

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 20 May 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 Redacted Version

**Decision on the Requests for leave to appeal the Decision on Evidentiary Scope of
the Confirmation Hearing, Preventive Relocation and Disclosure under Article
67(2) of the Statute and Rule 77 of the Rules**

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, Senior Trial Lawyer

**Counsel for the Defence
for Germain Katanga**

Mr David Hooper
Ms Caroline Buisman

**Counsel for the Defence for 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
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 “Prosecution’s Submission of Information on the Preventive Relocation of Witnesses 132, 163, 238, and 287”¹ filed by the Prosecution on 7 April 2008, in which the Prosecution provides information regarding the preventive relocation of four of its witnesses;

NOTING the “Prosecution’s Submission of Information on the Preventive Relocation of Witnesses 132, 163, 238 and 287”² filed by the Prosecution on 16 April 2008;

NOTING the “Prosecution’s Submission of Information regarding the Preventive Relocation of Witness 132”³ filed by the Prosecution on 17 April 2008;

NOTING the “Decision on Evidentiary Scope of the Confirmation Hearing, Preventive relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules”⁴ (“the Decision”) issued by the Single Judge on 18 April 2008;

NOTING the “Prosecution’s Application for Leave to Appeal the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation”⁵ (“the Prosecution’s Application”) filed by the Prosecution on 28 April 2008;

NOTING the “Request for leave to appeal the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of

¹ ICC-01/04-01/07-374-Conf-Exp

² ICC-01/04-01/07-398 (public redacted version)

³ ICC-01/04-01/07-404-Conf-Exp

⁴ ICC-01/04-01/07-411-Conf-Exp, ICC-01/04-01/07-433-Conf, ICC-01/04-01/07-428-Corr

⁵ ICC-01/04-01/07-453.

the Statute and Rule 77 of the Rules”⁶ (“the Defence’s Application”) filed by the Defence for Germain Katanga on 28 April 2008;

NOTING the “Prosecution’s Response to Defence Application for Leave to Appeal the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules”⁷ (“the Prosecution’s Response”) filed by the Prosecution on 2 May 2008;

NOTING the “Réponse aux demandes d’autorisation d’interjeter appel de l’équipe de Défense de Germain Katanga et du Procureur contre la ‘Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67 (2) of the Statute and Rule 77 of the Rules’”⁸ filed by the Defence for Mathieu Ngudjolo Chui on 2 May 2008;

NOTING articles 67 and 82(1)(d) of the *Rome Statute* (“the Statute”), rule 155 and 156 of the *Rules of Procedure and Evidence* (“the Rules”), and regulation 96 of the Regulations of the Registry (“the RoR”);

CONSIDERING that, as Pre-Trial Chambers I and II have repeatedly stated,⁹ 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:

⁶ ICC-01/04-01/07-456

⁷ ICC-01/04-01/07-464

⁸ ICC-01/04-01/07-462

⁹ 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

- 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”,¹⁰ 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”;¹¹
- (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”;¹²
- (iii) “[n]ot every issue may constitute the subject of an appeal”,¹³ 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’”;¹⁴ 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

¹⁰ ICC-01/04-168.

¹¹ Appeals Chamber Judgment, para 9

¹² Appeals Chamber Judgment, para 9

¹³ Appeals Chamber Judgment, para 9

¹⁴ Appeals Chamber Judgment, para 10

immediate resolution by the Appeals Chamber may materially advance the proceedings''';¹⁵

CONSIDERING that the Defence for Germain Katanga is seeking: (i) clarification of the Decision in the event that the Defence has incorrectly interpreted the Decision and (ii) in the alternative, leave to appeal in relation to the following issue:

whether the procedural mechanisms set up by the Single Judge to discharge the Prosecution's disclosure obligations concerning interview notes, interview transcripts, statements and documents on which the Prosecution does not intend to rely at the confirmation hearing but that fall within the scope of article 67 (2) of the Statute and rule 77 of the Rules materially violates the rights of the Defence under article 67(1).¹⁶

CONSIDERING that, according to the Defence for Germain Katanga:

Counsel for Katanga did not object to the procedure proposed by the Prosecution at the Status Conference of the 1st of April 2008. However, the Defence for Katanga was of the understanding that this procedure would apply prior to the confirmation hearing only and that the redactions be sustained until the date of confirmation only. The Defence for Katanga assumed that, post confirmation, the Prosecution would have to request leave from the Trial Chamber to maintain those redactions.¹⁷

This understanding finds support in the jurisprudence of the Trial Chamber in *Lubanga*, which has held that redactions to material disclosed to the Defence must be authorized by the Trial Chamber.¹⁸

However, having carefully reviewed the impugned Decision, it seems that the Single Judge considers it appropriate that these unauthorized redactions stay even after confirmation, unless the Defence requests the Trial Chamber for them to be disclosed. The Defence for Katanga understands this to mean that the burden for redactions has been reversed in the sense that rather than the Prosecution being required to seek redactions, the Defence is required to seek judicial intervention from the Trial Chamber to obtain the information which has been withheld. The defence are here only concerned with the position post confirmation. On the basis of this understanding, namely that the burden for redactions has been reversed even post confirmation, the Defence for Katanga seeks leave to appeal. Alternatively, if the Defence have incorrectly interpreted the impugned Decision, it hereby seeks clarification.¹⁹

CONSIDERING that the Defence for Germain Katanga has misinterpreted the Decision insofar as (i) it only regulates the pre-trial proceedings of the present case

¹⁵ Appeals Chamber Judgment, para 14.

¹⁶ ICC-01/04-01/07-456, paras 1, and 4-11

¹⁷ ICC-01/04-01/07-456 para 9

¹⁸ ICC-01/04-01/07-456 para 10

¹⁹ ICC-01/04-01/07-456 para 11

held before the Pre-Trial Chamber; (ii) it establishes separate procedural mechanisms in relation to interview notes, interview transcripts and witness statements in paragraphs 96 to 138 of the Decision, and in relation to documents in paragraphs 139 to 146 of the Decision; (iii) it gives the Defence fifteen days upon receipt of redacted versions of the relevant documents to request from the Pre-Trial Chamber the lifting of the redactions; and (iv) in the event the charges are confirmed, it will be up to the competent Trial Chamber to decide on whether the application of the Decision should be extended to the proceedings held before the Trial Chamber prior to the commencement of the Trial;

CONSIDERING, therefore, that in the view of the Single Judge this clarification satisfies the Defence's Request and there is no need to analyse the Defence's alternative request for leave to appeal;

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

- (i) whether the Single Judge incorrectly interpreted the system of witness protection established in the Statute²⁰ and in regulation 96 of the RoR, and in particular the authority of the Prosecutor to assess and determine the need for witness protection in order to efficiently conduct its investigations and prosecutions and to provide for alternative measures, where required ("the First Prosecution Issue"); and

²⁰ The Single Judge notes that article 54 (3)(f) of the Statute is a provision which does not refer specifically to witness protection. On the contrary, it refers to the "protection of any person" in general. Moreover, as the Single Judge has already stated when prohibiting the Prosecution's practice of making *proprio motu* redactions without the authorisation of the Single Judge, that article 54 (3)(f) of the Statute does not confer upon the Prosecution the power to take measures that have been entrusted to another organ of the Court, but it only grants the Prosecution the power to request such measures from the competent organ (*First Decision on Redactions*, ICC-01/04-01/07-88-Conf-Exp, para 52). In the view of the Single Judge this is the reason why the Prosecution has never referred in its several filings concerning the practice of Preventive Relocation to article 54 (3)(f) of the Statute as a possible legal basis for such a practice. As a result, the Prosecution's Submissions have been based on the joint interpretation of article 43(6) and 68(1) of the Statute. It is for this reason that the Single Judge observes with astonishment how the Prosecution has now changed its legal argumentation by relying extensively on article 54(3)(f) of the Statute.

- (ii) whether the Single Judge incorrectly excluded the evidence of Witnesses 132 and 287 for the purposes of the confirmation hearing (“the Second Prosecution Issue”);

CONSIDERING that, in the view of the Single Judge, the First Prosecution Issue arises from the Decision only insofar as it refers to the Prosecution’s practice of preventive relocation both prior to a decision by the Registrar on the inclusion of the relevant witness in the Court’s Witness Protection Programme and after a Registrar’s decision rejecting such inclusion;²¹

CONSIDERING that, in relation to this issue, the Chamber has already stated:

In the view of the Chamber, fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims as guaranteed by the relevant statutes (in systems which provide for victim participation in criminal proceedings).

The Chamber also holds that within the context of the Statute, respect for the fairness of the proceedings with regard to the Prosecutor, at the investigation phase of a situation, means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in article 54.²²

CONSIDERING further that the Single Judge highlighted in the Decision that:

[...] most of the witnesses on whom the Prosecution intends to rely at the confirmation hearing live in the province of Ituri. The security situation in this area remains volatile as described by the Single Judge in the First Decision on Redactions, including several instances of intimidation of witnesses on whom the Prosecution intends to rely at the confirmation hearing by alleged members of the FNI and the FRPI.²³

CONSIDERING that the interpretation by the Single Judge of the provisions of the Statute and the Rules on witness protection, as well as of regulation 96 of the RoR, prohibits certain practices carried out *proprio motu* by the Prosecution in relation to

²¹ According to the Prosecution, the practice of preventive relocation includes REDACTED See ICC-01/04-01/07-423-Conf- para 14

²² Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 ICC-01/04-135-tEN, paras 38-39

²³ ICC-01/04-01/07-428-Corr, para 16

witnesses, and may therefore have a certain impact on the Prosecution's current investigative methods;

CONSIDERING therefore that, in the view of the Single Judge, the First Prosecution Issue would significantly affect the fair and expeditious conduct of the proceedings;

CONSIDERING further that, in the Trial Chamber's "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters" issued on 8 May 2008,²⁴ the Majority of the Trial Chamber interprets the relevant provisions of the Statute, the Rules and the RoR in a manner that significantly differs from the interpretation given by the Single Judge in the Decision; that, as a result, the Majority of the Trial Chamber seems to implicitly accept the Prosecution's practice of preventive relocation; and that, therefore, an immediate resolution of the First Prosecution Issue by the Appeals Chamber may materially advance the proceedings in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*;

CONSIDERING that the Second Prosecution Issue also arises out of the Decision insofar as the remedy for the unlawful preventive relocation by the Prosecution of Witnesses 132 and 287 was the exclusion of their evidence for the purpose of the confirmation hearing;

CONSIDERING that at the hearing held in closed session and *ex parte* with the Prosecution and the Victims and Witnesses Unit ("the VWU") on 1 April 2008, the Single Judge highlighted in relation to four witnesses, including Witnesses 132 and 287, that:

First of all, as you stated, the Chamber is also responsible for witnesses' protection, so it's not something that is just VWU or the Prosecution in charge of that. The Chamber is in charge of ensuring that witnesses are protected.

²⁴ ICC-01/04-01/06-1311-Anx2, paras 20 and 80 and ICC-01/04-01/06-1311-Anx3, paras 4-6

The second point: I'm not sure if I'm convinced that the Prosecution is able, without VWU, to really protect these four witnesses mentioned by the Prosecution. So I would very much appreciate the Prosecution to make a filing in which it elaborates on the kind of protection that is being given or is about to be given to these four witnesses, because if I'm not convinced that these four witnesses are really protected, as the Single Judge stated before, their statements will not be admitted.²⁵

CONSIDERING that in the Decision, the Single Judge found that the type of protection provided for Witnesses 132 and 287 was only their unlawful relocation by the Prosecution;²⁶ that therefore they were to be considered at the time the Decision was issued as being unprotected; and that, as Witnesses 132 and 287 were unprotected, even redacted or summary versions of their evidence could not be admitted for the purpose of the confirmation hearing in order to ensure their protection since the content of their statements would inevitably disclose their identities.²⁷

CONSIDERING, further, that in the "Prosecution's Submission of the Document Containing the Charges and List of Evidence", the Prosecution explained:

Furthermore, in light of the Single Judge's confidential *ex parte* decision issued on 18 April 20082 ("18 April Decision") the Prosecution is hereby notifying Pre-Trial Chamber I ("PTC I") and each Defence counsel that it is not currently alleging the charge of sexual slavery levelled in the arrest warrant application against Germain KATANGA and Mathieu NGUDJOLO, punishable under Article 8(2)(e)(vi) or Article 8(2)(b)(xxii) and Article 25(3)(a) or (b) of the Statute. The Prosecution will be seeking leave to appeal the 18 April Decision regarding the exclusion of evidence in support of the allegation of sexual slavery and the decision-making process and the implementation of protective measures. Should the appeal be granted, the Prosecution will be in a position to reintroduce the charges of sexual slavery and add the charges of rape and outrage upon personal dignity. Therefore, to provide notice to the Defence and PTC I, the Prosecution maintains the factual allegations in relation to charges of sexual offences it may seek to bring against both persons charged, pending a resolution of the matter.

²⁵ ICC-01/04-01/07-T-22-CONF-EXP-ENG, p. 29, lines 8 to 19.

²⁶ This meant, *inter alia*, that REDACTED. See ICC-01/04-01/07-423-Conf- para 14

²⁷ Ensuring the protection of witnesses was a ground relied upon by this Chamber to exclude the evidence of four witnesses in the Lubanga case. See ICC-01/04-01/06-517.

CONSIDERING that the confirmation hearing is currently scheduled for 27 June 2008; and that, pursuant to rule 122 (4) of the Rules and the “Decision Establishing a Calendar according to the date of the Confirmation Hearing: 27 June 2008”,²⁸ the Prosecution has until 12 June 2008 to file an amended charging document along with the list of evidence supporting the new charges;

CONSIDERING therefore that, in the view of the Single Judge, the Second Prosecution Issue would significantly affect the fair and expeditious conduct of the proceedings;

CONSIDERING further that, due to the time constraints, it is unlikely that the Appeals Chamber will be in a position to decide on the Second Prosecution Issue prior to the holding of the confirmation hearing in the present case;

CONSIDERING, nevertheless, that if the Appeals Chamber decides after the confirmation hearing that the remedy for the Prosecution’s unlawful preventive relocation of witnesses 132 and 287 must be other than the exclusion of their evidence for the purpose of the confirmation hearing, the Prosecution can always resort to article 61 of the Statute, and, in particular, in the event that some of the charges are confirmed, to paragraph 9 of the said provision, according to which:

After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. [...]

CONSIDERING, therefore, that an immediate resolution of the Second Prosecution Issue by the Appeals Chamber may materially advance the

²⁸ ICC-01/04-01/07-459.

proceedings in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*;

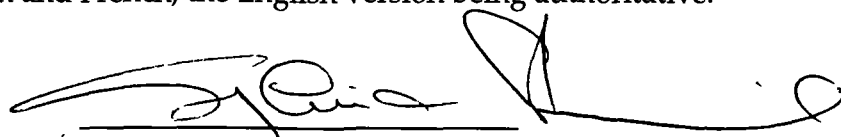
FOR THESE REASONS

DECIDE not to consider the alternative request for leave to appeal made by the Defence for Germain Katanga.

GRANT the Prosecution's Application in relation to the following two issues:

1. whether the Single Judge erred in its interpretation of the provisions of the Statute on witness protection, as well as of regulation 96 of the RoR, when prohibiting the Prosecution's practice of preventive relocation both prior to a decision by the Registrar on the inclusion of the relevant witness in the Court's Witness Protection Program and after the Registrar's Decision rejecting such inclusion.
2. Whether the appropriate remedy for the Prosecution's unlawful preventive relocation of witnesses 132 and 287 is the exclusion of their evidence for the purpose of the confirmation hearing.

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



Judge Sylvia Steiner
Single Judge

Dated this Tuesday 20 May 2008

At The Hague, the Netherlands