Rule 79(4). Pursuant to Rule 79(4), the Chamber may order the Defence to disclose any "evidence" in its possession which requires, according to the Chamber, to be provided to the parties and participants.

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<sup>56</sup> ICC-01/04-01/07-T-74-Red-ENG CT WT 02-11-2009, p. 61-62. See also, e-mails sent from the Katanga Defence to the Legal Adviser of the Trial Division on 2 November 2009, 5.14 pm and on 3 November 2010, 2.36 pm, and from the Ngudjolo Defence to the Legal Adviser of the Trial Division on 2 November 2009, 5.25 pm.



48. The Chamber observes that Rule 78, although it shares some similarities with Rule 77, also contains some distinctive elements.<sup>57</sup> The disclosure obligations of the Prosecution under Rule 77 are more extensive. The Prosecution must permit the defence to inspect any tangible object it intends to use in trial, which is “material to the preparation of the defence”. As mentioned above, the disclosure obligation on the part of the Prosecution under Rule 77 is a consequence of the role and duties of the Prosecution, as well as the rights of the accused, and therefore is not mirrored in Rule 78. The material to be disclosed by the Prosecution must be provided to the Defence sufficiently in advance for the accused to prepare his or her defence pursuant to Article 67(1)(b) of the Statute. In the present case, the Chamber ordered the Prosecution to disclose all incriminatory and exculpatory evidence (with the possibility of differing disclosure of material for which redactions or other protective measures were still required) several months before the intended commencement of the trial.<sup>58</sup>

49. No obligation has been imposed on the Defence for disclosure of material it intends to use as evidence before the start of the hearings on the merits. Requesting the Defence to disclose material three weeks prior to that, as sought by the Prosecution, would have imposed on the Defence a premature and unrealistic obligation. The Defence could not be expected, at that stage of the proceedings, to know whether and what kind of evidence it intended to present at trial. At least until after the Prosecution’s case, the Defence is not under any obligation to provide the Prosecution with any information that could reveal its strategy, except for the defences set out in Rule 79(1), Rule 80 and the material that the Defence intends to use in cross-examination of Prosecution witnesses.

50. The Chamber is of the view that the Defence has to disclose the material only when a decision has been made that it will be used at trial. For reasons of fairness

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<sup>57</sup> See also, Second Decision on disclosure by the defence, ICC-01/04-01/06-2192-Conf, par. 63.

<sup>58</sup> Order on Prosecution’s disclosure, ICC-01/04-01/07-846-tENG.

and efficiency in the proceedings, disclosure should be made within a reasonable time prior to the hearing during which it will be presented, in order to allow the Prosecution an opportunity to adequately prepare. The Chamber therefore encourages the Defence to permit the Prosecution to inspect documents or other tangible objects falling under Rule 78, as soon as it makes a decision to use them at trial.

51. In any case, the Chamber considers that the Defence shall permit the Prosecution to inspect all material in its possession or control, which it intends to use at trial pursuant to Rule 78, not less than two weeks prior to the scheduled commencement of the Defence case.

52. Furthermore, the Chamber recalls that pursuant to paragraph 103 of the Decision on Rule 140, the Defence must provide the Chamber, the parties and the participants with a list of documents which it intends to use for the purposes of its examination-in-chief of each witness. In order to allow the opposing party sufficient time to prepare for cross-examination, the list of documents shall be communicated well in advance of the day when the witness is scheduled to start giving his or her testimony. This may under no circumstances be less than three (3) days before the scheduled hearing.

53. As for the modalities for communicating Defence material to the other parties and participants, the Chamber notes that "inspection" under Rules 77 has been interpreted by the Prosecution to include the disclosure of material in electronic format.<sup>59</sup> The Chamber has endorsed this practice,<sup>60</sup> and considers that it should also be extended to Rule 78.

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<sup>59</sup> See in this respect Prosecution's disclosure of material under Rule 77.

<sup>60</sup> See for example, *Décision sur la requête de la Défense de Germain Katanga relative à la communication et l'utilisation de photographies de témoins protégés*, 31 May 2010, ICC-01/04-01/07-2148, par. 7.

### C. Communication of other material

54. The Prosecution further requests that, pursuant to Rule 79(4) and Regulation 54, the Defence be ordered to disclose all the evidence on which the accused intends to rely on for trial and which is not covered by the scope of Rules 78 and 79(1), which include (i) “the defences the accused intends to rely on and any substantive factual or legal issues he intends to raise”, three weeks before the commencement of the trial; as well as (ii) “information pertaining to the identification of the Defence witnesses, their statements or a summary thereof”, before the commencement of the Defence case.<sup>61</sup>

55. The Chamber is of the view that an obligation to disclose a document outlining the defences, as well as any information regarding the identification of Defence witnesses, their statements or summaries thereof, cannot be inferred from Rule 79(4). Such material cannot be considered as “evidence” and does not therefore fall within the material which the Defence may be ordered to disclose pursuant to this rule.<sup>62</sup>

56. The Chamber notes, however, that Regulation 54 of the Regulations of the Court provides that “[a]t 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*, a summary of the evidence the participants intend to rely on;<sup>63</sup> the length of the evidence to be relied on;<sup>64</sup> the length of questioning of the witnesses;<sup>65</sup> the number and identity (including any pseudonym) of the witnesses to be called;<sup>66</sup> the production and disclosure of the

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<sup>61</sup> Application, par. 9, 15 (ii) and (iii).

<sup>62</sup> For the same reasons, an obligation to provide such material cannot be inferred from Rule 78, which deals with the inspection of “any books, documents, photographs and other tangible objects [...], which are intended for use by the defence as evidence [...] at trial”.

<sup>63</sup> Regulation 54 (b).

<sup>64</sup> Regulation 54 (c).

<sup>65</sup> Regulation 54 (d).

<sup>66</sup> Regulation 54 (e).

statements of the witnesses on which the participants propose to rely;<sup>67</sup> the issues the participants propose to raise during the trial;<sup>68</sup> the presentation of evidence in summary form;<sup>69</sup> and the defences, if any, to be advanced by the accused.<sup>70</sup>

57. While the Statute and the Rules do not provide for any specific indication concerning the timing for the provision of such material, the Chamber finds that communication of certain information concerning the Defence case, before it starts, will assist in ensuring a fair and expeditious trial. In particular, the Chamber finds that information about the nature of the accused's defence, the identity of witnesses the Defence intends to call as well as a summary of the facts these witnesses will testify about, will allow the Prosecution to adequately prepare for the Defence case. Such information would also be relevant for the co-accused in the preparation of his case, and would allow the Legal Representatives of Victims to effectively participate in the proceedings. Finally, this information, together with an estimated length of the evidence to be presented by each of the defence teams would allow the Chamber to ensure an efficient conduct of the proceedings.

58. The Defence shall therefore provide the Prosecution, the Chamber, the co-Accused and the Legal Representatives of Victims with a document outlining the legal and factual issues that it intends to raise during its defence case as well as the defences, if any, to be advanced by the accused.<sup>71</sup>

59. Moreover, the Chamber recognizes that disclosure of information regarding the identification of Defence witnesses prior to their testimony will enable the Prosecution to conduct appropriate investigations about those witnesses and the evidence expected from them. For these reasons, the Defence should provide the parties and participants, as well as the Chamber, with the names, pseudonyms or

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<sup>67</sup> Regulation 54 (f).

<sup>68</sup> Regulation 54 (h).

<sup>69</sup> Regulation 54 (j).

<sup>70</sup> Regulation 54 (p).

<sup>71</sup> See in particular, Regulation 54 (h) and (p).

other alias, addresses, unless the information on the whereabouts of the witness is protected, and dates of birth of all its witnesses, together with their anticipated order of testimony.

60. Additionally, in order to ensure an efficient and expeditious conduct of the trial, avoiding delays or adjournments of the proceedings, the Chamber orders the Defence to provide the Prosecution either with statements of the witnesses they intend to call to testify, or with a summary of the key elements that each witness will address during his or her testimony. These summaries should include a description as exhaustive as possible of the facts on which each witness will testify, including any relevant information on their personal history and background, which is available to the Defence. The Chamber is of the view that such summaries will allow the Prosecution to sufficiently prepare for the Defence case. To ensure efficiency in the proceedings, the statements and/or the summaries should also be provided to the Chamber, the co-Accused and the Legal Representatives of Victims.

61. Also, the Defence should specify the estimated length of questioning for each witness and whether the two Accused agree on the presentation of joint witnesses.

62. The information mentioned above should be provided by both defence teams after completion of the Prosecution case and not less than two weeks prior to the commencement of the Defence case, regardless of the order of presentation of evidence by the defence teams.

63. Furthermore, the Chamber recalls that in the Decision on Rule 140, it stated that “[s]ubject to [its] authority [...] to determine the mode and order of questioning of witnesses and presenting evidence, each party presenting evidence shall inform the Chamber, the other parties and the participants of the exact order of witnesses due to testify and the scheduled date of their appearance at trial. This schedule shall

be updated at the end of each week and provide the exact planning for the coming two weeks.”<sup>72</sup> It also added that “[i]f there are any last-minute changes to the schedule or the calling order, the party in question shall inform the Chamber, the parties and the participants as early as possible”.<sup>73</sup>

64. Finally, the Chamber informs the parties and participants that it will schedule a status conference before the completion of the presentation of the evidence by the Prosecution during which it will discuss disclosure issues and other preparatory matters before the commencement of the Defence case.<sup>74</sup> A further status conference shall be convened once the Defence has provided the material as requested in the present decision.

**FOR THESE REASONS,  
THE CHAMBER**

**GRANTS**, in part, the Prosecution’s Application, and

**ORDERS** the Defence to

- a) permit the Prosecution to inspect any books, document, photographs, and tangible objects in the Defence possession or control under Rule 78 which are intended for use by the Defence at trial not less than two weeks prior to the commencement of the Defence case; the Defence shall facilitate this process, where possible, by disclosing such material in electronic format;

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<sup>72</sup> Decision on Rule 140, par. 8.

<sup>73</sup> Decision on Rule 140, par. 9.

<sup>74</sup> See also ICC-01/04-01/07-T-168-ENG ET WT 09-07-2010, p. 27.

b) pursuant to Regulation 54, provide the Prosecution, the co-Accused, the Legal Representatives of Victims and the Chamber, after completion of the Prosecution case and not less than two weeks prior to the commencement of the Defence case, with

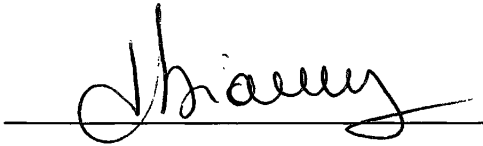
- i. a document outlining the legal and factual issues that it intends to raise during its defence case as well as the defences, if any, to be advanced by the accused;
- ii. the names, pseudonyms or other alias, addresses where possible, and dates of birth of all witnesses whom it intends to call to testify at trial, in their anticipated order of testimony;
- iii. the statements of the witnesses whom it intends to call to testify, or a summary of the key elements that each witness will address during his or her testimony;
- iv. the length of questioning of each witness; and

**REITERATES** the instructions given in paragraphs 8 and 103 of the Decision on Rule 140 concerning the provision to the Chamber, the Prosecution, the co-Accused and the Legal Representatives of Victims of a list of witnesses scheduled to testify, and of a list of documents that will be used during the course of the evidence of those witnesses, respectively.

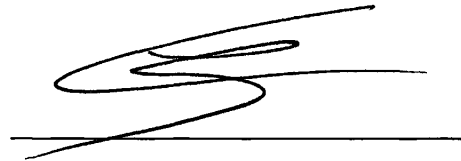
Done in both English and French, the English version being authoritative.



**Judge Bruno Cotte**  
**Presiding Judge**



**Judge Fatoumata Dembele Diarra**



**Judge Christine Van den Wyngaert**

Dated this 14th day of September 2010

At The Hague, The Netherlands