

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 22 April 2008

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

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

Public Document

**Decision on Application for Leave to Appeal by the Defence of Germain Katanga
against the "Fourth Decision on the Prosecution's Request for Authorisation to
Redact Documents Related to Witnesses 166 and 233"**

Decision/Order/Judgment 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
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

Ms Carine Bapita Buyagandu
Mr Joseph Keta
Mr J.L. Gilissen

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

Ms Silvana Arbia

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 “Fourth Decision on the Prosecution Request for Authorisation to Redact Documents related to Witnesses 166 and 233”¹ (“the Fourth Decision on Redactions”), issued by the Single Judge on 3 April 2008, in which the Single Judge decided to allow redactions of the names of “organisations that have been approached by the Prosecution for the specific purpose of obtaining information in relation to the ongoing investigations in the case of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* or in relation to future Prosecution investigations”²;

NOTING the “Defence Motion for Leave to Appeal the Fourth Decision on the Prosecution Request for Authorization to Redact Documents related to Witnesses 166 and 233”³ (“the Motion for Leave to Appeal”) filed by the Defence of Germain Katanga on 9 April 2008;

NOTING the “Prosecutions Response to Defence Motion for Leave to Appeal the Fourth Decision on Request to Redact Documents related to Witnesses 166 and 233”⁴ (“the Prosecution’s Response”) filed on 14 April 2008;

NOTING article 82(1)(d) of the *Rome Statute* (“the Statute”);

CONSIDERING that, as Pre-Trial Chambers I and II have repeatedly stated,⁵ for the Chamber to grant leave to appeal under article 82(1)(d) of the Statute, the issue

¹ ICC-01/04-01/07-360-Conf

² ICC-01/04-01/07-360-Conf, para. 27.

³ ICC-01/04-01/07-380.

⁴ ICC-01/04-01/07-390.

⁵ 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

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 Leave to Appeal”,⁶ 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”;⁷
- (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”;⁸
- (iii) “[n]ot every issue may constitute the subject of an appeal”,⁹ but “it must be one apt to ‘significantly affect’, i.e. in a

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.

⁶ ICC-01/04-168

⁷ Appeals Chamber Judgment, para. 9.

⁸ Appeals Chamber Judgment, para. 9.

⁹ Appeals Chamber Judgment, para. 9.

material way, either a) 'the fair and expeditious conduct of the proceedings' or b) 'the outcome of the trial'';¹⁰ 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''";¹¹

CONSIDERING that the Defence seeks leave to appeal the Fourth Decision on Redactions concerning the following issue:

[whether] the Single Judge incorrectly interpreted Rule 81(2) [of the Rules] by allowing redactions of the names of "organisations [that] have been approached by the Prosecution for the specific purpose of obtaining information in relation to the ongoing investigations in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* or in relation to future Prosecution investigations"¹²;

CONSIDERING that the Defence argues that the Fourth Decision on Redactions warrants the Appeals Chamber's consideration, *inter alia*, because:

- (i) In allowing redactions of the names of organisations on the mere ground that they were approached by the Prosecution in its ongoing investigations, the impugned Decision created a form of privilege for the Prosecution sources which is not provided for in either the Statute or Rules;
- (ii) The Single Judge widened the scope of Rule 81(2) of the Rules so as to include all names of the organisations approached by the Prosecution in order to obtain information in relation to the ongoing investigations in the present case or in relation to future Prosecution investigations; and,

¹⁰ Appeals Chamber Judgment, para. 10.

¹¹ Appeals Chamber Judgment, para 14.

¹² ICC-01/04-01/07-380, para. 1.

- (iii) The Single Judge granted a similar request for leave to appeal in its Decision on Third Defence Motion for Leave to Appeal¹³ in the case of *The Prosecutor v. Thomas Lubanga Dyilo*;

CONSIDERING that the Single Judge agrees with the submissions of the Prosecution insofar as its assertions that:

- (i) the Defence misinterpreted or misrepresented the Decision;
- (ii) “the Decision does not create any blanket assumption that any organisation will have its identity redacted merely because it has been approached by the Prosecution in the course of its investigations”;
- (iii) “contrary to the Defence’s characterisation, the Decision cannot be characterised as creating a ‘privilege’ for sources or organisations outside of the Statute and Rules”; and
- (iv) contrary to Defence arguments, the Decision held that “the identity of organisations can be withheld in order to protect further or ongoing investigations, under Rule 81(2)” but “d[id] not rule that this will always be the case” and instead analysed “each of the redactions separately in the Annex” “after consideration on a case-by case basis”¹⁴;

CONSIDERING that in the Fourth Decision on Redactions the Single Judge neither allowed redactions of the names of organisations “only” on the grounds that they were Prosecution sources nor widened the scope of Rule 81(2) to include all of the names of organisations approached by the Prosecution; and that, quite the contrary, in the Fourth Decision on Redactions, the Single Judge pursuant to the directive of

¹³ ICC-01/04-01/06-514

¹⁴ ICC-01/04-01/07-390, paras. 7-11.

the Appeals Chamber Decision on Third Defence Motion for Leave to Appeal¹⁵ in the *Lubanga* case:

- (i) decided “whether a source can be protected [under rule 81(2) of the Rules]... on a case-by-case basis”;¹⁶ and
- (ii) “discuss[ed] each of the redactions included under this specific category separately in Annex I”¹⁷, taking into account, *inter alia*, the type of the work in which the source was engaged, the context of the underlying security situation, and any potential risk to the source should its identity be disclosed;

CONSIDERING, therefore, that in the view of the Single Judge, the issue identified by the Defence of Germain Katanga does not arise from the Fourth Decision on Redactions;

CONSIDERING that the Single Judge need not address the elements of article 82(1)(d) of the Statute, because the identification of an issue which arises from the decision is a threshold matter which must be satisfied prior to any analysis on whether the requirements for a request for leave to appeal have been met;

¹⁵ ICC-01/04-01/06-774.

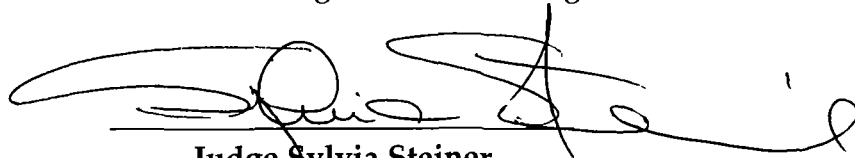
¹⁶ ICC-01/04-01/06-774, para. 63.

¹⁷ ICC-01/04-01/07-360-Conf, para. 28. The Single Judge notes that the Defence did not have access to the full analysis underlying the Fourth Decision on Redactions, which was only available in Annex I, *ex parte* Prosecution only, pursuant to the Appeals Chamber’s directive in ICC-01/04-01/06-773, para. 22.

FOR THESE REASONS

REJECT the Defence's motion for leave to appeal the Fourth Decision on Redactions.

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



Judge Sylvia Steiner
Single Judge

Dated this Tuesday 22 April 2008

At The Hague,

The Netherlands