

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: ICC-01/04-01/07
Date: 19 December 2007

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA***

Public Document

Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions

The Office of the Prosecutor

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

NOTING the “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence” (“the 19 May 2006 Decision”),¹ issued by the Single Judge on 19 May 2006, establishing a regime for *ex parte* motions pursuant to rule 81(2) and (4);

NOTING the “Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence’” (“the 13 October 2006 Appeals Judgment”),² issued by the Appeals Chamber on 13 October 2006, in which the Appeals Chamber partially reversed the *ex parte* regime established by the 19 May 2006 Decision;

NOTING the “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” (“the First Decision on Redactions”),³ by which the Single Judge partially granted the Prosecution’s request for authorisation to redact information in the interview notes and statements of witnesses 1, 3, 7, 8, 12, 13 and 14;

NOTING the “Defence Motion for Leave to Appeal the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” (“the Defence Motion”), filed by the Defence on 13 December 2007;⁴

¹ ICC-01/04-01/06-108-Corr.

² ICC-01/04-01/06-568.

³ ICC-01/04-01/07-84-US-Exp, filed on 3 December 2007, the confidential, *ex parte* version only available to the Office of Prosecutor and the Defence (ICC-01/04-01/07-88-Conf-Exp), issued on 6 December 2007, and the public redacted version (ICC-01/04-01/07-90), filed on 7 December 2007.

⁴ ICC-01/04-01/07-99.

NOTING the “Prosecution's Response to the Defence Motion for Leave to Appeal the First Decision on Redaction of Witness Statements”, filed by the Prosecution on 17 December 2007;⁵

NOTING articles 54, 61, 67 and 82(1)(d) of the *Rome Statute* (“the Statute”) and rules 76 to 83, 87, 88, 121 and 155 of the *Rules of Procedure and Evidence* (“the Rules”);

CONSIDERING that, as Pre-Trial Chambers I and II have repeatedly stated,⁶ for the Chamber to grant leave to appeal under article 82(1)(d) of the Statute, the issue identified by the appellant must: (i) have been dealt with in the relevant decision; and (ii) meet the following two cumulative criteria:

- a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings;

CONSIDERING that, according to the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying

⁵ ICC-01/04-01/07-110.

⁶ See *inter alia* the “Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal”, issued by Pre-Trial Chamber I on 23 June 2006 (ICC-01/04-01/06-165-Conf-Exp); the “Decision on Defence Motion for Leave to Appeal”, issued by Pre-Trial Chamber I on 18 August 2006 (ICC-01/04-01/06-338); the “Decision on Second Defence Motion for Leave to Appeal”, issued by Pre-Trial Chamber I on 28 September 2006 (ICC-01/04-01/06-489); the “Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions”, issued by Pre-Trial Chamber I on 14 December 2007 (ICC-01/04-01/07-108); and the “Decision on the Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest Under Article 58”, issued by Pre-Trial Chamber II on 19 August 2005 (ICC-02/04-01/05-20-US-Exp; unsealed pursuant to Decision ICC-02/04-01/05-52 issued on 13 October 2005), in particular para. 20.

Leave to Appeal”,⁷ issued by the Appeals Chamber on 13 July 2006 (“the Appeals Chamber Judgment”):

- (i) “[o]nly an issue may form the subject-matter of an appealable decision”;⁸
- (ii) “[a]n issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”;⁹
- (iii) “[n]ot every issue may constitute the subject of an appeal”,¹⁰ but “it must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”;¹¹ and
- (iv) “[i]dentification of an issue having the attributes adumbrated above does not automatically qualify it as the subject of an appeal” insofar as “the issue must be one ‘for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings’”;¹²

CONSIDERING that the Defence is seeking leave to appeal in relation to the following two issues:

- (a) whether the Decision was issued without hearing the Defence (“the first issue”);¹³ and

⁷ ICC-01/04-168.

⁸ Appeals Chamber Judgment, para. 9.

⁹ Appeals Chamber Judgment, para. 9.

¹⁰ Appeals Chamber Judgment, para. 9.

¹¹ Appeals Chamber Judgment, para. 10.

¹² Appeals Chamber Judgment, para. 14.

¹³ The Defence Motion, para. 8(i).

- (b) whether the Single Judge enlarged the scope of application of rule 81(2) of the Rules by considering as Prosecution sources those individuals – whose identity and identifying information could be redacted pursuant to the said rule – who, despite not being Prosecution witnesses for the purpose of the confirmation hearing, have been or are about to be interviewed by the Prosecution (“the second issue”);¹⁴

CONSIDERING, in relation to the first issue, that the Prosecution’s requests for authorisation to redact information pursuant to rules 81(2) and (4) of the Rules have been made *ex parte* in order to guarantee that their purpose, which is to prevent the Defence from accessing certain information, not be defeated beforehand; that, for this reason, such requests have been dealt with without the Defence being provided with the facts supporting the Prosecution’s requests; that the Defence has nevertheless been notified of such requests and of the legal basis on which such requests have been made (that is, rules 81(2) and (4) of the Rules); and that, as set out in the 19 May 2006 Decision, Duty Counsel for the Defence could have filed written submissions about the legal scope of rules 81(2) and (4) of the Rules;

CONSIDERING further that the Defence simply claims that “the Decision was issued without hearing the Defence”; that the Defence makes no analysis of the governing regime for *ex parte* motions in proceedings before the Pre-Trial Chamber which was established by the 19 May 2006 Decision¹⁵ and partially amended by the 13 October 2006 Appeals Judgment;¹⁶ and that, therefore, the Defence, instead of raising an issue arising from the Decision, is making a general allegation without explaining how the governing regime for *ex parte* motions has been violated by the Single Judge in the instant case;

¹⁴ The Defence Motion, para. 8(ii).

¹⁵ ICC-01/04-01/06-108-Corr, paras. 8-20 and pp. 19-22.

¹⁶ ICC-01/04-01/06-568, paras. 65-67, 75 and 77.

CONSIDERING that, in the view of the Single Judge, the second issue, as opposed to the first issue, constitutes an issue arising from the Decision;

CONSIDERING that those individuals who have been interviewed or are about to be interviewed by the Prosecution, and who have not yet become Prosecution witnesses, may have valuable information concerning the case at hand; that as they have not yet become Prosecution witnesses, the Defence may have an interest in contacting them; and that the redaction of their identities and identifying information would prevent the Defence from contacting them for the purpose of the preparation of the confirmation hearing;

CONSIDERING, therefore, that the second issue would significantly affect the fair conduct of the proceedings;

CONSIDERING that the second issue would also significantly affect the expeditious conduct of the proceedings because, depending on the approach taken, it may have an impact on how the Prosecution goes about selecting its witnesses for the purpose of the confirmation hearing, or it may delay certain investigative steps by the Defence;

CONSIDERING further that a number of *ex parte* Prosecution requests for authorisation for redactions are still pending before the Chamber; that additional Prosecution requests for authorisation for redactions will likely be made by the Prosecution by 14 January 2008; and that, under rule 121 of the Rules, the Single Judge must rule upon the requests prior to 29 January 2008, given that the confirmation hearing has been scheduled to start on 28 February 2008;¹⁷

¹⁷ Decision Establishing Time Limits for Decisions on Protective Measures and Requests for Redactions, issued by the Single Judge on 12 December 2007 (ICC-01/04-01/06-97-Conf-Exp-Corr).

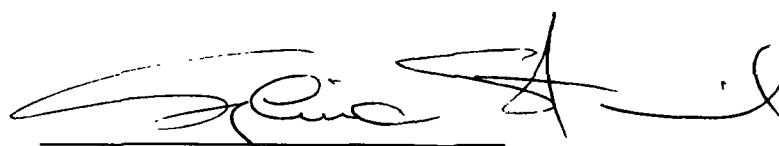
CONSIDERING, therefore, that an immediate resolution of the second issue by the Appeals Chamber may materially advance the proceedings in the case of *The Prosecutor v. Germain Katanga*, and that, given that the Single Judge must rule upon all Prosecution requests for authorisation for redactions prior to 29 January 2008, there is a need for an urgent ruling by the Appeals Chamber on the second issue for which leave to appeal is sought by the Defence;

FOR THESE REASONS,

REJECT the Defence Motion in relation to the first issue.

GRANT the Defence Motion in relation to the second issue, that is, whether the Single Judge enlarged the scope of application of rule 81(2) of the Rules by considering as Prosecution sources those individuals – whose identity and identifying information could be redacted pursuant to the said rule – who, despite not being Prosecution witnesses for the purpose of the confirmation hearing, have been or are about to be interviewed by the Prosecution.

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



Judge Sylvia Steiner
Single Judge

Dated this Wednesday 19 December 2007

At The Hague, The Netherlands