

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 4 April 2008

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR *v.* *Germain Katanga and Mathieu Ngudjolo Chui***

Public Document

Decision on the Defence Application for Leave to Appeal the "Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9"

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

The Office of the Prosecutor
Mr Luis Moreno Ocampo, Prosecutor
Mr Éric Macdonald, Trial Lawyer

**Counsel for the Defence
of Germain Katanga**
Mr David Hooper
Ms Caroline Buisman

**Counsel for the Defence of Mathieu
Ngudjolo Chui**
Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Bruno Cathala

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

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

NOTING the “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9”¹ (“the Second Decision on Redactions”), issued by the Single Judge on 21 December 2007, by which the Single Judge decided, *inter alia*, that “on an exceptional basis and only for the purpose of their protection by means of the redaction of their names and identifying information, the notion of “victim” under rule 81(4) of the Rules would also cover alleged victims of sexual offences which are unrelated to the charges in the case at hand;”

NOTING the “Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI”² issued by the Chamber on 10 March 2008 and by which the Chamber decided to join the cases of *The Prosecutor v. Germain Katanga* and *The Prosecutor v. Mathieu Ngudjolo Chui*;

NOTING the “Decision Establishing a Calendar in the Case against Germain KATANGA and Mathieu NGUDJOLO CHUI” (“the Decision Establishing a Calendar”),³ issued by the Single Judge on 10 March 2008 and by which the Single Judge, *inter alia*, decided that “in relation to those decisions issued by the Chamber in the case of *The Prosecutor v. Germain Katanga* that may have an impact on the Defence of Mathieu Ngudjolo Chui, in particular the First, Second and Third Decisions on Redactions, the Defence of Mathieu Ngudjolo Chui will have until 28 March 2008 at 16h00 to file any requests for reconsideration or, alternatively, for leave to appeal;”

¹ ICC-01/04-01/07- 123-Conf-Exp, the confidential redacted version available to the Defence (ICC-01/04-01/07-124-Conf), issued on 21 December 2007, and the public redacted version (ICC-01/04-01/07-160), filed on 23 January 2008

² ICC-01/04-01/07-257 and ICC-01/04-02/07-48 [ICC-01/04-01/07-307]

³ ICC-01/04-01/07-259

NOTING the “*Demande d’Autorisation d’Interjeter Appel de la Décision Relative à la Requête de l’Accusation Sollicitant l’Autorisation d’Expurger les Déclarations des Témoins 4 et 9*”⁴ (“the Application for Leave to Appeal”) filed by the Defence of Mathieu Ngudjolo Chui on 26 March 2008;

NOTING the “Prosecution’s Response to Ngudjolo’s Application for Leave to Appeal the Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9”⁵ (“Prosecution’s Response”) filed by the Prosecution on 31 March 2008, in which the Prosecution submits that it does not oppose the Application for Leave to Appeal;

NOTING the “Corrigendum to Prosecution’s Response to Ngudjolo’s Application for Leave to Appeal the Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9”⁶ filed by the Prosecution on 31 March 2008;

NOTING articles 54, 61, 67 and 82(1)(d) of the *Rome Statute* (“the Statute”), rules 76 to 83, 87, 88, 121 and 155 of the *Rules of Procedure and Evidence* (“the Rules”), and regulation 65 of the *Regulations of the Court* (“the Regulations”);

CONSIDERING that, as Pre-Trial Chambers I and II have repeatedly stated,⁷ 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:

⁴ ICC-01/04-01/07-340

⁵ ICC-01/04-01/07-346

⁶ ICC-01/04-01/07-350 and ICC-01/04-01/07-350-Anx

⁷ See, *inter alia*, “*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), “*Decision on Defence Motion for Leave to Appeal*”, issued by Pre-Trial Chamber I on 18 August 2006 (ICC-01/04-01/06-338), “*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), “*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 “*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

- 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 Leave to Appeal”,⁸ 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”;⁹
- (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”;¹⁰
- (iii) “[n]ot every issue may constitute the subject of an appeal”,¹¹ 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’”;¹² 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

⁸ ICC-01/04-168

⁹ Appeals Chamber Judgment, para 9

¹⁰ Appeals Chamber Judgment, para 9.

¹¹ Appeals Chamber Judgment, para 9

¹² Appeals Chamber Judgment, para 10.

immediate resolution by the Appeals Chamber may materially advance the proceedings''';¹³

CONSIDERING that the Defence is seeking leave to appeal in relation to the following issue: whether the Single Judge erred in law in finding that alleged victims of sexual offences not connected to the charges in the relevant case can be considered victims for the purpose of redactions pursuant to rule 81(4) of the Rules;¹⁴

CONSIDERING that the issue raised by the Defence for Mathieu Ngudjolo Chui is an issue arising out of the Decision;

CONSIDERING that the issue concerns the systematic and teleological interpretation by the Single Judge of rule 81(4) of the Rules regarding the redactions to the identity and identifying information of individuals (i) who are not witnesses, but were referred to by the Prosecution witnesses in their statements; and (ii) who are victims of sexual offences in events other than the alleged joint FRPI/FNI attack on the village of Bogoro on or about 24 February 2003;

CONSIDERING that the interpretation of the Single Judge was based on the systematic and teleological approach embraced by the Statute and the Rules in relation to victims of sexual offences; that the interpretation led to the conclusion that victims of sexual offences are entitled to special protective measures due notably to their particular vulnerability; and that such measures should be granted on an exceptional basis and only for the purpose of their protection by means of the redactions of their names and identifying information;¹⁵

¹³ Appeals Chamber Judgment, para 14

¹⁴ ICC-01/04-01/07-340, para 15

¹⁵ ICC-01/04-01/07-160, para. 19.

CONSIDERING that as a result of the interpretation of the Single Judge of rule 81(4) of the Rules, the Defence will not have access to the names of the relevant victims of sexual offences; that the Defence may have an interest in contacting such individuals for the purpose of preparing for the confirmation hearing, and that the redaction of their identity and identifying information would prevent the Defence from doing so;

CONSIDERING, therefore, that the issue raised by the Defence for Mathieu Ngudjolo Chui would significantly affect the fair conduct of the proceedings;

CONSIDERING that the issue raised by the Defence would also significantly affect the expeditious conduct of the proceedings in two ways in that (i) if the names are not disclosed, it may delay the Defence in conducting its own investigation; or (ii) if the names are disclosed, additional actions by the Prosecution and Victims and Witnesses Unit to ensure their safety may be required;

CONSIDERING further that a number of *ex parte* Prosecution requests for authorisation for redactions are still pending before the Chamber; that, according to the Decision Establishing a Calendar, the Prosecution has until 8 April 2008 to make its final requests for redactions concerning the statements, interview notes, interview transcripts and documents relating to those witnesses it still intends to rely on at the confirmation hearing and for whom protective measures cannot be implemented by 1 April 2008;¹⁶ and that according to rule 121(3) of the Rules, the Single Judge must rule upon the requests prior to 21 April 2008, given that the confirmation hearing has been scheduled to start on 21 May 2008;

CONSIDERING therefore that an immediate resolution of the issue raised by the Defence for Mathieu Ngudjolo Chui may materially advance the proceedings in the

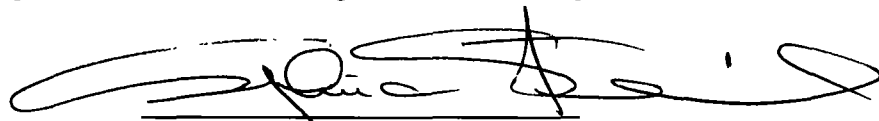
¹⁶ ICC-01/04-01/07-259, p 13

case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*; and that, given that the confirmation hearing in the case is scheduled to commence on 21 May 2008, there is a need for an urgent ruling by the Appeals Chamber on the issue for which leave to appeal is sought by the Defence;

FOR THESE REASONS,

GRANT the Defence Application for leave to appeal in relation to the following issue: whether the Single Judge erred in law in finding that alleged victims of sexual offences not connected to the charges in the relevant case can be considered victims for the purpose of redactions pursuant to rule 81(4) of the Rules.

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

A handwritten signature in black ink, appearing to be 'Sylvia Steiner', written over a horizontal line.

Judge Sylvia Steiner
Single Judge

Dated this Friday 4 April 2008

At The Hague,

The Netherlands